Scooter Libby Case Underlines Need for Legal Reform

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In April, former New York Times journalist Judith Miller revealed in "The Story" that by manipulating her memory through tendentious questioning and withholding exculpatory evidence, Special Counsel Patrick J. Fitzgerald induced her to give false testimony that in 2007 helped convict I. Lewis "Scooter" Libby of obstruction of justice, false statements, and perjury.

Libby is the former chief of staff to Vice President Dick Cheney and assistant to President George W. Bush, which might explain the media reaction to this bombshell, which was hardly to respond at all. A prominent journalist's allegation of misconduct by a powerful prosecutor in a high profile case appeared to raise among our media watchdogs no significant questions of politics, law, or justice.

Examination of the trial transcripts shows that the Libby trial was a travesty of justice. It was compounded by the refusal of the press—during the multi-year investigation that began in 2003, at the time of the 2007 trial, and again in recent months in response to Miller's grave charges—to ask questions that might have disturbed the comforting narrative that a Bush loyalist who helped lie the nation into war got his just deserts. Making matters still worse, the Libby trial implicated vital questions about the rule of law and due process that ought to command the attention of progressives as well as conservatives but remain largely ignored.

The massive growth of the American criminal justice system—the United States has the highest incarceration rates in the world and the highest number of prisoners, metes out among the longest sentences, and possesses a byzantine and proliferating federal criminal code—should be a top priority for conservatives alarmed by the threat of arrogant and overreaching government. And it should constitute an urgent concern for progressives keen to protect the vulnerable.

In an incisive Preface to Georgetown Law Journal's *Annual Review of Criminal Procedure,* "Criminal Law 2.0," Judge Alex Kozinski maintains that because of defective assumptions and flawed processes, our criminal justice system all too commonly convicts innocents. "Much of the so-called wisdom that has been handed down to us about the workings of the legal system, and the criminal process in particular, has been undermined by experience, legal scholarship and common sense," he argues.

We now know, according to Kozinski, that eyewitness testimony is "highly unreliable" and human memory is malleable and easily manipulated. Even evidence from fingerprints, voice identification, handwriting, bite marks, hair comparisons, and foot and tire prints is far from foolproof. We have also learned that while, when properly conducted, DNA comparison produces results that are beyond doubt, much can go wrong in gathering and analyzing DNA.

In addition, we have little information about whether juries follow judges' instructions. We do know that courts do little to compel prosecutors to comply with their obligation to disclose exculpatory evidence to the defense. Moreover, though juries are instructed that the defendant is presumed innocent, prosecutors have a distinct advantage at trial in presenting their case first because initial affirmations are more readily believed than subsequent denials.

The police have "vast discretion" that enables them to manipulate, manufacture, conceal, and destroy evidence. Guilty pleas are not conclusive proof of guilt because prosecutors can intimidate defendants by bringing "multiple counts for a single incident" and because of "the overcriminalization of virtually every aspect of American life." And though we incarcerate at a higher rate than other developed countries and hand out much longer sentences, there is little evidence that long sentences deter crime.

One should not get carried away. Kozinski is confident that "the system reaches the correct result in most cases." Nevertheless, he provides ample reason to worry that a sizeable number of the 2.2 million people in American jails are not guilty. "The National Registry of Exonerations has recorded 1576 exonerations in the United States since 1989," he reports, and "the year 2014 alone saw a record high of 125 exonerations, up from 91 the year before." Those are just the wrong convictions we know about.

Kozinski, who was appointed to the 9th Circuit by President Ronald Reagan in 1985, offers numerous proposals for reforming the criminal justice system, starting with juries. He recommends, for example, videotaping jury deliberations and sealing and preserving them for use by the trial judge and the reviewing court; furnishing jurors with a written copy of jury instructions; allowing them to take notes during trial; making full trial transcripts available for their deliberations; and giving jurors a say in sentencing.

Much of what Kozinski writes about reforming the conduct of prosecutors revolves around their failure, because of the incentives that impel them to put securing convictions ahead of doing justice, to comply with their legal and moral obligation to provide the defense with exculpatory evidence. And much of what he has to say about reforming the work of judges deals with their failure to enforce prosecutors' obligations.

Kozinski would require the prosecution to automatically turn over to the defense "evidence bearing on the crime." He would significantly increase judges' authority and obligation to supervise prosecutors' compliance with their duty to disclose. He would add "conviction integrity units" to prosecutors' offices, which would have no other responsibility than to

investigate whether those found guilty have been wrongly convicted. He would create prosecutorial integrity units, independent of prosecutors' offices, to review allegations of prosecutorial misconduct. He would abolish absolute prosecutorial immunity. And he would treat prosecutorial misconduct as a civil rights violation.

Adoption of these reforms and the many others that Kozinski presents would reduce the number of wrongful convictions and reaffirm our criminal justice system's bedrock conviction that it is better to let ten guilty men go free than to convict one innocent man.

The problem in the end is one of restoring checks on state power and re-limiting government. "Repealing a thousand vague and over-reaching laws and replacing them with laws that are cast narrowly to punish morally reprehensible conduct and give fair notice as to what is criminal may not solve the problem altogether," he concludes, "but it would be a good start."

Kozinski's proposals for reforming criminal justice in America should be an easy sell since they appeal to conservative devotion to limited government, to progressive dedication to protecting the vulnerable from the strong arm of the state, and to what should be an unwavering commitment across party lines to due process and the rule of law.

But the case of Scooter Libby suggests that the injustices Kozinski highlights and the reforms he advocates may not command the attention they deserve. When elite journalists greet with a yawn—or a wink and a nod—the momentous allegation that a federal prosecutor brought down a key aide to a wartime president and vice president by withholding exculpatory evidence and manipulating witnesses' testimony, it is clear that the instinct for due process and the rule of law has atrophied to a perilous extent.

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