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before

The U.S. House of Representatives
Committee on the Judiciary

on

"The Use and Misuse of Presidential Clemency Power for Executive Branch Officials"

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Mr. Chairman, Mr. Ranking Member, members of the Committee:

Thank you for this opportunity to share my perspective on President George W. Bush's sudden and surprising decision to commute entirely the prison term of I. Lewis "Scooter" Libby.

As I will explain, President Bush's commutation was fundamentally a sentencing decision — a sentencing decision that is peculiar and suspect on its own terms, and a sentencing decision that is inconsistent with the Justice Department's stated sentencing policies, with arguments federal prosecutors make in courts across the nation every day, and with the equal justice principles Congress has pursued in modern sentencing reforms. Nevertheless, even though President Bush's commutation undermines the rule of law and complicates the work of federal prosecutors and judges, I hope this Committee will not respond by seeking to restrict historic Presidential clemency powers. Rather, because the President's commutation shines light on some troublesome consequences of peculiar use of the clemency power, I urge this Committee to seize this unique political moment to consider ways Congress might improve the process of, and public respect for, executive clemency decision-making.

I. The Commutation is a Peculiar and Suspect Sentencing Decision.

President Bush's official statement which accompanied his clemency decision sets out some reasons for his decision to commute entirely the prison term of Mr. Libby. Tony Snow and other White House officials have subsequently provided additional details about the President's thinking and the nature of his decision. These explanations make clear that the President's commutation is fundamentally a sentencing decision. But, upon careful review, the commutation is revealed to be a peculiar and suspect sentencing decision given the President's own statements about the Libby case and U.S. District Judge Reggie Walton's determination that Mr. Libby should receive a significant term of imprisonment for his crimes.

A. The President's explanation for commuting Mr. Libby's prison term

President Bush's official statement notes the "serious convictions of perjury and obstruction of justice" in Mr. Libby's case. The statement stresses the importance of the investigation into the leaking of Valerie Plame's name and describes Special Counsel Patrick Fitzgerald as "a highly qualified, professional prosecutor who carried out his responsibilities as charged." President Bush's statement also expresses "respect" for the jury's verdict and asserts that "if a person does not tell the truth, particularly if he serves in government and holds the public trust, he must be held accountable." President Bush emphasizes that "our entire system of justice relies on people telling the truth." Taken together, these statements indicate that the President has no public concerns about either the investigation or the prosecution that led to Mr. Libby's "serious convictions."

Though lauding Mr. Fitzgerald's investigation and prosecution and the jury's work,

President Bush's statement criticizes U.S. District Judge Reggie Walton's sentencing decision. The President's statement asserts that "the district court rejected the advice of the probation office," which apparently suggested a sentence in the range of 15-21 months' imprisonment. The President then explains that he has "concluded that the prison sentence given to Mr. Libby is excessive" and has decided to commute the 30-month prison term imposed by Judge Walton.

Seeking to justify this decision, the President claims that Mr. Libby is still subject to "a harsh punishment" because his commutation leaves in place the fine and supervision term ordered by Judge Walton. President Bush's statement also stresses collateral consequences — the damage to his reputation and his family's suffering — from Mr. Libby's convictions.

Providing a further account of the President's commutation decision, White House spokesman Tony Snow made these points in a July 5th *USA Today* commentary:

> The president believes pardons and commutations should reflect a genuine determination to strengthen the rule of law and increase public faith in government.... In reviewing the case, the president chose to rectify an excessive punishment, and at the same time, the president made clear that he would not second-guess the jury that found Libby guilty.

B. Peculiar and suspect aspects of the President's sentencing decision

The President's stated reasons for commuting all of Mr. Libby's prison are hard to understand and harder to justify. Mr. Libby's prison term was set at the *bottom* of the sentencing range suggested by the federal guidelines created by the U.S. Sentencing Commission; this prison term was recommended by an experienced prosecutor and selected by an experienced federal district judge. In other words, the President's conclusion that Mr. Libby's prison term was "excessive" contradicts the recommendation of an expert sentencing agency and the determinations of the prosecutor and judge most familiar with the details of Mr. Libby's criminal

offenses and personal circumstances. (Notably, under existing precedents, the U.S. Court of Appeals for the D.C. Circuit would have considered Mr. Libby's 30-month prison term — and even a longer within-guideline term — "presumptively reasonable" on appeal.)

