

## JURISPRUDENCE

## The Quality of Mercy Is Strained

Bush commutes Libby's sentence, while his lawyers come down hard on everyone else.

By Harlan J. Protass

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What's stunning about President Bush's commutation of Scooter Libby's sentence, if you're a criminal defense lawyer, isn't that it was politically motivated. Or that it tramples on principles of equal justice. Or even that it is the latest in a long string of Bush administration assaults on the rule of law.

Rather, what's astonishing is that the factors Bush relied on in commuting Libby's sentence are the same ones that the administration has aggressively sought to preclude judges from considering when imposing sentences on everyone else.

The specific bases Bush gave for the commutation are that the 30-month prison sentence was too harsh for Libby's crime, that he was a first-time offender who had a long history of public service, that his conviction had already damaged his career and reputation and caused his wife and young children to suffer, and that sentencing Judge Reggie Walton rejected the advice of the probation office, which recommended that he consider "factors that could have led to a sentence of home confinement or probation." Defense attorneys would generally agree that these are all good reasons for reducing Libby's sentence—particularly in light of the nature of his offense. They would also agree that 30 months was too long in the first place to serve for the nonviolent crime of making false statements.

The Bush administration, however, has consistently maintained that at sentencing, judges should be precluded from thinking about precisely the sort of individual circumstances the president raised in lending a hand to Libby. Last month, Attorney General Alberto Gonzales proposed legislation that would prevent judges from relying on anything outside the federal sentencing guidelines as the basis for a sentence more lenient than the range that the guidelines provide for. Only the rarest of exceptions to this rule would be permitted.

That proposed legislation would effectively reverse the 2005 [Supreme Court decision in \*United States v. Booker\*](#), which authorized sentencing judges to consider factors like a defendant's life story and the nature and circumstances of his or her offense. Gonzales' bill would also make the federal guidelines, which the Supreme Court found unconstitutional, essentially mandatory again—again leaving judges less leeway for showing mercy.

Consider, in that light and in comparison to Libby, the case of [United States v. Rita](#), which the Supreme Court decided two weeks ago. As [Douglas Berman describes](#) at Sentencing Law and Policy, Victor Rita also got "caught up in a criminal investigation and ultimately was indicted on five felony counts based on allegations that"—like Libby—"he lied while giving grand jury testimony." Rita was convicted. At sentencing, he argued that he should receive a sentence below the range in the federal guidelines because he was elderly and sick, had served for 24 years as a Marine, including tours in Vietnam and the first

Gulf War, and was vulnerable to abuse in prison because he'd worked in criminal justice on behalf of the government.

After receiving a within-the-guidelines sentence of 33 months, Rita appealed on the ground that the sentence was unreasonable given the nature of his offense and his personal circumstances. The Bush administration opposed Rita's appeal. The government argued that 33 months was reasonable simply because it complied with the federal guidelines. And the Supreme Court agreed, affirming Rita's sentence. Berman lists other cases in which Bush prosecutors demanded and got harsh sentences for minor crimes committed by sometimes-sympathetic defendants. The point is that this administration has steadfastly asserted its belief in uniform sentencing. Nationwide, the Department of Justice requires prosecutors to advocate for sentences that adhere to the guidelines because, the administration argues, this is the best way to narrow sentencing disparities among defendants who commit similar crimes.

Pardons and sentence commutations are by definition tickets that are good for only one ride, special treatment for special defendants. And yet, one can't help asking, what of all those fears about disparity? In the weeks and months to come, defense attorneys across the country won't be able to resist tapping away at their keyboards, arguing that their clients' individual circumstances call for sentencing breaks, just like Libby's did. It probably won't work. But the administration's inconsistency is so glaring—and so perfectly illustrates the flaw of harsh and mandatory sentencing regimes—that to point it out to judges will be irresistible.

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