SCOOTER LIBBY, STILL A FELON; THE UNITARY EXECUTIVE, STILL A DUBIOUS THEORY

I agree with the surmise of many that Libby dropped his appeal, partly, because the damn thing was getting expensive. And given this passage from Ted Wells' statement on why they dropped the appeal, I also think Harriet Grant once again drove the decision-making process.

> However, the realities were, that after five years of government service by Mr. Libby and several years of defending against this case, the burden on Mr. Libby and his young family of continuing to pursue his complete vindication are too great to ask them to bear.

Shorter Harriet: You've already sacrificed your law license, your children's adolescence, and your pride for these thugs. Let it drop, please.

But I'm really curious by this part of Ted Wells' statement:

> Mr. Libby has made the decision to discontinue his appeal in recognition that success on the appeal would lead only to a retrial, a process that would last even beyond the two years of supervised release, cost millions of dollars more than the fine he has already paid, and entail many more hundreds of hours preparing for an all-consuming appeal and retrial.

Um, no, not really. Remember, there were two parts to Libby's appeal. First, the claim that Judge Walton should have made Andrea Mitchell testify, so Wells could undercut her credibility and therefore suggest she had told Tim Russert

of Valerie's identity and Wells could argue that NBC was just out to get Scooter Libby.

Had Libby won that appeal, we would have had a retrial, with all the same witnesses and evidence, plus Mitchell. That's it. And he probably still would have been found guilty, since David Addington still would have testified that Scooter Libby knew Joe Wilson's wife worked at the CIA two days before, Libby claimed, he learned it from Russert "as if it were new."

The other grounds for appeal, though, was that Patrick Fitzgerald was not legally appointed under the Appointments Clause of the Constitution. Had Libby won that appeal, it might mean either he gets tried without any of the evidence discovered during Fitzgerald's investigation. That means no testimony from Ari, Judy, Addington, or Cooper, and fewer of his own notes. So pretty much, his word to the FBI against Russert's word to Eckenrode, and just one false statements charge. A pretty weak case, IMO. Or, it gets thrown out. Or, Mukasey asks Jeff Taylor to recreate the investigation. Had this appeal worked, it might have offered a great deal to Libby.

But I think they were afraid of losing a battle in the great war to build the unitary executive.

Consider the following passage from Charlie Savage's book, describing the opposition to the Independent Counsel as a key doctrine of the Unitary Executive Theory.

> Alito kept a close eye on developments of the Unitary Executive Theory, the Supreme Court's 7-1 June 1988 ruling on the independent counsel case.
>
> [snip]
>
> He characterized the decision as an endorsement of a "congressional pilfering" of presidential power, and he embraced Scalia's championing of the Unitary Executive Theory as a "brilliant but very lonely dissent."(270)

You see, if Scooter Libby's appeal of his conviction based on the Appointments Clause of the Constitution had succeeded, it would make Special Counsel appointments like Patrick Fitzgerald's illegal. And as soon as they brought in their appeals team, they began to look like crusaders for the Unitary Executive. Take this comment Libby's snotty appeals lawyer made in the hearing on whether Libby should go right to jail.

> Walton: But the law will require review of individual factors of each case and situation, and in the context of each case, Edmond versus Morrison, which fact situation is most applicable to this case. Edmond related to military and is not as clearly applicable. **Also, re: Scalia, if we had a situation where the special counsel could be removed at will, this would have changed his position regarding Morrison**.
>
> **Robbins: Well I doubt that since I was there when Scalia read his opinion**. [my emphasis]

Robbins is referring to the same case Alito was—Morrison v. Olson. He's saying that, in spite of the plain language reading of Scalia's opinion,

> If [an independent counsel] were removable at will by the Attorney General, then she would be subordinate to him and thus properly designated as inferior; but the Court essentially admits that she is not subordinate.

…He, Robbins, knows better, apparently from observing Scalia on the day he read the opinion. I would suggest Robbins was instead looking toward this passage to glean Scalia's meaning:

> It is, in other words, an additional advantage of the unitary Executive that it can achieve a more uniform

> application of the law. Perhaps that is not always achieved, but the mechanism to achieve it is there. **The mini-Executive that is the independent counsel, however, operating in an area where so little is law and so much is discretion, is intentionally cut off from the unifying influence of the Justice Department, and from the perspective that multiple responsibilities provide**. What would normally be regarded as a technical violation (there are no rules defining such things), may in his or her small world assume the proportions of an indictable offense. What would normally be regarded as an investigation that has reached the level of pursuing such picayune matters that it should be concluded, may to him or her be an investigation that ought to go on for another year. How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile — with whether it is worthwhile not depending upon what such judgments usually hinge on, competing responsibilities. And to have that counsel and staff decide, with no basis for comparison, whether what you have done is bad enough, willful enough, and provable enough, to warrant an indictment. How admirable the constitutional system that provides the means to avoid such a distortion. And how unfortunate the judicial decision that has permitted it.

And I would wager that Robbins believed that Scalia and his colleagues Alito, Roberts, and Thomas, at least, all Justices appointed since the Morrison decision, would rule that, in spite of the fact that Fitzgerald was reviewing perjury and obstruction of justice cases all the

time in his day job as US Attorney, he had no basis of comparison to decide whether Libby's lies were "bad enough, willful enough, and provable enough, to warrant an indictment." Or, to put it another way, I would bet there was the hope that with the changes in SCOTUS since Morrison v. Olson, they could do away with any independent investigation of the executive branch altogether. Dick Cheney's wet dream—and his lackey would get to keep his law license!

But, as with all SCOTUS issues these days, there's the delicate matter of Anthony Kennedy. Kennedy had just been installed on the Court when this case was heard—but he was not a part of the decision. Chief Justice Rehnquist had sided with the majority in Morrison; did they suspect that a real conservative would do so in Libby's appeal? Or did Scalia just make it know that even the Unitary Executive theory doesn't preclude investigations of the Executive?

I'm sure money was a part of it. But I rather suspect they also didn't want to litigate this issue and lose just as a new Attorney General came to town with several investigations on his plate.