

his honor and privilege to work as a magistrate judge. Judge Pitman expressed gratitude to all of the attorneys who have appeared before him, because more often than not they taught him something about the law.

Legal History

The Trials of “Scooter” Libby: Justice Run Amok?

By C. Evan Stewart



On July 6, 2003, a retired American diplomat Joseph C. Wilson IV published an op-ed piece in *The New York Times* challenging President George W. Bush’s assertion that Saddam Hussein had sought to acquire nuclear materials for his regime in Iraq. That essay triggered a Rube Goldberg-like series of events that, frankly, confound me to this day.

Novak’s Column

A week later, on July 14, 2003, well-known, national jour-

nalist Robert Novak published his regular column. In it, Novak wrote (among other things) that Wilson’s earlier mission to Niger to investigate claims that Iraq had made plans to buy and transport uranium from Niger had been a result of his wife’s suggestion. Wilson’s spouse was publicly identified: Valerie Plame, an employee of the Central Intelligence Agency. Novak did not specify his sources, other than to reference “senior administration officials.”

Novak’s initial and primary source for his Wilson-Plame story was Richard Armitage, the Deputy Secretary of State (and a critic of the Iraq War); it was subsequently confirmed to Novak by Karl Rove, a key presidential aide, and Bill Harlow, the CIA’s Director of Public Affairs. Armitage also leaked the Wilson-Plame story to Bob Woodward of *The Washington Post*.

The Intelligence Identities Protection Act of 1982 makes it a federal crime to disclose publicly the identity of a “covert” intelligence agent; and the CIA considered whether the Novak column triggered this concern. After its investigation, the CIA concluded that there was “no evidence” that the disclosure of Plame had harmed any CIA operation, any agent in the field, or “anyone else, including Plame herself.” Indeed, by 2003, Plame was *not* a “covert” agent (as defined by the statute); furthermore, according to the CIA’s acting general counsel, “dozens, if not hundreds of people in Washington” knew Plame was

a CIA employee before the publication of Novak’s column.

Let’s Appoint a Special Counsel

Notwithstanding, the Novak column and the “leak” of Plame caused a political firestorm; it appeared to reflect a (clumsy) attempt by the Bush administration to punish opponents of the Iraq war. Attorney General John Ashcroft recused himself from any investigation into the matter out of an “abundance of caution,” so it fell to his deputy, James Comey. Comey, in short order, appointed his good friend (and godfather to one of his children), Patrick Fitzgerald, as a special counsel. Fitzgerald promptly convened a grand jury and went to work.

After hearing from a bevy of witnesses, the grand jury indicted no one for violating the 1982 statute (not surprisingly). But, I. Lewis “Scooter” Libby, chief of staff to Vice President Dick Cheney, was indicted on October 25, 2005 on multiple counts for lying about his communications with journalists (other than Novak) regarding when and what he said to them about Plame in 2003. According to the indictment, Libby lied about discussions he had with Tim Russert (NBC News), Matthew Cooper (*Time Magazine*), and Judith Miller (*The New York Times*) – lied insofar as he *denied* he leaked Plame’s CIA status to Cooper and Miller, and lied when he said he remembered first learning about Plame in a conversation with Russert on July 10, 2003. At

his press conference announcing Libby's indictment, Fitzgerald accused Libby of having harmed national security, said that Libby had thrown "sand...in his eyes," and called the charges of lying quite serious because "truth is the engine of our judicial system."

On March 6, 2007, after deliberating for 10 days, a District of Columbia jury convicted Libby on four felony counts, while acquitting him on another. Still proclaiming his innocence, Libby was sentenced to 30 months in jail, fined \$250,000, and subjected to two years of supervised release after the end of his prison term (this was based upon Fitzgerald's sentencing recommendation that Libby's "falsehoods were central to issues in a significant criminal investigation").

On July 2, 2007, President Bush commuted Libby's prison sentence; but – notwithstanding Vice President Cheney's imploring – he refused to pardon Libby. On November 3, 2016, the District of Columbia Court of Appeals reinstated Libby as a member of the D.C. Bar. And on April 13, 2018, President Trump pardoned Libby.

