

Obama Lawyers Shield Cheney on Leak

By [Jason Leopold](#)

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The Obama administration asserted a legal argument that a federal judge called the Jon Stewart “Daily Show exemption,” as the Justice Department continued a court fight to protect ex-Vice President Dick Cheney from disclosures about his role in the leak of a CIA officer’s identity six years ago.

At a federal court hearing Tuesday, Jeffrey Smith, an attorney in the Justice Department’s Civil Division, argued that the transcript of Cheney’s 2004 interview with special prosecutor Patrick Fitzgerald about the CIA leak should remain secret for as long as 10 more years.

Last month, Smith cited the possibility that the transcript’s release might discourage future vice presidents from cooperating with criminal investigations because their words could become “fodder for The Daily Show.”

When Smith revived that argument on Tuesday, U.S. District Court Judge Emmett Sullivan said, “You’re getting back to the Daily Show exemption. You’re not going back there, are you?”

A skeptical Sullivan asked Smith, “How do you distinguish the political fray from the public’s right to know what the government is up to?”

Smith said he was simply arguing that high-level officials like Cheney would be unwilling to speak to criminal investigators if there was a chance that what they said privately would become public. “Presidents don’t really have to cooperate if they really don’t want to,” Smith said.

Last week, Smith argued in court documents that just because Cheney voluntarily agreed to be interviewed by the special prosecutor investigating the leak of Valerie Plame’s covert CIA identity doesn’t mean Cheney “waived any privileges to which he may have been entitled to” since “none of the privileges at issue here was ever his to waive.”

In a footnote contained in a 12-page court filing, Smith wrote, “These privileges belong to the government. The presidential communications privilege belongs to the President; the deliberative process privilege asserted here belongs to the White House; and the law enforcement privilege asserted here belongs to DOJ.

“A government official, even one as senior as the Vice President cannot implicitly waive these governmental privileges by individually submitting to an interview.”

Though Judge Sullivan didn’t issue a ruling in the case, he didn’t appear swayed by the government’s arguments. He said the Justice Department was, in effect, requesting that he “legislate” by issuing some sort of special Freedom of Information Act exemption for vice

presidents, which was something “the courts can’t do,” according to a transcript of the hearing.

“What you are asking the court to do is issue a ruling that says every time a special investigator calls a vice president to come down to testify, that information is protected from the public,” Sullivan said.

“No, that’s not it at all,” Smith responded.

Smith said he simply was concerned the transcript would become part of the “political fray” – and that by withholding it for as long as 10 years, its use would be limited to historical purposes.

That argument brought another incredulous response from Sullivan. “Would there be some impediment to putting this information in a time capsule to be examined by future inhabitants of this world?” Sullivan asked. “Where do I draw the line? This happened five years ago.”

The case stems from a FOIA lawsuit filed last year by the public interest group, Citizens for Responsibility and Ethics in Washington (CREW), which is seeking access to Cheney’s interview transcript and now has confronted denials from both the Bush and Obama administrations. [For more background on the case, see Consortiumnews.com’s [“Bush-Cheney Linked to CIA Leak Case.”](#)]

Shaking Heads

The resistance from the Obama administration has left some of its supporters shaking their heads. Not only does the obstruction go against President Obama’s pledge of government openness, but it is protecting the reputation of former Vice President Cheney, one of Obama’s most vocal critics.

The administration’s position also seems to equate with cheap partisanship a request for information about a major controversy from George W. Bush’s presidency – the leaking of Plame’s covert CIA identity as part of a campaign to discredit her husband, former U.S. Ambassador Joseph Wilson, who was an early Iraq War critic.

In a declaration filed with the court earlier this month, Lanny Breuer, an assistant attorney general for the criminal division, said releasing Cheney’s interview transcript could discourage cooperation from future vice presidents and thus would raise “the specter of the grand jury process” each time there was a demand to investigate “baseless, partisan allegations.”

In last week’s filing, Obama’s Justice Department even took an apparent swipe at the House Oversight Committee, which investigated the Plame leak for the past several years. The filing noted that the Cheney transcript was initially sought by “a congressional subpoena from a committee that appeared to be conducting a contentious investigation of the White House.”

In seeking to block disclosure of the transcript this month, Obama’s Justice Department did reveal some new details about special prosecutor Fitzgerald’s interrogation of Cheney. According to one reference in the court filing, Bush and Cheney were in contact about the

scandal, including what is described as “a confidential conversation” and “an apparent communication between the Vice President and the President.”

The filing also made clear that Cheney was at the center of White House machinations rebutting criticism from Wilson, who charged in summer 2003 that the Bush administration had “twisted” intelligence to justify invading Iraq in March 2003. While seeking to discredit Wilson, administration officials disclosed to reporters that Wilson’s wife, Valerie Plame, worked for the CIA.

Besides the contacts with Bush, the filing referenced Cheney’s questions to the CIA about its decision to send Wilson to Africa in 2002 to investigate – and ultimately refute – suspicions that Iraq was seeking yellowcake uranium from the African country of Niger.

Cheney was asked, too, about his role in arranging a statement by then-CIA Director George Tenet taking responsibility for including a misleading claim about the African uranium in Bush’s 2003 State of the Union address, and Cheney’s discussions with his chief of staff I. Lewis Libby and other White House officials about how to respond to inquiries regarding the leak of Plame’s identity, the court filing said.

Fitzgerald also questioned Cheney about his participation in the decision to declassify parts of a 2002 National Intelligence Estimate regarding Iraq’s alleged WMD. It ultimately fell to Bush to clear selected parts of the NIE so they could be leaked as part of the White House campaign to disparage Wilson.

Cheney’s aide Libby was convicted of perjury and obstruction of justice in the leak case, but his 30-month prison term was commuted by President Bush.

CREW had represented the Wilson’s in a civil lawsuit against Cheney and other Bush administration officials, which Obama’s Justice Department asked the U.S. Supreme Court to reject. The High Court dismissed the case last month.

Judge Sullivan said if he issues a ruling in favor of CREW, he would allow the government to appeal his decision before ordering the release of the transcript.

Jason Leopold’s Web site is The Public Record, at www.pubrecord.org.

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