Unlike some other high-profile cases which have led to calls for the President to exercise his clemency powers,[1] the prison sentence in Mr. Libby's case was not the product of a mandatory sentencing provision. Rather, under federal statutes, Judge Walton could have imposed a lower sentence or a sentence as high as the statutory maximum of 25 years' imprisonment. In the exercise of his discretion, however, Judge Walton was obliged to consider the guideline range of 30-37 months' imprisonment and was required to select a sentence he judged "sufficient, but not greater than necessary" to achieve the purposes of punishment Congress has set forth in 18 U.S.C. § 3553(a).

Judge Walton reached his sentencing decision after reviewing a detailed pre-sentencing report, lengthy sentencing memoranda from the parties, and hundreds of letters from interested persons. Judge Walton also held a sentencing hearing in which he heard arguments from the parties and provided Mr. Libby an opportunity to address the court directly. Judge Walton thereafter determined that a 30-month prison sentence for Mr. Libby, in addition to a sizeable fine and a post-imprisonment term of supervision, was appropriate in light of federal sentencing

[1] Two weeks ago, in a hearing before this Committee's Subcommittee on Crime, Terrorism and Homeland Security, numerous witnesses described how mandatory sentencing provisions can sometimes require judges to impose unduly severe prison sentences for certain offenders. Providing specific examples, these witnesses stressed the unfairness of the 11- and 12-year federal prison sentences received by former Border Patrol Agents Ignacio Ramos and Jose Alonso Compean, and noted the excessiveness of the 55-year federal prison sentence received by first-offender Weldon Angelos for minor marijuana sales. Despite many calls for clemency relief in these and other cases involving long mandatory prison terms, President Bush to date has not remedied or even expressed concern about an "excessive" sentence in any case where a judge was required to impose a long prison term without considering the defendant's unique circumstances.

law and policy.[2]

Judge Walton's sentencing determinations would appear to vindicate President Bush's stated view that "serious convictions of perjury and obstruction of justice," especially when committed by a person who "serves in government and holds the public trust," call for "a harsh punishment." Moreover, Judge Walton's selection of a prison term at the very *bottom* of the calculated guideline range suggests that he was attentive to collateral personal consequences that Mr. Libby's prosecution and convictions necessarily produce. Nevertheless, Judge Walton still concluded that a 30-month prison term was "sufficient, but not greater than necessary" to achieve the punishment goals Congress set out in 18 U.S.C. § 3553(a).

Of course, defendants and their attorneys often complain that sentences imposed within guidelines ranges are excessive, and they frequently appeal within-guideline sentences claiming that they are unreasonably long. In thousands of such appeals in recent years, however, no federal appellate court has declared a single within-guideline sentence to be unreasonably long. Indeed, since the Supreme Court's 2005 decision in *United States v. Booker*,[3] the vast majority of sentences imposed *above* the guidelines have been declared reasonable by federal circuit courts, and many sentences below the guidelines have been declared unreasonable in light of congressional sentencing purposes and policies.

Given that Mr. Libby faced a statutory maximum sentence of 25 years' imprisonment and

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[2] In an unusual statement issued the same day President Bush announced his commutation decision, Mr. Fitzgerald responded to the President's assertion that Mr. Libby's sentence was excessive by stressing its regularity:

> The sentence in this case was imposed pursuant to the laws governing sentencings which occur every day throughout this country. In this case, an experienced federal judge considered extensive argument from the parties and then imposed a sentence consistent with the applicable laws.

