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The Use and Misuse of Presidential Clemency Power for Executive Branch Officials
Convened by Representative John Conyers
Chair, Judiciary Committee, United States House of Representatives
July 11, 2007

Mr. Chairman and Distinguished Members of the Committee:

I want to thank you for convening this hearing and for granting me the opportunity to appear before you today on behalf of my client, Victor A. Rita, Jr. I have been an attorney for over 20 years and have worked as an Assistant Federal Public Defender in North Carolina for over 15 years. In 2005, I was appointed as appellate counsel to represent Mr. Rita, and I assisted him with his case through to the United States Supreme Court. On appeal, Mr. Rita sought to have his sentence of 33 months vacated, based upon various factors, contending that such a sentence was excessive and unreasonable. Mr. Rita has asked me to thank you for your time, and he expressed his regret for being unable to be here with us today. Unfortunately, Mr. Rita was required to report to the Bureau of Prisons on July 2, 2007, to begin the service of his sentence. Ironically, this was the same day that President Bush commuted the 30 month prison term of I. Lewis Libby, concluding that it was "excessive."¹

My testimony will begin with an introduction to Mr. Rita's case and a comparison of the striking similarities between his case and that of Mr. Libby. Next, I will discuss the evolution of Mr. Rita's case, and its final disposition in the Supreme Court. Finally, I will conclude by bringing to your attention the parallel arguments which President Bush made on behalf of Mr. Libby and which I have repeatedly argued on behalf of Mr. Rita. In my conclusion, I hope that you will understand the vast discrepancy between the results of these two similar cases.

I. A Comparison of the Facts in the Cases of Victor Rita and I. Lewis Libby

It is highly appropriate for you to examine the legal background of Mr. Rita's case and Mr. Libby's case. I believe you will be surprised to find that they are nearly identical in many aspects. To begin, neither man was the target of the investigation for which he was ultimately charged. In North Carolina, Assistant U.S. Attorney Matthew Martens began an investigation of

¹"Statement by the President on Executive Clemency for Lewis Libby," at <http://www.whitehouse.gov/news/releases/2007/07/print/20070702-3.html> (last visited July 4, 2007) (hereinafter "Statement").

a North Carolina firearms company, InterOrdnance, Inc., to determine whether it was violating the federal firearms laws. In the process of this investigation, Mr. Martens called witnesses, including Mr. Rita, before the grand jury to testify. In Washington, D.C., U.S. Attorney Patrick Fitzgerald was appointed to investigate the leaking of Valerie Plame's name to columnist Robert Novak to learn whether any person violated either the Intelligence Identities Protection Act or the Espionage Act. In the process of this investigation, Mr. Fitzgerald called witnesses, including Mr. Libby, before the grand jury to testify. Both men -- Rita and Libby -- were federally indicted on two counts of making false statements under oath, two counts of perjury, and one count of obstruction of justice. Both were convicted by a jury. Both men were sentenced to over two years of imprisonment: Mr. Rita for 33 months and Mr. Libby for 30 months. Both men have extensive civil service backgrounds, are dedicated family men, and have been subjected to "a harsh sentence based in part on allegations never presented to the jury."² Despite all of these similarities, today Mr. Rita is in prison and Mr. Libby is not.

I had no involvement in Mr. Libby's case, and therefore, cannot comment upon the details of what transpired other than what I have read from documents retrieved from the district court file. Having represented Mr. Rita, however, I can give a better explanation of his case and background.

Public Service: Mr. Rita is a 59 year old man who has spent the better part of his life in public service. Like Mr. Libby, who has served in the Defense Department, Mr. Rita has served in the United States Marine Corps, the United States Army, and the former Immigration and Naturalization Service (now the Department of Homeland Security). During Mr. Rita's military service, he contributed nine years of active duty and fifteen years of reserve duty. He served in theater in both the Vietnam War and the first Gulf War. During Mr. Rita's service in Vietnam, he was exposed to Agent Orange. During the first Gulf War, he suffered a crushed foot which, after being treated in Germany and in the U.S., he was honorably discharged on August 17, 1992. Like Mr. Libby, who has received various awards for his service, Mr. Rita has accumulated over 35 medals, awards, and commendations for his service.³ During Mr. Rita's

²Statement.

