

Looking at the *Libby* Case from a Sentencing Perspective

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In March 2007, I. Lewis “Scooter” Libby was found guilty by a federal jury of obstruction of justice, two counts of perjury, and one count of lying to the FBI during an investigation surrounding the leak of the identity of CIA agent Valerie Wilson. Libby had already resigned from his position as chief of staff to Vice President Dick Cheney following his indictment on five felony counts. Speculation abounded as to what sentence Libby would receive and what actions, if any, the president would take in response.

Though the events and controversy surrounding the leak investigation and the prosecution of Scooter Libby will long be of interest to political historians, the events and controversy surrounding his sentencing should be of immediate interest to anyone who follows federal sentencing law and policy. The Guideline calculations and the parties’ arguments at sentencing were contestable and controversial. The same could also be said for the initial sentencing decisions of District Judge Reggie Walton when he sentenced Libby to thirty months in prison and denied Libby bail pending appeal. Judge Walton also fined Libby \$250,000 and ordered a two-year term of supervised release. But after Libby’s failed appeal of Judge Walton’s denial of bail, President Bush exercised his executive clemency power to commute Scooter Libby’s thirty-month prison sentence in its entirety (though he left in place Libby’s convictions, the fine, and the supervised release term).

This Issue of the *Federal Sentencing Reporter* provides primary materials and commentary relating to events surrounding Libby’s initial sentencing and the subsequent commutation of his prison term. Though the Libby saga and its aftermath might be viewed in purely political terms, this Issue of *FSR* seeks to explore the *Libby* case through the lens of sentencing law and policy. The materials in this Issue provide varied perspectives on the Libby saga and sentencing lessons that might be drawn from it. This introduction reviews the essential sentencing features of the *Libby* case and previews the items in this Issue.

I. The Legal Basics of Libby’s Initial Sentencing

After Libby’s jury conviction on four counts on March 6, 2007, Judge Walton set a sentencing date for early June. Though scheduled sentencing dates in high-profile cases often get postponed, the parties stayed on schedule and submitted a set of sentencing memoranda to Judge Walton soon after the confidential presentence report (“PSR”) was provided to the parties. Both the government and Libby’s defense team submitted two distinct sentencing memoranda, one addressing Guideline calculation issues and one addressing the broader factors set forth in 18 U.S.C. § 3553(a). (The parties’ memoranda discussing § 3553(a) factors are reproduced in this Issue.)

Federal Sentencing Reporter, Vol. 20, No. 1, pp. 1–4, ISSN 1053-9867 electronic ISSN 1533-8363
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As revealed by the parties' sentencing submissions, the PSR prepared by the U.S. Probation Office assessed the applicable Guidelines to produce a Guideline sentence range of fifteen to twenty-one months of imprisonment. The PSR also suggested the consideration of downward departures because of various unique features of Libby's background and actions.¹

The parties had distinct views on the PSR's suggestions. In its sentencing memoranda, the government argued for additional sentencing enhancements due to the severity of the crime about which Libby lied. The government asserted that the proper Guideline range was thirty to thirty-seven months, and it urged Judge Walton to impose a sentence within that range. Libby's lawyers, in contrast, argued in support of the PSR's Guideline calculations and further contended that Libby's public service and the impact of his convictions on his career and family called for a sentence of probation rather than any prison term.

Notably, in addition to the materials submitted by the parties, Judge Walton received many letters from persons interested in the *Libby* case. The majority of letters submitted to Judge Walton urged leniency. Many prominent individuals—including, for example, former secretaries of state Donald Rumsfeld and Henry Kissinger—described personal experiences working with Libby and asked Judge Walton to take Libby's contributions to the nation into consideration.

Other letters were from "outraged citizens" who called for the stiffest penalties to be given to Libby.² Those letters advocating stiff penalties were concerned about the example that would be set if Libby's crimes went lightly punished. The authors of these letters included persons who self-identified as a mother, an ex-intelligence officer, and a fifth-grade teacher. These letters expressed a deep concern for the special treatment with which politically connected individuals are treated. They advocated for even harsher consequences due to Libby's position as a lawyer and top administration official.