Statement of Special Counsel Patrick J. Fitzgerald (July 2, 2007).

a calculated guideline range of 30-37 months' imprisonment, Judge Walton's imposition of a prison term of only 30 months was arguably merciful. As noted above, this prison term would have been considered presumptively reasonable by the U.S. Court of Appeals. Against this legal backdrop, the President's conclusion that Mr. Libby's prison term was "excessive" is curious, to say the least.

Even if one accepts the President's assertion that a 30-month prison term for Mr. Libby was excessive, it is hard to justify or understand the President's decision to commute Mr. Libby's prison sentence *in its entirety*. It is particularly difficult to see how, in Tony Snow's words, "the rule of law" and "public faith in government" have been served by enabling Mr. Libby to avoid having to serve even one day in prison following his "serious convictions of perjury and obstruction of justice." Indeed, the conclusion to the prosecution's sentencing memorandum submitted to the District Court in this case spotlights why a term of imprisonment for Mr. Libby seemed essential — and certainly not "excessive" — to both Mr. Fitzgerald and Judge Walton:

> Mr. Libby, a high-ranking public official and experienced lawyer, lied repeatedly and blatantly about matters at the heart of a criminal investigation concerning the disclosure of a covert intelligence officer's identity. He has shown no regret for his actions, which significantly impeded the investigation. Mr. Libby's prosecution was based not upon politics but upon his own conduct, as well as upon a principle fundamental to preserving our judicial system's independence from politics: that any witness, whatever his political affiliation, whatever his views on any policy or national issue, whether he works in the White House or drives a truck to earn a living, must tell the truth when he raises his hand and takes an oath in a judicial proceeding, or gives a statement to federal law enforcement officers. The judicial system has not corruptly mistreated Mr. Libby; Mr. Libby has been found by a jury of his peers to have corrupted the judicial system.[4]

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[3] 543 U.S. 220 (2005).

[4] Government's Sentencing Memorandum, *United States v. Libby*, Cr. No. 05-394 (RBW), at 16-17 (May 25, 2007).

II. The Commutation is Contrary to the Bush Administration's Sentencing Policies and Practices, and to Principles of the Sentencing Reform Act.

Though peculiar and suspect on its own terms, President Bush's decision to commute entirely the prison term of Mr. Libby is especially puzzling and troubling in light of the Bush Administration's stated sentencing policies and practices. The President's commutation also undermines principles of modern federal sentencing reform reflected in the Sentencing Reform Act of 1984 and sentencing policies stressed by members of Congress from both political parties.

A. The Justice Department's modern vigorous advocacy for within-guidelines prison sentence for white-collar offenders

In testimony to Congress and the U.S. Sentencing Commission and in other policy advocacy, the Justice Department during the Bush Administration has repeatedly and vigorously argued for certain and stiff punishment for white-collar offenders. In addition, throughout the Bush Administration, federal prosecutors in courts nationwide have repeatedly and vigorously argued against judges reducing sentences below the guidelines based on the kinds of personal considerations mentioned in President Bush's commutation statement.

Policy advocacy. The Justice Department during the Bush Administration has consistently urged Congress and the Sentencing Commission to support and strengthen sentencing laws to ensure that white-collar offenders receive serious punishments including terms of imprisonment. Here are a few notable excerpts taken from written testimony and speeches from various Justice Department officials:

- In 2001, then-Acting Deputy Attorney General Robert Mueller testifying before the U.S. Sentencing Commission stressed the importance of equal and severe punishment for privileged defendants:

> When [successful professionals] break the law, they should not be excused from serving a prison sentence simply because they did not commit crimes of violence. The public has a right to expect that people with privileged backgrounds who commit crimes will not be exempt from the full force of the law and will not be treated with inappropriate leniency.[5]

- In 2002, then-U.S. Attorney James Comey echoed similar points when testifying before the United States Senate:

> [T]he real and immediate prospect of significant periods of incarceration is necessary to give force to law. Nothing erodes the deterrent power of our laws — and breeds contempt for obeying the law — more quickly than if certain criminals appear to receive punishment not according to the gravity of the offense, but according to their social or economic status.[6]