³This information comes from page 65 of Mr. Rita's Joint Appendix filed in the Supreme Court (hereinafter "J.A. ___"). Rita v. United States, No. 06-5754 (2007) (Joint Appendix).

years of service in what is now the Department of Homeland Security, he worked first as an INS criminal investigator and later as an INS asylum officer. All told, Mr. Rita retired with more than 32 years of service to the federal government. Finally, even though neither man had any criminal history points as contemplated by the federal Sentencing Guidelines, Mr. Rita did have one prior probationary conviction in 1986 for using his father's address when purchasing a firearm. This conviction was never an issue in Mr. Rita's appeal nor did it prevent or inhibit the INS from later hiring Mr. Rita as an Immigration Asylum Officer.

Family: Like Mr. Libby, whose attorneys describe his dedication to serving his country as being surpassed only by his commitment to his family, Mr. Rita is also devoted to his family. He describes himself as "a family man."⁴ While Mr. Libby has young children who have become victims, it also "bothers [Mr. Rita] that [his] family [went] through this."⁵ Mr. Rita has been married for almost 28 years and is "the co-parent of two boys. One son was a teenager and the other [was] a 25 year old college student" at the time of trial.⁶ He "support[ed] the boys financially and otherwise," despite being retired and disabled. He also "help[ed] out [his] mother-in-law as well[,]" because she was in a retirement home.⁷

Discrepancies: Despite these similarities, Mr. Rita's personal background is very different from Mr. Libby's in many respects. While Mr. Libby is a law school graduate, Mr. Rita had a troubled youth as he "had to grow up partly on his own" and dropped out of high school.⁸ Mr. Rita obtained his GED and then later completed his Associate of Arts degree while working for the INS. As a result, Mr. Rita is not of the same means as Mr. Libby. Though he retained his own attorney in the district court, he went into debt and "exhausted funds from [his] savings" during his trial.⁹ He filed a pro se notice of appeal and was appointed counsel for his appellate process. In comparison, Mr. Libby had the benefit of his own legal training, a large

⁴J.A. 79.

⁵J.A. 80.

⁶J.A. 42.

⁷J.A. 83.

⁸J.A. 64.

⁹J.A. 92.

defense team, and the Libby Legal Defense Trust, which was formed “to help defray the legal defense costs for Lewis ‘Scooter’ Libby and his family.”¹⁰

In addition to his severely strained economic condition, Mr. Rita also differs from Mr. Libby with regard to his health condition. Mr. Rita suffers from: “hypertension, degenerative disc disease, Type 2 diabetes, enlarged prostate, infection in his legs, skin rash due to exposure to Agent Orange while he was a foot soldier in Vietnam, arthritis, sleep apnea, and different respiratory ailments.”¹¹ He also suffers from “NTN elevated BP, hyperlipidemia . . . arthritis of [the] cervical spine, and acid reflux.”¹² There are suspicions that some of his illnesses originated from his exposure to Agent Orange in Vietnam, as he served between 1968-69, years during which the chemical was used.¹³ “At the end of the tour he started to have gum disease, rashes, headaches, migraines,” and despite having “no history of [Type 2] diabetes or any sort . . . in his family . . . [h]e started to have symptoms of that soon thereafter.”¹⁴ He takes well over a dozen medications per day and requires a continuous positive airway pressure (CPAP) machine to sleep through the night and awaken again the next morning.

Finally, Mr. Rita and Mr. Libby differ in their vulnerability now that Mr. Libby will serve no prison time. Due to his prior service with immigration, as well as his poor physical condition, Mr. Rita is an especially vulnerable victim in prison. During his time with the INS in both New York and in Miami, Mr. Rita “worked on immigration matters and other drug interdiction matters to where his testimony was used to put offenders away in prison. Those offenders threatened him directly and indirectly.”¹⁵ To demonstrate the gravity of his testimony, at one time “there was a \$50,000 bounty on his head” as a result of his law enforcement activities.

Now, I would like to address the important parts of Mr. Rita’s legal case.

¹⁰ Libby Legal Defense Trust: www.scooterlibby.com.

¹¹J.A. 51.

¹²J.A. 68.

¹³ Vietnam’s War Against Agent Orange at <http://news.bbc.co.uk/2/hi/health/3798581.stm> (last accessed July 8, 2007).

¹⁴J.A. 72.

¹⁵J.A. 61.