I Am Confused

Almost immediately after having become special counsel, Fitzgerald learned what Comey already knew: the actual, primary leaker was Armitage. So why not go after him? Apparently, because (as set forth above) there was in fact no violation of the 1982 statute. So, why did the investigation not end then and there, with the

special counsel closing up shop? (Instead, Fitzgerald instructed both Armitage and Novak *not* to go public with the fact that Armitage was the primary source for Novak.) And why go after Libby, who indisputably was not the leaker to Novak (and thus did not throw "sand...in [Fitzgerald's] eyes" on that score), and the alleged "illegality" was Libby's lying about (misremembering) a call with Russert (that it was Russert who brought up Plame's name) and lying about leaking Plame's name to Miller and Cooper (notwithstanding that neither published the "leak" *prior* to Novak's column)?

The answer seems to be that Fitzgerald was after a bigger fish than Libby. According to Libby's lawyer, Fitzgerald twice offered to drop all charges against Libby if he would "deliver" Vice President Cheney to him on a silver platter. Exactly what crime Cheney supposedly committed is/was unclear (Fitzgerald did say in his closing argument to the jury: "There is a cloud over the vice president. He sent Libby off to [disclose Plame's identity to Miller].") Fitzgerald also told the jury that CIA agents could have died because of Plame's "outing": "[Hostile foreign governments] could arrest them. They could torture them. They could kill them."). When Libby declined the twice offered "deal," Fitzgerald settled for prosecuting him.

What Was the "Evidence"?

Russert's initial recounting to the feds of what happened in

the July 10, 2003 phone call with Libby was quite equivocal – he could not remember whether or not he had mentioned Plame's name to Libby (but would not rule it out). At the trial in 2007, however, Russert was unequivocal. Now (undoubtedly, with the help of governmental horseshedding), he was absolutely *certain* that Plame's name had *not* been discussed on the call. Standing alone, this difference in the two men's recollections of a phone call from years before seems to be of little moment – certainly not for meeting the burden of proving a crime. But what about Libby's interactions with the other reporters?

As for Cooper, it turned out that his work papers and notes *supported* Libby's version of his conversation with the *Time* reporter. (Karl Rove, in fact, turned out to be Cooper's source for Plame.) Consequently, the jury acquitted Libby of lying to the FBI about his conversation with Cooper.

This made Libby's interactions with Miller in June and July of 2003 pretty darn important to Fitzgerald's case. Indeed, in his summation to the jury, Fitzgerald called her testimony "critical" to his prosecution of Libby. At the close of the government's case, Libby's defense team moved to dismiss the allegation that Libby lied to Miller *after* the Novak column was public. The government did not oppose the motion, and the Court granted it. This left a discussion between Libby and Miller on June 23, 2008 as the

fulcrum on which hung the jury's conviction of Libby.

Miller originally went to jail (where she spent 85 days) rather than testify before Fitzgerald's grand jury about her confidential communications with Libby. She was freed from her contempt order after Libby contacted her and specifically released her from any obligations of confidentiality. Miller then testified before the grand jury twice; the second appearance was the most consequential because she had found her notes of her 2003 conversations with Libby, and Fitzgerald used those notes both to refresh her memory and prompt her testimony. With respect to the June 23 meeting, Miller's notes included the following: "(wife works in Bureau?)." And in her notes of a July 8 Libby-Miller conversation there was an untethered reference to "Valerie Flame [sic]." Based upon those notations, Miller told the grand jury she was "certain that Libby and I discussed Wilson's wife.... [But that she] couldn't remember if that [June 23] was the first time I heard that she works for the CIA."

At trial, Miller was one of 10 journalists called to testify; she was the *only* one who testified that Libby had talked about Wilson's wife. Her testimony mirrored that of her second grand jury appearance (based upon the above quoted June 23 notes); at the same time, she also testified that she "did not recall Libby's having mentioned Plame's name, the fact that her job was secret, or that she had helped send her

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husband to Niger for the CIA." Nonetheless, her testimony about her June 2003 conversation with Libby could not be squared with what Libby had said about his July 10 call with Russert, and that served to corroborate Russert's unequivocal testimony. Thus, Miller's testimony was, as Fitzgerald told the jury, "critical" to Libby's conviction.

Innocent and Not So Innocent Mistakes

In the same year as Libby's conviction, Plame published her account of her "outing": "Fair Game: My Life as a Spy, My Betrayal by the White House" (Simon & Schuster 2007) [which later became a movie starring Naomi Watts as Plame]. In 2011, at Libby's suggestion, Miller read "Fair Game" and a light bulb went off. Plame had written that, during the time when she was in fact a covert agent overseas (years before 2003), her covers had been various "Bureau" jobs at the State Department. As Miller subsequently wrote in her memoirs ("The Story: A Reporter's Journey" (Simon & Schuster 2015)), if Libby had been her source on Plame as a CIA operative, "he would not have used the

word *Bureau* to describe where Plame worked," since the CIA (unlike the State Department) is organized by divisions. *Someone else* had thus been Miller's source about Wilson's wife working at the "Bureau" ("one of the twenty or more nonproliferation experts I routinely spoke to")!