- In 2003, the Justice Department's Ex Officio member of the U.S. Sentencing Commission expressed the Justice Department's concerns about the Commission's failure to address "the increasingly severe problem of federal judges ignoring the existing guidelines to grant lenient sentences or even probation to wealthy, well connected criminals."[7]

- In a 2005 speech, Attorney General Alberto Gonzales advocated responding to the Supreme Court's *Booker* decision through "the construction of a minimum guideline system" in order to create "a system of tougher, fairer, and greater justice for all." Here are some of Attorney General Gonzales' points in support of his proposal to limit judicial authority to reduce sentences below calculated guideline ranges:

> In the 17-plus years that they have been in existence, federal sentencing guidelines have achieved the ambitious goals of public safety and fairness set out by Congress.... [because] increased incarceration means reduced crime.... Federal sentencing guidelines have helped keep Americans safe while also delivering on their promise to reduce unwarranted disparities in sentences....

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[5] Testimony of James B. Comey before the Subcommittee on Crime and Drugs of the Senate Judiciary Committee (June 19, 2002) (quoting prior testimony of then-Acting Deputy Attorney General Robert Mueller), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=280&wit_id=650

[6] *Id.*

[7] Minutes of the January 8, 2003 U.S. Sentencing Commission Public Meeting (reporting remarks of Eric Jaso), *available at* http://www.ussc.gov/MINUTES/1_08_03.htm

> For 17 years, mandatory federal sentencing guidelines have helped drive down crime. The guidelines have evolved over time to adapt to changing circumstances and a better understanding of societal problems and the criminal justice system. Judges, legislators, the Sentencing Commission, prosecutors, defense lawyers, and others have worked hard to develop a system of sentencing guidelines that has protected Americans and improved American justice.[8]

Interestingly, in his 2005 speech calling for a legislative response to *Booker*, Attorney General Gonzales expressed particular concern about defendants "receiving sentences dramatically lower than the guidelines range ... on the basis of factors that could not be considered under the guidelines."[9] Attorney General Gonzales singled out for criticism below-guideline sentences given to white-collar offenders: he assailed one judge's decision to impose only a term of probation due to the collateral harms suffered by the defendant; he attacked another judge's decision to reduce a prison term based in part on the defendant's advanced age and his need to help care for his severely ill wife.[10]

Court advocacy. The Justice Department's vigorous advocacy for within-guidelines prison sentences for white-collar offenders takes place in courtrooms as well as in testimony and speeches. In response to defense arguments for reduced prison terms, federal prosecutors regularly argue to sentencing judges and appellate courts that terms of imprisonment, and not merely fines and probation, are essential to achieve the goals of punishment and deterrence stressed by Congress in the Sentencing Reform Act. Especially in white-collar cases involving first-offenders — whether involving economic crimes such as those that led to convictions in the

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[8] Sentencing Guidelines Speech by Attorney General Alberto Gonzales (June 21, 2005), *available at* http://www.usdoj.gov/ag/speeches/2005/06212005victimsofcrime.htm.

[9] *Id.*

[10] *Id.*

Enron and WorldCom prosecutions, or involving high-profile defendants such as Martha Stewart and the rapper Lil' Kim convicted for perjury and obstruction like Mr. Libby — federal prosecutors consistently encourage judges to disregard defense arguments for lower sentences because of the collateral harms that prominent and privileged defendants necessarily suffer as a result of a federal prosecution.

Perhaps the most telling recent court advocacy relevant here comes from the Justice Department's successful arguments before the Supreme Court in support of the reasonableness of a 33-month sentence received by Victor Rita for perjury and obstruction of justice. Mr. Rita, a highly decorated military veteran who suffers significant medical ailments, was peripherally involved in a federal investigation of InterOrdinance, a firearms company. Based on a misrepresentation about his dealings with InterOrdinance, Mr. Rita was prosecuted and convicted of perjury and obstruction of justice, and he was given a within-guideline sentence of 33-months' imprisonment.

