U.S. House of Representatives
Committee on the Judiciary

**Statement of David B. Rivkin, Jr.**
**Partner, BakerHostetler, LLP**
**Former Member, White House Counsel's Office and**
**Department of Justice Department Official**
**Before the Hearing On**
**Use and Misuse of Presidential Clemency Power for Executive Branch Officials**
**Committee on the Judiciary**
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I want to express my gratitude to Chairman Conyers and Ranking Member Lamar Smith, for inviting me to appear before you today to participate in the hearing on President Bush's use of his pardon power to commute the prison sentence of the former Chief of Staff to Vice President Cheney, Scooter Libby. Let me say at the outset that nobody can seriously argue that, with the single exception of impeachment cases, the President's pardon power is not absolute on its face or that it cannot be exercised by the President in any and all policy contexts, so long as the underlying offense involves violations of federal law. Indeed, the concerns that have been expressed about this commutation are primarily of a policy nature and go to the propriety of the commutation of Mr. Libby's prison sentence and the context in which it was issued. My bottom line view is that, given all the facts and circumstances involved in Patrick Fitzgerald's investigation and prosecution of Mr. Libby, the commutation of his sentence at this time by the President is entirely appropriate. Indeed, it is my hope that, in due course, the President will take the next step and issue a full pardon to Mr. Libby.

Let me go through the policy arguments that have been raised against the President's action and outline for you some suitable rebuttals. First, let's take the issue of timing of the commutation, since many critics have suggested that it was premature. The simple answer is that, following Judge Walton's decision not to allow the continuation of bail for Mr. Libby during the pendency of his appeal, and the rejection by the D.C. Circuit of Mr. Libby's challenge to this decision, he was subject to an immediate incarceration. In this regard, I recognize that Judge Walton's decision was entirely within his discretion – there is no constitutionally-protected right to bail following conviction. Accordingly, the D.C. Circuit's affirmation of this decision is also quite legally correct. Nevertheless, in my view, it was unnecessarily harsh.

Second is the criticism that the commutation of Mr. Libby's sentence, imposed after the jury found him guilty of perjury and obstruction of justice, somehow evinces disregard for the rule of law or, at the very least, trivializes what are properly considered to be serious violations of federal law. Let me stipulate that perjury and obstruction of justice are indeed major transgressions and ought to be taken seriously. By the same token, the very nature of the pardon power presupposes the President's ability to pardon individuals convicted of serious violations of federal law; there is no suggestion in the Constitution that only minor offenses ought to be a proper subject for the exercise of the pardon power.

More fundamentally, I believe that the pardon power, when properly deployed, advances the cause of justice. The Framer's understood that justice under the law, the justice of rules, procedures and "due process", while important to our system of "ordered" liberty, is not the only conceivable form of justice. They wanted the political branches to render a different kind of justice, driven by the considerations of equity and not by rules. It is the closest we come today to what the Founders would have called the natural law-driven justice. The President's pardon power is one example of such justice; the ability of Congress to pass private bills, which sidestep the rules governing immigration or land acquisition, is another.

The pardon power is, of course, inherently selective – it does critics no good to complain that thousands of people seek it, but only a few obtain favorable results. It is inherently discretionary, and is an extraordinary remedy to advance what the President exercising it believes to be in the best interests of justice. The fact that somebody was prosecuted and convicted by the jury of his peers, in accordance with the established evidentiary and other judicial procedures, suggests, in most instances, that justice was done. Unfortunately, there are some instances where this is not the case.

This is not, by the way, to criticize our criminal justice system, which is, probably, the fairest and most defendant-friendly system in today's world. However, any rule-based system, no matter how well-managed and operated, inevitably, albeit very occasionally, produces less than perfect results. There are instances where obviously guilty individuals go free, and there are occasions where individuals, who should not have been prosecuted at all, end up being convicted.

In my view, there are several reasons why the entire prosecution of Mr. Libby did not evolve in a way that could have promoted justice or ended up promoting justice. This, incidentally, is not meant to impugn the integrity of any of the participants in what, in my view, became a rather tragic process. Prosecutor Fitzgerald is undoubtedly an honorable man, and, by all accounts, does not have a partisan bone in his

body. The same is true about Judge Walton, and I have no doubt that the jury was fair and conscientious in its deliberations. The problems reside elsewhere.

