

The False Evidence Against Scooter Libby

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Patrick J. Fitzgerald, at the time a Justice Department special counsel, announcing the indictment of I. Lewis ‘Scooter’ Libby on Oct. 28, 2005, in Washington, D.C. Photo: Getty Images

A revelation in journalist Judith Miller’s new memoir, “The Story: A Reporter’s Journey,” exposes unscrupulous conduct by Special Counsel Patrick J. Fitzgerald in the 2007 trial of I. Lewis “Scooter” Libby.

Ms. Miller, a former New York Times reporter, writes that Mr. Fitzgerald induced her to give what she now realizes was false testimony. By withholding critical information and manipulating her memory as he prepared her to testify, Ms. Miller relates, Mr. Fitzgerald “steered” her “in the wrong direction.”

Ms. Miller's inaccurate testimony helped Mr. Fitzgerald persuade a Washington, D.C., jury in 2007 to find Mr. Libby, former chief of staff to Vice President Dick Cheney, guilty of obstruction of justice, making a false statement and perjury.

Mr. Fitzgerald's conduct warrants revisiting not only to set the record straight about Mr. Libby, but also to illustrate the damage that can be done to national security by a special counsel who, discovering no crime, generates through his investigations the alleged offenses he seeks to prosecute.

According to the conventional view, in the summer of 2003 Mr. Libby compromised national security by unlawfully outing a covert CIA agent. Mr. Libby's supposed purpose was to punish the agent's husband, who challenged President George W. Bush's assertion in his 2003 State of the Union address that the British government learned that Iraq had sought to purchase African uranium. According to the standard anti-Bush account, when Mr. Libby became enmeshed in a federal investigation, he lied to conceal his crime and protect Mr. Cheney.

A more extensive account of the new evidence in the Libby case and its consequences can be found [here](#).

This account is false in all essential respects, as Mr. Fitzgerald—since 2012 a partner in the Chicago office of the Skadden Arps law firm—had reason, as well as an ethical obligation as an officer of the court, to know.

Scooter Libby did not “out” CIA employee Valerie Plame. That was done by then-Deputy Secretary of State Richard Armitage, a critic of the conduct of the Iraq war. Mr. Armitage disclosed to columnist Robert Novak that Ms. Plame, who at the time held a desk job in the CIA's Counterproliferation Division, urged the agency to send her husband, retired Ambassador Joseph C. Wilson, to Africa in early 2002 to investigate whether Iraq had sought uranium. Presidential aide Karl Rove and then-CIA Director of Public Affairs Bill Harlow confirmed Mr. Armitage's disclosure for Novak's July 14, 2003, column. (Novak died in 2009.)

Mr. Fitzgerald didn't charge anyone with leaking Ms. Plame's identity or disclosing classified information to reporters. From the moment he took over the FBI leak investigation in December 2003, he knew Mr. Armitage was the leaker but declined to prosecute him, Mr. Rove or Mr. Harlow because the disclosure of Ms. Plame's identity wasn't a crime and didn't compromise national security.

Mr. Fitzgerald nonetheless pressed on for someone to prosecute, eventually focusing on Mr. Libby, whose trial became a contest of recollections. The excruciatingly inconsequential question on which his conviction turned was whether, as Mr. Libby recalled, he was surprised to hear NBC's “Meet the Press” host Tim Russert ask him about Ms. Plame in a phone call on July 10 or 11, 2003. In November 2003, Russert (who died in 2008) told the FBI that he

didn't recall mentioning Mr. Wilson's wife to Mr. Libby, but couldn't rule it out. By August 2004 Russert had changed his story. Under questioning by Mr. Fitzgerald, he insisted he could not have mentioned Ms. Plame.

Despite the many reasonable doubts that Mr. Libby's lawyers raised about Russert's recollection, Mr. Libby was convicted for what he said about a phone conversation during which the prosecutor himself insisted Ms. Plame was not mentioned.

Although the case centered on conflicting recollections of a four-year-old phone call, Judge Reggie B. Walton denied the defense request to present scientific testimony on the unreliability of memory. Jurors might have welcomed it: During deliberations, according to juror Denis Collins, they lamented their lack of expert knowledge. In any event, Mr. Libby's and Tim Russert's differing memories shouldn't have mattered since Mr. Armitage disclosed Ms. Plame's CIA employment.

