

WHAT JUDGE SULLIVAN'S OPINION MEANS

As I reported, Judge Emmet Sullivan has issued his ruling in the Dick Cheney interview FOIA, ruling partly for and partly against CREW. Sullivan has ordered DOJ to turn over the documents in question by October 9. He has directed DOJ to redact the information exempted in two earlier filings. So, as I suggested, we'll get some new information. But we won't learn how Cheney answered when asked whether Bush authorized him to leak classified information (which ended up including Valerie Wilson's identity).

Here's some more detail on what the ruling means.

A Rebuke to Obama's Executive Power Grab

While Judge Sullivan accepted all of Ralph DiMaio and David Barron's specific exemptions based on national security or deliberative grounds, he rejected the laughable DOJ argument that releasing Cheney's interview materials would dissuade other high level White House officials from cooperating in investigations. That's important, because it rejects a theory that would shield a great deal of information on White House criminality. Here's Sullivan's description of everything that would be shielded under such a theory.

In this sense, the category of proceedings that DOJ asks this Court to conclude are "reasonably anticipated" could encompass any law enforcement investigation during which law enforcement might wish to interview senior White House officials. Such proceedings might include an investigation into alleged criminal activity that physically took place in the White House; financial wrongdoing by

a White House official that took place before or during his or her tenure in the executive branch; misconduct relating to official responsibilities, such as the breach of national security protocol that formed the basis of the Plame investigation; or even an event occurring outside the White House with only tangential connection to one or more White House officials. Thus conceived, it becomes clear that the scope of the proceedings described by DOJ is breathtakingly broad.

I'm guessing, but unless the parts of Cheney's interview Sullivan has ordered to be released are a lot more scandalous than I think they are, I don't think Obama's DOJ will appeal this because it's unlikely the Appeals Court will agree with them, and as we've seen, Obama's Administration tends to go to great lengths to avoid letting Appeals Courts issue rulings in relatively unimportant cases that reign in executive power.

Continued Shielding of the Most Important Information in Cheney's Interview

As I've said, Judge Sullivan did accept all the national security and deliberative exemptions that DOJ and CIA invoked. Here's a list of what that includes, and here's my more detailed description of how Cheney probably responded.

- Vice President's discussion of the substance of a conversation he had with the Director of the CIA concerning the decision to send Ambassador Wilson on a fact-finding mission to Niger in 2002.
- Vice President's discussion of his requests for

information from the CIA relating to reported efforts by Iraqi officials to purchase uranium from Niger.

- Vice President's recollection of the substance of his discussions with the National Security Advisor while she was on a trip to Africa.
- Vice President's description of government deliberations, including discussions between the Vice President and the Deputy National Security Advisor, in preparation of a statement by the Director of CIA regarding the accuracy of a statement in the President's 2003 State of the Union Address.
- Vice President's recollection of discussions with Lewis Libby, the White House Communications Director, and the White House Chief of Staff regarding the appropriate response to media inquiries about the source of the disclosure of Valerie Plame Wilson's identity as a CIA employee.
- Vice President's description of his role in resolving disputes about whether to

declassify certain information.

- Vice President's description of government deliberations involving senior officials regarding whether to declassify portions of the October 2002 National Intelligence Estimate.
- Description of a confidential conversation between the Vice President and the President, and description of an apparent communication between the Vice President and the President.
- Names of non-governmental third-parties and details of their extraneous interactions with the Vice President.
- Name of a CIA briefer.
- Names of FBI agents.
- Names of foreign government and liaison services.
- The name of a covert CIA employee.
- The methods CIA uses to assess and evaluate intelligence and inform policy makers.

Assuming DOJ does responds to Sullivan's order, I expect them to withhold significant parts of pages 2, 3, 6, 7, 9, 12, 14, 15, 16, 17, 23, 25, and 26. Which means we'll get roughly 15 pages out of 28, plus fragments of the remaining 13

pages. Not bad, but as you can tell, the most interesting information will be withheld.

Interestingly, Sullivan sort of confirmed a claim DOJ had made earlier: in spite of the fact that we know a great deal about this information already, some of it does not identically match what we already know.

First, a review of CREW's declaration and attachments in conjunction with DOJ's in camera submission demonstrates that none of the withheld records has been publicly released; nor has information identical to the information contained in those documents been made public. More fundamentally, however, CREW's argument ignores the purpose of the deliberative process privilege, which is designed to protect the decision making process itself. Regardless of whether certain factual information is publicly available, the information in the withheld documents is protected precisely because it might compromise what information was considered and what role it played in the deliberative process. [my emphasis]

Though Sullivan's statement is weaker than the claim DOJ made, this does suggest that Cheney's story didn't entirely match the story released publicly at trial.

A Potential to Demand the Information O'Donnell Already Requested??

Now, Sullivan pretty much blew away CREW's argument that Cheney had effectively waived any privilege when he acceded to the interview with Pat Fitzgerald. But I'm curious whether Sullivan's interpretation of the case that both CREW and DOJ relied on on this issue leaves room to argue that Cheney did waive privilege by having his lawyer leak information about his interview to Michael Isikoff. Here's what Sullivan had to say about the waiver argument.

Contrary to CREW's suggestion, the court in *In re Sealed Case* did not create a per se rule that a disclosure to any third party constitutes a waiver of any and all privilege claims. Rather, the court simply concluded based on the facts in that case that the deliberative process privilege could not be asserted as to documents that had already been revealed to the public and to a private, non-government attorney. The present case, by contrast, involves the disclosure of information gained by Vice President Cheney in his official capacity and disclosed to Fitzgerald the Special Counsel in his official capacity as a law enforcement officer. *In re Sealed Case*, quite simply, does not address the issue before the Court – whether the information given by Vice President Cheney constituted a protected inter-agency communication or a public disclosure to a third party.

In other words, Sullivan argues that Fitzgerald does not count as a third party.

Now, as I've noted before, we know that Cheney's lawyer, Terry O'Donnell, leaked a key part of the information over which Barron invoked the deliberative privilege—whether or not Bush declassified information for Cheney to leak. Here's what O'Donnell leaked to Michael Isikoff.

... the "president declassified the information and authorized and directed the vice president to get it out." But Bush "didn't get into how it would be done. He was not involved in selecting Scooter Libby or Judy Miller." Bush made the decision to put out the NIE material in late June,

Michael Isikoff is, by anyone's definition, a third party. And so it seems as if Sullivan might buy the "waiver" argument with regards to

this information.

And that's some of the most critical information
in Cheney's interview.