On June 5, 2007, Judge Reggie Walton heard directly from the parties and settled on a sentence for Libby of thirty months in prison. Judge Walton accepted the government's argument for a three-level Guideline enhancement due to the seriousness of the underlying crime about which Libby lied. Rejecting the defense's arguments that this enhancement was inapplicable due to the fact that no underlying crime was ever proven and its arguments for a below-Guideline sentence, Judge Walton selected an imprisonment sentence of thirty months, which marked the bottom of the government's suggested enhanced sentencing range. Judge Walton also fined Libby \$250,000 and ordered a two-year term of supervised release.

Following Libby's sentencing, attention turned to Judge Walton's decision concerning bail pending appeal. On June 14, 2007, after a hearing on the issue, Judge Walton denied Libby bail pending appeal. As expected, Libby's legal team immediately appealed Judge Walton's denial of bail pending appeal to the Court of Appeals for the D.C. Circuit.

While the world was waiting for the next development in the Libby saga, on June 21, 2007, the United States Supreme Court handed down its decision in *Rita v. United States*.³ In a case affirming a thirty-three-month sentence for crimes similar to those committed by Libby, the Supreme Court held that circuit courts were permitted (but not required) to consider within-Guidelines sentences presumptively reasonable. As commentators at the time noted, this ruling suggested that Libby's thirty-month sentence would be considered reasonable on appeal because it was at the bottom of the Guidelines range as determined by Judge Walton.

The notable parallels between the crimes and sentences of Scooter Libby and Victor Rita received considerable attention after the Supreme Court's decision, and a number of pieces in this Issue review the basics of the *Rita* ruling and reflect on Libby's commutation in that context. Of course, despite similarities in the crimes and initial sentences received by Libby and Rita, the two ultimately would serve far different terms.

II. The President's Commutation Decision and Reactions

On July 2, 2007, the Court of Appeals for the D.C. Circuit, in a one-line order, denied Libby's request for bail pending appeal. But Libby did not have to worry very long about when he would have to report to prison. On that same day, only four hours after the circuit court acted, President Bush used his executive clemency power to commute the imprisonment portion of Libby's thirty-month sentence in its entirety.

Along with his decision, President Bush issued an official statement (which is reprinted in this Issue) explaining why he was exercising his clemency power in this way. Notably, President Bush's statement assailed the sentence Libby received but not his prosecution and conviction: "I respect the

jury's verdict. But I have concluded that the prison sentence given to Mr. Libby is excessive. Therefore, I am commuting the portion of Mr. Libby's sentence that required him to spend thirty months in prison." The president's statement went on to stress the various other consequences that Libby would face despite not serving any time in prison: "My decision to commute his prison sentence leaves in place a harsh punishment for Mr. Libby. The reputation he gained through his years of public service and professional work in the legal community is forever damaged. His wife and young children have also suffered immensely."

The peculiarity of the president's clemency decision created some surprising legal confusion along with much unsurprising political backlash. In his official statement, President Bush stated that Libby "will remain on probation." However, Libby's sentence included a term of supervised release, not probation; technically, supervised release is to be served only *after* a term of imprisonment.⁴

In order to determine exactly what remained of Libby's sentence after the president's commutation, Judge Walton ordered lawyers on both sides to submit briefs on the issue. On July 12, 2007, Judge Walton upheld Libby's term of supervised release, though he did so on grounds not fully anticipated by the government and Libby's defense team. Judge Walton rejected the argument that supervised release was a valid punishment because Libby had spent one day in custody while being booked by U.S. marshals. Instead, Judge Walton upheld Libby's term of supervised release based solely on the president's constitutional powers. (Judge Walton's conscientious and contentious opinion providing a resolution of Libby's sentencing status in the wake of the president's commutation is reprinted in this Issue.)