The most important and consequential problem was the decision to appoint a Special Counsel to investigate this matter in the first place. This step was particularly regrettably, since the senior DOJ officials knew, prior to tapping Mr. Fitzgerald, that the leak of Valerie Plame's name to the columnist Robert Novak – the ostensible basis of the CIA's referral of the matter to the Department of Justice – was effected by the Deputy Secretary of State Dick Armitage and that Mr. Fitzgerald either learned about this fact at the time he was appointed and likewise. Also, it appears that shortly after his appointment, Mr. Fitzgerald knew that the very reason for his appointment – alleged violation of IIPA – was in error, since Ms. Wilson was not a covert agent within the meaning of the IIPA. More generally, as I have written and argued on other occasions, the appointment of a Special or Independent Counsel, no matter the probity and virtue of the individual involved, invariably skews the exercise of prosecutorial discretion and is virtually guaranteed to produce less than optimal results. It fosters time and again a "leave no stone unturned," protracted, costly, and Inspector Javier-like pursuit of the individual being investigated. Yet, doing justice is not a mechanical process and it must always be informed by a sound exercise of prosecutorial discretion.

Here, we have a situation where a Special Counsel spent several years and millions of taxpayer dollars all because he believed that Mr. Libby might have lied to him or to his investigators when they investigated a "crime" they already knew had not been committed. In the process, the Special Counsel caused a great deal of harm to the ability of reporters to ply their business – which is a core element of our body polity's overall system of political and institutional checks and balances. I emphasize the word "might" because, quite aside from the frailties of human memory, Mr. Fitzgerald could not have known for sure at the time he went after Judith Miller, Matt Cooper, and other media figures that Mr. Libby's account of having heard first from reporters of Ms. Plame's work and her alleged role in organizing her husband's trip to Niger was false. That conclusion on his part necessarily had to await until he successfully coerced the reporters involved. Ask yourself whether a regular DOJ prosecutor, not wearing a Special Counsel hat, would have done this.

And, to those who say that, given Mr. Libby's high-government position, a regular government prosecutor would have been just as relentless as Mr. Fitzgerald, my response is look at how the Department of Justice's career attorneys (in the Public Integrity section) treated another high-ranking official, President Clinton's former National Security Advisor, Sandy Berger. There is no dispute about what Mr. Berger has done, since he admitted, after some time lapsed, to such transgressions as stealing highly classified documents from the National Archives, destroying at least some of them, and lying about it to Executive branch officials. What he did certainly amounted to an obstruction of justice, providing misleading and false information to Executive branch officials, and several other serious criminal law transgressions. The only reason perjury is not on my list is because Mr. Berger was not put in the position where he had to testify under oath.

Yet, presented with all of these facts, the career attorneys in the Department of Justice decided not to prosecute him and settled for the imposition of a fine on Mr. Berger, as well as the forfeiture for a period of years of his security clearance. My point here is not to suggest that Mr. Berger was treated too leniently; rather it is to suggest that Mr. Libby was treated too harshly. In my view, when two senior government officials, who have been accused or suspected of having engaged in a substantially similar conduct – in neither case was personal enrichment or any other pecuniary consideration an issue – receive a dramatically different treatment from our criminal justice system, we cannot say that justice was done.

This brings me to my last point, which has been trumpeted by the critics of the President's commutation of Mr. Libby's sentence – why wasn't he exonerated by the jury, since juries are often swayed by arguments that a particular defendant was treated overly harshly by the government or was made a scapegoat for the transgressions of others. Indeed, Mr. Libby's lawyers have tried to deploy some arguments along these lines and yet, did not succeed. In my view, the reason for this has to do with how Mr. Fitzgerald chose to present his case to the jury. He did so ably, and without violating his ethical obligations; yet, in my view, it was done in a way that was fundamentally unfair and sealed Mr. Libby's fate with the jury.

Jurors are human beings and as human beings want to understand a defendant's motivations. As a result, the overall narrative provided by the prosecutor, the context if you will, is extremely important. In Mr. Libby's case, Mr. Fitzgerald presented the jury the following damning narrative – there was a nefarious effort in the White House to destroy Joe Wilson's reputation and even to punish him, by allegedly hurting the career of his wife Valerie Plame; these activities were a part and parcel of the broader effort to sell the Iraq war to the American people. While I believe this narrative to be fundamentally false, it proved successful with the jury.

The fact that the critics of the President's decision to commute Mr. Libby's sentence invariably invoke the broad narrative of the alleged White House Iraq war-related nefarious activities, underscores how unfair and politicized this whole exercise has been.
To summarize, since, in my opinion, Mr. Libby's prosecution led to a fundamentally unjust result, the use of the pardon power to remedy the injustice, if only partially at this time, was an entirely correct and proper exercise of the President's powers.