II. Mr. Rita's Case

Between March 2002 and February 2004, the U.S. Attorneys office for the Western District of North Carolina began a federal grand jury investigation “into the sale of, among other things, PPSH 41 machinegun ‘parts kits’ by a company . . . located in Union County, in the Western District of North Carolina.”¹⁶ The purpose of the investigation, in part, was “to determine whether violations of 18 U.S.C. § 922(o) had been committed with regard to PPSH 41 machinegun ‘parts kit’ distributed by the [c]ompany[.]”¹⁷

In January 2003, Mr. Rita purchased one PPSH 41 parts kit and one RPK part kits from the same company.¹⁸ Three months later, the ATF began a national recall of all PPSH 41 parts kits and in September 2003, an agent spoke with Mr. Rita by phone about the recall. During the conversation, Mr. Rita agreed to return “the last ‘parts kit’ he had ordered” to an attorney in Miami the following week.¹⁹ Two days later, Mr. Rita shipped the PPSH 41 kit back to the company and gave the RPK kit to his attorney for delivery to the ATF. A week and a half later, the agent visited the attorney to claim the kit, but upon inspection discovered that it was not the PPSH 41 kit that she had asked Mr. Rita to surrender. Two weeks later, the federal grand jury issued a subpoena for Mr. Rita to appear to explain why he had not surrendered the PPSH 41 parts kit.

When Mr. Rita appeared before the grand jury in October 2003, he gave answers contrary to his literal actions. Those answers provided the basis for the charges of false testimony and obstruction of justice. Based upon these statements, Mr. Rita was indicted three weeks later for the five aforementioned counts.

Though I have no intimate knowledge of Mr. Libby's case, please note that his five counts of obstruction of justice, false statements, and perjury revolve around three conversations with Tim Russert, Matthew Cooper, and Judith Miller. While Mr. Rita was only brought before the grand jury once, Mr. Libby testified in October and November 2003 as well as twice in

¹⁶J.A. 41.

¹⁷J.A. 9.

¹⁸J.A. 7.

¹⁹J.A. 41.

March 2004. Each time, he was questioned about these three conversations and each time, like Mr. Rita, he made what the jury determined to be false statements. As the prosecutor noted in Mr. Rita's case: "Mr. Rita was not a target at the time. He would never have been a target . . . if he had simply told us what he knew."²⁰ Likewise, the prosecutor in Mr. Libby's case noted that he "could have told the truth, . . . could have declined to speak with FBI agents, invoked his Fifth Amendment rights before the grand jury, or challenged any lines of inquiry. Mr. Libby had access to counsel and had adequate time to review relevant documents and contemplate his conduct."²¹ While both had the option of remaining silent or of telling the truth, Mr. Libby arguably had a greater ability to decide his own fate because he was both an attorney by training and had ready access to other counsel.

Mr. Rita went to trial and was convicted on all five counts. His trial counsel filed a motion for downward departure prior to sentencing and elaborated on Mr. Rita's public service, military service, medical history, and vulnerability to victimization in prison. Trial counsel requested a downward departure through federal Sentencing Guideline § 5H1.4, "which allows [a] non-custodial sentence for a seriously infirm defendant."²² At sentencing, counsel again presented evidence of the above facts. Mr. Rita was sentenced to 33 months imprisonment followed by three years of supervised release. The district court imposed no fine upon Mr. Rita due to his health condition.²³

Mr. Libby also went to trial and was convicted of four of the five charges against him. Both parties filed sentencing memoranda that outlined how Mr. Libby should be sentenced appropriately, even though each party listed different applicable guideline ranges. On June 5, 2007, Mr. Libby was sentenced to 30 months imprisonment followed by two years of supervised release. The district court imposed a \$250,000 fine upon Mr. Libby which he paid July 5, 2007. Though Mr. Libby's actions included more instances of false statements and perjury, he was given a 3 month lighter sentence than Mr. Rita.

²⁰J.A. 74.

²¹Government's Sentencing Memorandum at 5. United States v. Libby, 1:05CR394-RBW.

²²J.A. 44.

²³J.A. 87.

On appeal in April 2006, Mr. Rita questioned the reasonableness of his sentence. In Booker v. United States, 543 U.S. 220 (2005), the Supreme Court declared the mandatory sentencing guidelines unconstitutional and instructed the lower federal courts to treat the guidelines as merely advisory: just one of seven factors to be considered under 18 U.S.C. § 3553(a).²⁴ The Fourth Circuit court of appeals affirmed Mr. Rita’s sentence because it “affirm[s] a post-Booker sentence if it is both reasonable and within the statutorily prescribed range.” The court held that a sentence “within the properly calculated Guidelines range . . . is presumptively reasonable.”²⁵ Mr. Rita sought further review in the Supreme Court arguing that his sentence was unreasonable and that the judicial establishment of a presumption of reasonableness by the courts of appeals was essentially a return to pre-Booker mandatory guideline sentencing.