The political backlash to President Bush's commutation was focused on its peculiar rationale and the special treatment received by a high government official. In the wake of the *Rita* ruling, those working in the federal sentencing system were surprised to hear President Bush declare that Libby's within-Guideline sentence was excessive. Presidential candidate Bill Richardson had an especially potent reaction that perhaps captured the thoughts of many defense attorneys and defendants: "Will the president also commute the sentences of others who obstructed justice and lied to grand juries, or only those who act to protect President Bush and Vice President Cheney?"⁵

Following President Bush's commutation of Libby's term of imprisonment, and in reaction to the increasing debate concerning the presidential power to grant clemency for an executive official, the Committee on the Judiciary of the House of Representatives convened a hearing that was tellingly titled "The Use and Misuse of Presidential Clemency Power for Executive Branch Officials." The hearing, which often had representatives debating the propriety of the hearing itself, provided an opportunity for some witnesses to discuss the recent *Rita* ruling and the peculiarity of the commutation as a sentencing decision. In this Issue we reprint the written testimony of Professor Douglas Berman and Tom Cochran, the public defender who represented Mr. Rita. Their testimony focused on sentencing aspects of the *Libby* case and the potential impact of President Bush's official statement for other defendants whose sentences were significantly harsher than Libby's but for whom clemency was not exercised.

III. The Broader Story of Sentence Reconsideration

Three authors contributing to this Issue, all of whom know well many defendants who would be eager to receive the president's executive grace, use the Libby commutation as a springboard for discussing executive pardon and clemency powers more generally. Covering related ground from an array of unique perspectives, Margaret Colgate Love, Molly Gill, and Keith Heidmann all spotlight different aspects of the history and current state of the clemency power and suggest distinct ways in which the Libby commutation might be a catalyst for, in Love's words, "reinventing the president's pardon power." Read together, these pieces essentially encourage constructive engagement with, rather than critical cynicism about, President Bush's Libby-inspired awareness of the potential excessiveness of federal sentencing law and policy.

It is especially interesting to consider the most current and consequential debate regarding federal sentencing against the Libby commutation backdrop. As detailed in a research memorandum from the U.S. Sentencing Commission's staff, the Commission is now facing difficult questions concerning whether and how to give retroactive effect to its recent reduction in the crack sentencing guidelines. Though the Commission is technically a judicial branch agency, some observers have described the Commission's authority to provide retroactive sentence reductions as a kind of equitable clemency power that can provide relief to those defendants that the Commission views as excessively sentenced. As the research memorandum highlights, in this particular retroactivity set-

ting the Sentencing Commission is considering the fate of nearly twenty thousand prisoners previously sentenced under the old crack guidelines.

Though many political, policy, and practical concerns are intertwined within the crack amendment retroactivity issue, the same kinds of concerns likely were in the mind of President Bush as he considered Scooter Libby's fate following his sentencing. As suggested by his official statement, President Bush apparently decided that his own sense of sentencing justice for Scooter Libby justified the reduction of his sentence and the exercise of the clemency power. It remains to be seen if the Sentencing Commissioners will likewise be guided by their own sense of sentencing justice for thousands of federal defendants when exercising their retroactivity power.

Notes

¹ *Libby Lawyers Ask Court for Probation*, TalkLeft, post of May 31, 2007, by Jeralyn Merritt, available at: <http://www.talkleft.com/story/2007/5/31/21232/8074>.

² *Libby Sentenced to 30 Months in Prison*, CNN, June 5, 2007, available at: <http://www.cnn.com/2007/POLITICS/06/05/cia.leak.trial/index.html>.

³ 127 S. Ct. 2456 (2007).

⁴ *Libby Pays Fine; Dispute over President's Power Lingers*, SCOTUSBLOG, July 3, 2007, available at: <http://www.whitehouse.gov/news/releases/2007/07/20070702-3.html>.

⁵ *Libby Commutation: Washington Responds*, CNN, July 2, 2007, available at: <http://politicalticker.blogs.cnn.com/2007/07/02/libby-commutation-washington-responds/#more-682>.