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Libby [Folder 1]: [Post-Sentencing]

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DOCUMENT NO.	FORM	SUBJECT/TITLE	PAGES	DATE	RESTRICTION(S)
001	Memorandum	Post-Sentencing Issues - To: The Chief of Staff - From: Fred F. Fielding	2	06/14/2007	P5;

COLLECTION TITLE:
Counsel's Office, White House

SERIES:
Fielding, Fred - General Files

FOLDER TITLE:
Libby [Folder 1]: [Post-Sentencing]

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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

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Withdrawal Marker
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This marker identifies the original location of the withdrawn item listed above. For a complete list of items withdrawn from this folder, see the Withdrawal/Redaction Sheet at the front of the folder.

COLLECTION:
Counsel's Office, White House

SERIES:
Fielding, Fred - General Files

FOLDER TITLE:
Libby [Folder 1]: [Post-Sentencing]

FRC ID:
11703

OA Num.:
11717

NARA Num.:
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2014-0234-F

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Andrew C. McCarthy
Director, FDD's Center for Law and Counterterrorism

Andrew C. McCarthy is a former federal prosecutor and a Contributor at *National Review Online*. From 1993 through 1996, while an Assistant United States Attorney for the Southern District of New York, he led the prosecution against the jihad organization of Sheik Omar Abdel Rahman, in which a dozen Islamic militants were convicted of conducting a war of urban terrorism against the United States that included the 1993 World Trade Center bombing and a plot to bomb New York City landmarks. Mr. McCarthy also made major contributions to the prosecutions of the bombers of the United States embassies in Kenya and Tanzania, and the Millennium plot attack Los Angeles International Airport.

Following the September 11 attacks, Mr. McCarthy supervised the U.S. Attorney's Anti-Terrorism Command Post in New York City, coordinating investigative and preventive efforts with numerous federal and state law enforcement and intelligence agencies. From 1999 through 2003, he was the Chief Assistant U.S. Attorney for the Southern District's satellite office, responsible for federal law enforcement in six counties north of New York City.

Mr. McCarthy is the recipient of numerous awards, including the Justice Department's highest honors: the Attorney General's Exceptional Service Award (1996) and Distinguished Service Award (1988). He has served as a Special Assistant to the Deputy Secretary of Defense, and as an Associate Independent Counsel in the investigation of a former cabinet official. He has also been an Adjunct Professor of Law both at the Fordham University School of Law and at New York Law School.

He writes extensively on a variety of legal, social and political issues for *National Review* and *Commentary*, among other publications, as well as providing commentary for various television and radio broadcasts.

D.C

Former Fed Prosecutor
Andrew McCarthy National Review

I have been trying to stay out of the Libby fray (too many friends on both sides), and I want nowhere near an argument over Derb's comments. But as someone who has the battle scars attendant to defending Pat Fitzgerald here on our friendly Corner, I feel constrained to say that Joseph Bottom is really reaching here. Derb's observation was A reaction at NRO — and an aberrational one. It was decidedly not, as he maintains, THE reaction. This place has been about as solidly pro-Scooter as anyplace, including the place where Mr. Bottum usually hangs his hat.

Not that Scooter Libby has asked for my advice, but I also must say that that the ardor of his supporters — including, I believe, NR — has hurt him, and hurt the conservative movement, in very fundamental ways. As to him personally, all this passionate rhetoric about his heroic service to the United States, how the investigation should never have happened, and how he got unfairly singled out and screwed (all of which I agree with) would be fine if it weren't obscuring something fairly important: Lying to the FBI and a grand jury is a very bad thing, even if we all think it was an unworthy investigation.

The blather about the foibles of memory is just an excuse for people who don't want to confront that inconvenient fact. Foibles of memory come up in every trial — they were particularly *highlighted* in the Libby trial because the defense hoped to score points with them given the nature of the charges, but they were not *materially different* from what happens in every trial. That's why we have juries.

Witnesses have varying recollections, and juries sort it out. The evidence that Libby lied, rather than that he was confused, was compelling. And the jury was dilligent: the post-verdict commentary showed that they liked and felt sorry for him, several thought there should have been no case, some openly hoped for a pardon, and on the one count where the evidence was considerably weaker than the others, they acquitted him. They convicted him on the other four charges, reluctantly, because they had no choice if they were going to honor their oaths. And I respectfully think it's very presumptuous of people who were not there and did not spend nearly the time and attention the jurors did on Libby's case, to continue saying that the jury got it wrong and this was just a case of faulty memory.

By ignoring all that, and by railing as if Libby deserves an apology rather than acknowledging that he did a bad thing, Libby's supporters have made it easier for him to avoid doing something that would have put him in much better stead with the sentencing judge and would position him much better for a pardon: Utter the words "I'm sorry," in a way that communicates an awareness and some real contrition over the lying. Judges who've sat on cases where the evidence of wrongdoing is compelling expect a defendant — especially a smart, accomplished defendant — to express awareness and remorse; when the defendant fails to do that, it is not at all unusual for a judge to hammer him. The message from Scooter supporters here and elsewhere that he's got nothing to apologize for is not doing him any favors.