In her prep sessions with Fitzgerald (and before the grand jury), he had asked Miller several times what Libby had meant when he said "Bureau" – "Did he mean FBI?" Miller replied no; that Libby had only been talking about the CIA. But Fitzgerald, in steering Miller to the CIA conclusion, knew that Plame had had prior cover jobs in the State Department's "Bureaus." He nonetheless failed to provide that information to Miller; and given that it constituted exculpatory evidence vis-à-vis Libby, Fitzgerald never informed Libby's lawyers of Plame's State Department "Bureau" jobs (even though such background information on Plame had been sought by Libby's lawyers).

With this new insight into Plame's cover jobs at the State Department, Miller then re-reviewed her notes from the entire June-July 2003 period. She concluded that *none* of the Plame references came from Libby. In her memoirs she wrote:

My heart sank as I closed the notebooks. What if my testimony about events four years earlier had been wrong? Had I misconstrued my notes? Had Fitzgerald's questions

about whether my use of the word *Bureau* meant the FBI steered me in the wrong direction?

Though I felt certain before the trial that Libby and I had discussed “the wife,” if only in passing, my memory may have failed me. Rereading those elliptical references and integrating them with what I had learned since trial and with the information about Plame’s cover that Fitzgerald had withheld, it was hard not to conclude that my testimony had been wrong. Had I helped convict an innocent man?

The Aftermath of a Refreshed Memory

On November 3, 2016, the District of Columbia Court of Appeals granted Libby’s petition for reinstatement to the D.C. bar. That action was based upon a report by the D.C. bar’s Office of Disciplinary Counsel, which *inter alia* wrote that (i) Libby had consistently maintained his innocence; (ii) he never denied the seriousness of the charges for which he was convicted, and (iii) Miller, as a “key prosecution witness...has changed her recollection of the events in question.”

In response to President Trump’s 2018 pardon of Libby, Valerie Plame wrote that that act “hurts all of us.” Plame is currently running for Congress in New Mexico. Fitzpatrick, now a partner at Skadden Arps in Chicago, said the pardon was ill-considered, and to the extent the decision “purports to be premised

on the notion that Libby was an innocent man convicted on the basis of inaccurate testimony caused by the prosecution,... [t]hat is false.”

The man who appointed Fitzgerald, James Comey, also weighed in on the Libby pardon, calling it “an attack on the rule of law.... There’s no reason that’s consistent with justice to pardon him.” Of course this is the same James Comey who, after telling the President of the United States: “I don’t do sneaky things, I don’t leak, I don’t do weasel moves,” promptly leaked seven internal FBI memos to a friend at Columbia Law School, so that he would in turn leak them to *The New York Times* and trigger the need for a special counsel to investigate Russian interference with the 2016 presidential election. (Comey also shared those FBI documents with his personal lawyer, Patrick Fitzgerald.) On August 29, 2019, the Justice Department’s inspector general issued a 79 page report, citing Comey for willfully violating Justice Department/FBI internal policies and procedures in leaking those memoranda, and finding that Comey’s actions were in an effort “to create public pressure for official action,... [which] set[s] a dangerous example” for every FBI employee. *The New York Times* characterized the report as a “stinging rebuke”; Comey’s response on Twitter was as follows: “I don’t need a public apology from those who defamed me, but a quick message with a ‘sorry we lied about you’ would be nice.”

In the Circuit

Meet the New Circuit Executive: Michael D. Jordan

By Joseph Marutollo



On August 16, 2019, Second Circuit Chief Judge Robert A. Katzmann announced the appointment of Michael D. Jordan as the circuit executive for the Second Circuit. The *Federal Bar Council Quarterly* recently interviewed Mr. Jordan to discuss his years of service to the Second Circuit and his new role as the circuit executive.

Path to the Second Circuit

Mr. Jordan, who holds a B.S. from Manchester University in Indiana and a master’s degree in philosophy from the University of Georgia, pursued his legal training at New York University School of Law. While at N.Y.U., Mr. Jordan served as the articles editor of the law review, a mem-