III. The Supreme Court Decision in Rita v. U.S.

In November, 2006, the Supreme Court agreed to review Mr. Rita’s case. The Court asked Mr. Rita and the Executive Branch, by way of the Solicitor General’s Office, to brief three questions, the first of which was whether the district court’s choice of a within-guidelines sentence for Mr. Rita was reasonable. The Solicitor General argued vehemently, indeed successfully, that Mr. Rita’s 33 month sentence was reasonable--the Supreme Court agreed. Considering the significant similarities between the cases of Mr. Rita and Mr. Libby, one can reasonably conclude that Mr. Rita’s Supreme Court precedent would have applied to Mr. Libby’s case had Mr. Libby appealed the reasonableness of his 30 month sentence.

IV. Rita’s Argument Compared with President Bush’s Executive Order of Clemency

On July 2, 2007, President Bush commuted Mr. Libby’s 30 month sentence.²⁶ In his signing statement, President Bush based his reasoning upon the fact that “the district court rejected the advice of the probation office, which recommended a lesser sentence and the consideration of factors that could have led to a sentence of home confinement or probation.”²⁷ Though the President stated he “respect[s] the jury’s verdict, . . . [he] concluded that the prison

²⁴J.A. 113.

²⁵Id. (citations omitted).

²⁶Statement.

²⁷Id.

sentence . . . [was] excessive.”²⁸ The President’s statement listed the arguments of those critical of Mr. Libby’s punishment in further justification of his decision. Those factors included: that “the punishment [did] not fit the crime,” that “Mr. Libby was a first-time offender with years of exceptional public service,” and that he “was handed a harsh sentence based in part on allegations never presented to the jury.”²⁹

Incredibly, the President’s justifications for commuting Mr. Libby’s sentence mirror Mr. Rita’s arguments before the Supreme Court. However, when Mr. Rita appeared before the Supreme Court this past February, the President’s Solicitor General took the opposite position and argued that “uniformity” trumped Mr. Rita’s justifications for a lesser sentence.³⁰ The President’s actions place his absolute constitutional pardoning power at odds with his own Solicitor General’s successful argument before the Supreme Court. As noted by one legal scholar, “The Bush administration, in some sense following the leads of three previous administrations, has repeatedly supported a federal sentencing system that is distinctly disrespectful of the very arguments that Bush has put forward in cutting Libby a break.”³¹ When I spoke by telephone with Mr. Rita this past Monday, he had one simple question for me to pass along to you: How can the Executive Branch argue that my reasons for seeking a lower sentence before the Supreme Court were wrong and then use my same reasons for a lower sentence to justify wiping out Mr. Libby’s prison time completely? I am hopeful this committee will explore Mr. Rita’s question concerning the disparate treatment of him and Mr. Libby more deeply.

Conclusion

For now, I would like to conclude with a summary of two men who were both facing the same charges and who received nearly the same sentence. Neither one appears to have been the

²⁸Id.

²⁹Id.

³⁰At oral argument before the Court in Mr. Rita’s case, Deputy Solicitor General Michael Dreeben argued that “one of the things [a judge] is required to do under section 3553(a) is to consider the need to avoid unwarranted disparity between defendants who have been convicted of similar criminal conduct and have similar records.” (Oral Arguments Tr. 37, February 20, 2007.) Mr. Dreeben further noted that “we are in a Federal system with 674 Federal district judges, and we cannot have all our own personal guidelines systems.” Id.

³¹Adam Litpak, Bush Rationale on Libby Stirs Legal Debate, N.Y. Times, July 4, 2007 (quoting Ohio State University Law Professor Douglas A. Berman).

main target: both were called as witnesses as a part of larger investigations. Both had distinguished careers in public service and neither had any countable criminal history points under the federal Sentencing Guidelines. One is of economic means, able to hire an entire defense team and pay a quarter million dollar fine at the drop of a hat. The other is economically destitute, appearing before you today through the public defender's office. One's sentence has been commuted by the Executive Branch, the other's sentence has been affirmed by the Supreme Court based upon the adverse arguments of the Executive Branch. Today, one is in prison suffering from multiple, serious medical conditions that may lead to his victimization, or to further disablement. Today, the other walks on the outside, free, knowing that he will wake up tomorrow in his own bed, in his own home, and with his family. I would like to thank you for your time, and I am happy to answer your questions to the best of my ability.