In response to Mr. Rita's claims on appeal that his sentence was unreasonably long given his distinguished military and government service and his poor health, the Department of Justice argued to the Fourth Circuit and then to the Supreme Court that a 33-month prison term for Mr. Rita was "reasonable." The Department supported its reasonableness claims by stressing that Mr. Rita's sentence was at the bottom of the calculated guideline range, that Mr. Rita committed his crimes while serving as a federal government employee, and that Mr. Rita failed to accept responsibility for his crimes.

In its 8-1 decision in *Rita v. United States*[11] — which was handed down just days before

[11] 75 U.S.L.W. 4471 (S. Ct. June 21, 2007)

President Bush called Mr. Libby's 30-month prison "excessive" — the Supreme Court declared Mr. Rita's 33-month prison sentence reasonable. The majority opinion in *Rita* stresses that it was sensible to afford within-guideline sentences a "presumption of reasonableness" because in such cases "*both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case [which] significantly increases the likelihood that the sentence is a reasonable one."[12] The majority opinion also concluded that "Rita's lengthy military service, including over 25 years of service, both on active duty and in the Reserve, and Rita's receipt of 35 medals, awards, and nominations," even when considered together with other personal suffering and circumstances, did not create "special circumstances [that] are special enough" to call for a lower prison sentence.[13] Notably, in a separate concurrence, Justice Antonin Scalia (joined by Justice Clarence Thomas) described Victor Rita's 33-month prison term for perjury and obstruction of justice as a "relatively low sentence."[14]

Because I personally believe that a long and distinguished military career should be considered an important mitigating factor at sentencing, I was somewhat disappointed and a bit surprised that only one member of the Supreme Court expressed serious concern about the reasonableness of Mr. Rita's 33-month prison sentence for perjury and obstruction of justice. But I was more disappointed and surprised that President Bush decided Mr. Libby should not have to serve even a single day in prison for the same crimes that his Justice Department and the Supreme Court believed reasonably required Mr. Rita to serve 1000 days in prison. (Moreover,

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[12] *Id.*

[13] *Id.*

[14] *Id.* (Scalia, J., concurring in part and concurring in the judgment).

the important nature of the underlying investigation that Mr. Libby obstructed, as well as his background as a lawyer and as a high-ranking government official, arguably makes Mr. Libby's crimes even more serious than Mr. Rita's.)

I must note here that, in my scholarly writings, I have often criticized the federal guidelines' heavy emphasis on aggravating *offense* factors while disregarding many mitigating *offender* characteristics. Indeed, along with many federal judges, I have repeatedly urged the U.S. Sentencing Commission to amend the guidelines to ensure that judges at sentencing can give greater consideration to various mitigating personal circumstances — such as prior good works, age and mental condition, and family responsibilities — which can sometimes diminish culpability and indicate reduced risks of recidivism. The official statement issued with Mr. Libby's commutation indicates that President Bush now recognizes these deficiencies in the guidelines, and I now hope all prosecutors working in his Administration will start consistently supporting sensible consideration of mitigating personal circumstances for all federal offenders at sentencing.

B. Congress's long-standing interest in achieving equal justice and respect for the law through modern sentencing reforms.

In 1984, Congress enacted the landmark Sentencing Reform Act ("SRA") which sought to remedy a perceived "shameful disparity in criminal sentences" that created "disrespect for the law." S. Rep. No. 98-225, at 46, 65 (1983). The SRA was the result of more than a decade of reports and hearings and it passed with broad bipartisan support: prominent supporters of the legislation included Representatives John Conyers and Dan Lundgren as well as Senators Strom Thurmond, Edward Kennedy, Orrin Hatch, Patrick Leahy, and Arlen Specter.

