



STATEMENTS AGAINST INTEREST:
THE SENATE TESTIMONY OF OIL COMPANY
CEOs AND THE CASE OF *IN RE CHENEY*

On November 9th, 2005, at a joint hearing of the Senate Commerce and Energy Committees on “Energy Pricing and Profits,” Senator Frank R. Lautenberg (D-NJ) asked the CEOs of the largest oil companies the following question:

“Did your company or any representatives of your companies participate in Vice President Cheney’s energy task force in 2001?”

The witnesses stated as follows:

- ✓ Lee Raymond of ExxonMobil: **“No”**
- ✓ David J. O’Reilly of Chevron: **“No.”**
- ✓ James Mulva of ConocoPhillips: **“We did not, no.”**
- ✓ Ross Pillari of BP America: **“To be honest, no, I wasn’t here then.”**
Lautenberg then asked: *“But your company was here?”* Pillari said **“Yes.”**
- ✓ John Hofmeister of Shell Oil said: **“Not to my knowledge.”**

On November 16th 2005, the *Washington Post* published an article about a document it had obtained that contradicted the testimony of some of the CEOs.¹ Senator Lautenberg immediately wrote to Attorney General Gonzales seeking an investigation to determine whether any statements violated the Federal “False Statements” statute, 18 U.S.C. §1001. Attorney General Gonzales has not yet responded to Senator Lautenberg’s request.

¹ Dana Milbank and Justin Blum, *Document Says Oil Chiefs Met With Cheney Task Force*, The Washington Post, Nov. 16, 2005, at A1.

Then, the November 23, 2005 edition of the *Washington Post* reported that Republican staffers on the Energy Committee were making legal arguments that supposedly exonerated the oil company CEOs.² The Post wrote:

Yesterday, Marnie Funk, a spokeswoman for the GOP staff of the Senate Energy and Natural Resources Committee, one of the two panels that convened the hearing, said its lawyers had reached a preliminary conclusion: Based on a court decision in which two groups unsuccessfully challenged the secrecy of the Cheney task force, Funk said the executives appeared to be telling the truth.

"What we simply determined was that the definition of 'participation' was something litigated, and what the court concluded was that attending meetings, and even making presentations, did not rise to the level of fully participating," Funk said.

However, the case that the Republican staff is referencing, *In Re Richard B. Cheney*, 406 F.3d 723 (D.C. Cir. 2005), actually supports the opposite conclusion.

In Re Cheney

On May 10, 2005, the United States Court of Appeals for the District of Columbia Circuit issued its decision in the case of *In Re Cheney*. In that case, two nongovernmental organizations, Judicial Watch and the Sierra Club, were seeking the records of Vice President Cheney's Energy Task Force under the Federal Advisory Committee Act (FACA).

The Court ruled that the energy task force was not an "advisory committee" under FACA, and therefore did not have to disclose its records.³ Under FACA, the membership of "advisory committees" cannot be "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government."⁴ The Court found that all of the official "members" of the Cheney task force were Federal officials.

However, the court specifically found that an individual could *participate* in the task force but not be a *member*.⁵ That is why Senator Lautenberg asked the CEOs: "Did your company or any representatives of your companies ***participate*** in Vice President Cheney's energy task force in 2001?"

² Justin Blum, *Big Oil 'Participation' at Issue*, The Washington Post, Nov. 23, 2005, at A17.

³ *In Re Cheney*, 406 F.3d at 728.

⁴ *Id.*

⁵ *Id.*

In *In Re Cheney*, the court held that:

Congress could not have meant that *participation* in committee meetings or activities, even influential participation, would be enough to make someone a member of the committee.⁶

Therefore, the court's holding that only Federal officials were "members" of the Cheney task force has no bearing on who *participated*.

In the *Washington Post* story, the Republican spokesperson states: "what the court concluded was that attending meetings, and even making presentations, did not rise to the level of fully participating." The court made no such conclusion. In fact, the court reached the opposite conclusion, providing an example of participation as making a "presentation" that "might affect the committee's judgment."⁷

Summary

Senator Lautenberg asked the oil company CEOs if they participated in the Cheney task force, not whether they were official "members" – a distinction that is highlighted in the *In Re Cheney* case. The court's decision in the *Cheney* case only strengthens the argument for a Justice Department investigation of whether the oil company executives' testimony violated the Federal "False Statements" law.

⁶ *Id.* at 728 (*emphasis added*).

⁷ *Id.* at 728.