Still, Mr. Fitzgerald—who declined to respond to written questions for this article—sought a conviction, and he went so far as to jail Judith Miller for 85 days to obtain evidence against her sources, one of whom was Mr. Libby.

Ms. Miller's new memoir recounts that after her conditions had been met and Mr. Fitzgerald asked the court to release her from jail in September 2005, she was summoned to testify before the grand jury. While Mr. Fitzgerald prepared her, she recalls, his pointed queries led her to believe that a four-word question regarding Joseph Wilson surrounded by parentheses in her notebook—“(wife works in Bureau?)”—proved that Mr. Libby had told her about Ms. Plame's CIA employment in a June 23, 2003, conversation (well before Mr. Libby's phone conversation with Russert). She so testified at trial in 2007.

Three years later, Ms. Miller writes, she was reading Ms. Plame's book, “Fair Game,” and was astonished to learn that while on overseas assignment for the CIA Ms. Plame “had worked at the State Department as cover.” This threw “a new light” on the June 2003 notebook jotting, Ms. Miller says, since the State Department has “bureaus,” while the CIA is organized into “divisions.”

Ms. Miller, who had spoken to many State Department sources around the same time she spoke to Mr. Libby, says in her memoir that she then realized she must have begun her conversation with him wondering whether Mr. Wilson's wife worked at the State Department. Ms. Miller also now understood that “If Libby, a seasoned bureaucrat, had been trying to plant her employer with me at our first meeting in June, he would not have used the word *Bureau* to describe where Plame worked.”

Mr. Fitzgerald, who had the classified file of Ms. Plame's service, withheld her State Department cover from Ms. Miller—and from Mr. Libby's lawyers, who had requested Ms. Plame's employment history. Despite his constitutional and ethical obligation to provide

exculpatory evidence, Mr. Fitzgerald encouraged Ms. Miller to misinterpret her ambiguous notes as showing that Mr. Libby brought up Ms. Plame.

If Ms. Miller had testified accurately, she would have dealt a severe blow to Mr. Fitzgerald's central contention that Mr. Libby was lying when he said he was surprised to hear Russert mention Ms. Plame.

Dismayed that her inaccurate testimony may have "helped convict an innocent man," Ms. Miller did what a reporter does: She investigated. She learned from Mr. Libby's lawyer, Joseph Tate, that, as she recounts in her book, "Fitzgerald had twice offered to drop all charges against Libby if his client would 'deliver' Cheney to him."

Harvard psychology professor Daniel L. Schacter, author of "The Seven Sins of Memory" and one of the nation's leading memory experts, told Ms. Miller that "the jury lacked the information it needed about memory failure" to assess fairly Mr. Libby's statements.

And in a 2013 interview, Mr. Cheney told Ms. Miller that in the summer of 2003—as the Plame affair erupted, criticism of the White House mounted and post-invasion Iraq deteriorated—Mr. Libby took the lead within the Bush administration in arguing for a counterinsurgency strategy. In 2007 Gen. David Petraeus successfully implemented the surge. It is painful to contemplate how many American and Iraqi lives might have been spared if Mr. Libby, the foremost champion inside the White House in 2003 of stabilizing Iraq through counterinsurgency, had not been sidelined and eventually forced to resign by Mr. Fitzgerald's overwrought investigation and prosecution.

On Oct. 28, 2005, at the news conference on the day of Mr. Libby's indictment, Mr. Fitzgerald accused him of harming national security by throwing sand in federal investigators' eyes. The allegations against Mr. Libby were grave, the prosecutor argued, because "the truth is the engine of our judicial system."

Yet it was Mr. Fitzgerald who threw sand in the eyes of Ms. Miller and the American people, and in the gears of the U.S. legal system. As special counsel he placed his quest for a conviction above the search for truth and the pursuit of justice.

Mr. Berkowitz, a senior fellow at Stanford University's Hoover Institution, is the author of "Constitutional Conservatism: Liberty, Self-Government and Political Moderation" (Hoover Institution Press, 2013). A more extensive account of the new evidence in the Libby case and its consequences can be found on [here](#).