Throughout the last two decades, members of Congress from both parties have restated their belief and reaffirmed the vitality of the principles of equal justice reflected in the Sentencing Reform Act. Most recently, members of this Committee have played a leading role in stressing the importance of equal justice in federal sentencing. Representative Tom Feeney, for example, has repeatedly praised the federal sentencing guidelines for ensuring "that offenders would be treated equally before the law regardless of their socioeconomic standing,"[15] and he has advocated legislative efforts to guarantee that sentencing justice is "the same for all, regardless of one's race, gender, status, or socioeconomic background."[16] Similarly, former House Judiciary Committee Chairman, Representative F. James Sensenbrenner, has called for sentencing legislation in the wake of the *Booker* decision to help ensure that "all defendants [will] be treated equally under the law."[17] Representative Sensenbrenner recently introduced legislation designed to vindicate "two of the hallmarks of our judicial system, fairness and equity," and "to ensure that the sentence administered depends more upon the crime committed than which courtroom is issuing the sentence."[18] Senators have also emphasized the enduring importance of sentencing fairness and equity. During a 2000 oversight hearing, for example, Senator Strom Thurmond stressed the need for "similar punishment for similarly situated defendants" because "disparity breeds disrespect for the law and it undermines public confidence

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[15] Tom Feeney, *Reaffirming the Rule of Law in Federal Sentencing* (November 21, 2003), *available at* http://www.house.gov/feeney/pdf/lawreviewfeeneyamd.pdf.

[16] Letter to Editor of the National Journal from Representative Tom Feeney (February 14, 2003), *available at* http://www.house.gov/feeney/pdf/feeneyamendart1.pdf.

[17] News Advisory released by F. James Sensenbrenner (March 14, 2006), *available at* http://judiciary.house.gov/MEDIA/PDFS/BOOKERREPORT.PDF

[18] News Advisory released by F. James Sensenbrenner (September 29, 2006), *available at* http://judiciary.house.gov/media/pdfs/Bookerfixbillintro92906.pdf

in our system."[19] And, in a brief submitted this year to the Supreme Court, Senators Edward Kennedy, Orrin Hatch and Dianne Feinstein urged the Court to vindicate "the basic goals of the Sentencing Reform Act, including transparency, the elimination of unwarranted disparity, and fair and proportional sentences,"[20] and stressed that Congress has long sought to "remove politics, prejudice, and subjectivity from sentencing."[21]

As evidenced by the public and media reaction, the President's commutation of the entirety of Mr. Libby's prison sentence is not viewed as a paragon of "fairness and equality." Indeed, notwithstanding spokesman Tony Snow's claims to the contrary, the President's commutation decision seems likely to weaken the rule of law and to decrease public faith in government. Moreover, the President's commutation decision is certain to complicate the important work of federal prosecutors and federal judges who seek to advance the principles of equal justice and fairness reflected in the Sentencing Reform Act.

Many academic commentators and media stories have noted that defense attorneys are certain to start filing in many federal sentencing proceedings what is being called the "Libby Motion." Here is how Professor Ellen Podgor has explained the challenges that the President's commutation decision present for those working within the federal criminal justice system:

> [E]very criminal defense lawyer who practices in the white collar arena is asking him or herself — why shouldn't my client have this same privilege? After all the client may have been convicted of a perjury or obstruction charge, may have children, may be suffering the collateral consequences of the loss of a law license, may have served their

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[19] Statement of Senator Strom Thurmond at Senate Judiciary Committee Hearing (October 13, 2000), *reprinted at* 15 Federal Sentencing Reporter 317 (2003).

[20] Brief of Amici Curiae Senators Edward M. Kennedy, Orrin G. Hatch, and Dianne Feinstein in Support of Affirmance in *Claiborne v. United States* at 18-19 (January 2007).

[21] *Id.* at 21.