Admitting wrongdoing and saying you're sorry comes with some risk — it hurts a defendant's chances on appeal. But I don't think he's got much of a shot on appeal anyway. Moreover, he lives in a country where no one ever has to lie, or even speak — he could have refused to answer the questions unless they gave him immunity. He ought to be sorry and he ought to say so. And, obviously, President Bush has the power to pardon him no matter what anyone advises, but I can tell you that the Pardon Attorney at DOJ is not likely to be very favorably impressed by a "woe is

me" petition from someone who doesn't seem to grasp that lying to investigators, especially when done by a public official, is dishonorable behavior. I imagine the recommendation would be against a pardon absent some demonstration of contrition.

Finally, I dread the next time — and you know there will be a next time — when a high-ranking liberal Democrat lies to investigators and obstructs justice. When the outraged grumbling starts around here, like it (rightly) did with Clinton's lying and obstruction, the media is going to have an awful lot of material to quote from, and they are going to say, with considerable force, that it's not lying that matters to us but who is doing the lying. The invective is doing us no favors, just as it is doing Libby no favors.

June 14, 2007, 5:00 a.m.

Respite for Scooter

An alternative for the president.

By P. S. Ruckman Jr.

Democrats were fairly confident Calvin Coolidge was in a pickle. A federal judge had slapped Charles L. Craig, an outspoken Tammany Hall star and comptroller of New York City, with a 60-day sentence for failure to retract several public statements. Craig appealed, but was on his way to doing the time.

It seemed the president would have to grant a pardon and annul the decision of a Republican-appointed judge., Or, Craig would be jailed simply for exercising his First Amendment rights, and the Democrats could use the widely publicized case as campaign material. Indeed, labor leader Samuel Gompers predicted a martyr would be a great "public service" and begged everyone to stop lobbying for a pardon — something Craig loudly promised he would not accept anyway. Key Republicans agreed it was all an awful mess and begged Coolidge to just grant the pardon and get it over with.

Everyone was focused on the pardon that might, or might not, appear.

That is when a cold bucket of water was tossed on those unfamiliar with the world of federal executive clemency. Without comment, Coolidge remitted Craig's 60-day sentence. Administration officials were designated to explain that Craig "justly deserved" his punishment, but the people of New York needed their comptroller. The *Times*, the *Post*, Craig, and everyone else were essentially left wondering the same thing: What's a remission? Silent Cal had masterfully evaded conflict with the judge, upheld the essence of the court's decision, avoided a pardon, and denied Craig the victimization he so craved.

Today, many are pleased that Scooter Libby might be denied bail and sent to prison during his appeal. In their minds, a pardon is Libby's only way out. Of course, they would declare such a pardon "unprecedented" and "controversial" right up to Election Day. Meanwhile, Libby's strongest supporters are clearly disappointed with the president, if not outright angry. In their view, a pardon should be granted right away and the less likely an immediate pardon seems, the gloomier their world gets.

I'm not predicting a cold-water dousing is just around the corner, but that's not to say there isn't a very large bucket sitting right at the President's feet.

The Constitution gives presidents the power to grant "reprieves and pardons." The U.S. Supreme Court has interpreted that language to include pardons, conditional pardons, commutations of sentence, conditional commutations of sentence, remissions of fines, as well as forfeitures, reprieves, respites, and amnesties. A respite delays the execution of a sentence. It does not address

issues of due process or guilt or innocence. It merely suspends sentence for a designated period of time. George Washington granted the first respites in June, 1795, when he delayed the execution of two men who fought in the Whiskey Rebellion — both of whom were eventually pardoned

The typical respite lasts between 30 and 90 days. But many times, initial grants have been followed by a second and third respite, or as many additional respites as were necessary. Woodrow Wilson delayed the six-and-a-half-year prison sentences of two men with nine respites because an "investigation of the facts" had taken "considerable time" — 13 months to be exact. Wilson also delayed the five-year sentences of W.G. and S.G. Simpson with three respites before pardoning them. The men were described as "guilty," but it was noted they had made a "strong showing" that they had not intended to commit a crime. Howard Showalter lost his appeals, but his five-year sentence was delayed by Wilson for eight months before a pardon was granted over the strenuous objections of the judge and U.S. attorney. Robert Sidebotham's 13-month sentence was delayed for over a year (with eight respites) because Wilson concluded it was "doubtful" Sidebotham "realized he was violating the law." A pardon followed. There is, in short, a long history to the use of the respite.

E.C. Chambers was the champ of delays. Chambers sold property prone to flooding, and was convicted on 12 counts of "using the mails to defraud." He faced a possible sentence of five years and a $12,000 fine, but was given only two years and a $6,000 fine. Chambers appealed, lost, and was ordered to turn himself in.

President Wilson complained to the attorney general that he could not give the case "full consideration" by the day Chambers was supposed to report to prison. So a respite was granted. And 15 more followed. The sentence was delayed from May of 1917 to November of 1919, before Wilson's 17th act of clemency on behalf of Chambers ended the matter. Almost four years after the original conviction, a "thorough investigation" was over and a pardon was granted.

More recently, President Clinton twice delayed the court-ordered execution of a federal prisoner in order that a study of discrimination in federal sentencing might be completed. The respite power has not disappeared.

To date, President Bush has expressed a desire to refrain from interfering with the judicial process. A pardon would certainly be disruptive. Is there a way Bush can avoid a pardon, allow Libby to remain out of prison, take the position that the appeal has merit (or at least deserves to be heard), and revisit clemency later — perhaps at the end of the term?

Yes there is: Bring on the respites.

— *P. S. Ruckman, Jr., a political scientist, is the author of the forthcoming book* Pardon Me, Mr. President: Adventures in Politics, Crime and Mercy