> country — perhaps in war, and may be a first offender. Should they not receive the same sentence of "no time."
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> One should expect that there will be Libby Motions made, and/or motions that contain this language in a request for a departure from the guidelines. The motion will likely include a comparison to the client's circumstances with that of Libby. It will probably also contain language from the U.S. Sentencing Guidelines that speaks to a basic policy consideration of the guidelines being to obtain "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal conduct." And after all, the guidelines permit departure for factors that were not considered by the U.S. Sentencing Commission. Did the Commission consider that a President would take an entire sentence and commute it prior to the individual even seeing one day in jail? And understanding that the U.S. Sentencing Commission did not consider this, should a departure therefore be allowed?
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> And the judges, what will they do with these motions? The activist ones might follow the activist executive and say — yes this is grounds for departure. But more likely we will see judges continue to follow the flow of the guidelines and sentence individuals as if the Libby case did not exist.
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> And we law professors will be left to try and explain this to students.[22]

Professor Podgor's comments spotlight how defense attorneys and judges will likely respond to President Bush's commutation, but I think federal prosecutors may now be placed in the most difficult of all positions. Nationwide, federal prosecutors must return to all the courtrooms in which they have argued that within-guideline sentences are always reasonable and now somehow explain why their boss concluded that Mr. Libby's within-guideline sentence was "excessive."

[22] Ellen S. Podgor, *The Libby Motion*, Post on White Collar Crime Prof Blog, July 3, 2007, *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/2007/07/the-libby-motio.html

III. This Committee Should Explore Possible Ways to Enhance the Process and Improve Public Appreciation for the Exercise of Historic Executive Clemency Powers.

There is a sad personal irony to my criticism of President Bush's decision to commute Mr. Libby's entire prison sentence. Almost exactly a decade ago, I was critical of then-Governor Bush's decision not to commute the death sentence of one of my clients, Terry Washington. Mr. Washington was a poor, African-American man who suffered from mental retardation and was sentenced to death in Texas after his conviction for killing a co-worker. Along with other lawyers at a large law firm, I served as Mr. Washington's pro bono appellate lawyer, and I drafted a clemency petition on Mr. Washington's behalf. In addition to noting the mistakes of Mr. Washington's appointed trial lawyer, the clemency petition stressed the severe abuse that Mr. Washington suffered as a child and his significantly diminished mental capacities. In May 1997, then-Governor Bush denied our request to commute Mr. Washington's sentence to life in prison, and the state of Texas executed Mr. Washington.

According to a 2003 *Atlantic Monthly* article by Alan Berlow, then-Governor Bush focused only on the facts of Mr. Washington's crime and never seriously considered the significant personal considerations that arguably justified commuting Mr. Washington's death sentence.[23] Needless to say, Mr. Washington's personal life story could not have been more different than Mr. Libby's. But, after seeing the President's obvious compassion for Mr. Libby's fate in his commutation statement, I cannot help but have some sadness about the President's

[23] *See* Alan Berlow, *The Texas Clemency Memos*, The Atlantic Monthly, July/August 2003. It bears noting that the clemency petition argument urging then-Governor Bush to spare Mr. Washington from execution because of his mental retardation a few years later became a winning constitutional claim in the Supreme Court's landmark decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Atkins* declared that any execution of a person with mental retardation would constitute cruel and unusual punishment in violation of the Eighth Amendment.

failure to show similar compassion for Mr. Washington and the great majority of criminal offenders whose personal suffering perhaps can never be fully understood by those who are more fortunate.

I relay the story of Mr. Washington to make clear that my concerns about the President's commutation do not stem from a broader aversion to the exercise of executive clemency power. In fact, I have long been a supporter of robust exercise of clemency powers by chief executives at state and federal levels, and I have previously criticized President Bush for having pardoned more Thanksgiving turkeys than he has commuted federal sentences. Especially as evidence of wrongful convictions and overzealous prosecutions continues to be revealed, executive clemency power can and should remain a vital component of the structure and fabric of modern criminal justice systems. Consequently, I sincerely hope that this hearing and the work of this Committee will not lead to efforts seeking to restrict executive clemency authority. Rather, I urge this Committee to recognize that President Bush's commutation might energize Congress and others to explore means to improve the process of, and public respect for, executive clemency decision-making.

Executive clemency power has a rich and distinguished history. The Framers of our Constitution robustly championed executive clemency power. At the time of founding, Alexander Hamilton stressed the importance of clemency in the Federalist Papers, emphasizing that "[t]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel."[24] Similarly, James Iredell of North Carolina championed the crucial

[24] The Federalist No. 74, pp. 447-49 (C. Rossiter ed. 1961).

nature of the executive clemency power, explaining that "there may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice."[25]

Of course, one need not look back hundreds of years to find praise for the executive power of clemency. The late Chief Justice William Rehnquist, writing for the Supreme Court, spotlighted that executive clemency power is "deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice."[26] Such a power is essential, continued Chief Justice Rehnquist, because "[i]t is an unalterable fact that our judicial system, like the human beings who administer it, is fallible" and thus executive clemency provides "the 'fail safe' in our criminal justice system."[27]

Unfortunately, in modern times, the "fail safe" of executive clemency has been failing to effectively serve the ends of justice that the Framers emphasized. Perhaps because only the most troublesome grants of clemency generate media attention and legislative hearings, executive officials often sensibly conclude that they will never face serious criticisms for failing ever to exercise their historic clemency powers, but will always face scrutiny for exercising this power. These political realities have led a Supreme Court Justice and leading scholars to lament that the clemency process has "been drained of its moral force" and that the important concept of mercy

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[25] Address by James Iredell, North Carolina Ratifying Convention (July 28, 1788), *reprinted in* 4 The Founders Constitution 17-18 (P. Kurland & R. Lerner ed. 1987).

[26] Herrera v. Collins 506 U.S. 390, 411-12 (1993).

[27] *Id.* at 415.

has lost its resonance in modern times.[28] The diminished state and perception of executive clemency is quite unfortunate, especially because I believe the Framers would view an executive's record of denying all clemency requests to be a matter of embarrassment rather than a point of pride.

For these reasons, I sincerely hope that this hearing and the work of this Committee will not begin any effort to limit or diminish executive clemency power, but rather will result in efforts to revive and restore this power to its historically important and respected status. To this end, let me close my testimony by making one suggestion as to how Congress might start down this path. Specifically, I urge this Committee to begin work on the creation of a "Clemency Commission."

My vision of this proposed "Clemency Commission" is very much in the model of the U.S. Sentencing Commission. A Clemency Commission could and should be a special administrative body, perhaps placed in the Judicial Branch, which would be primarily tasked with helping federal officials (and perhaps also state officials) improve the functioning and public respect for executive clemency as, in Chief Justice Rehnquist's words, "the historic remedy for preventing miscarriages of justice." Though the structure and staffing and mandates

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[28] *See, e.g.*, Address by Justice Anthony M. Kennedy to the American Bar Association Annual meeting (August 9, 2003), *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html; Austin Sarat, *Governor Perry, Governor Ryan, and The Disappearance of Executive Clemency in Capital Cases: What Has Happened to Mercy in America?*, FindLaw column, December 29, 2004, *available at* http://writ.news.findlaw.com/commentary/20041229_sarat.html#bio; *see also* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buffalo Criminal Law Review 1 (2005).

of a Clemency Commission could take many forms, I envision it as having personnel with expertise about the nature of and reasons for occasional miscarriages of justice in the operation of modern criminal justice systems. The Commission could study the causes of wrongful conviction and "excessive" sentences and overzealous prosecutions and make recommendations to the other branches about specific cases that might merit clemency relief or about systemic reforms that could reduce the risk of miscarriages of justice. In addition, the Commission could be a clearing-house for historical and current data on the operation of executive clemency powers in state and federal systems, and could serve as a valuable resource for offenders and their families and friends seeking information about who might be a good candidate for receiving clemency relief.

Despite constitutional limitations on significant legislative interference with the President's clemency powers, there are certainly various ways this Committee could seek to improve the transparency and understanding of the exercise of this historic executive power. Though the creation of a Clemency Commission would be an ambitious endeavor, I am quite confident that the effort could pay long-term dividends for both the reality and the perception of justice and fairness in our nation's criminal justice systems.

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Thank you once again for this opportunity to share my perspective on these important issues. I would be happy and eager to answer any questions members of the Committee may have.