

JUN 25 2007

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RECEIVED

UNITED STATES OF AMERICA,

Plaintiff- Appellee,

v.

I. LEWIS LIBBY,

also known as "Scooter Libby,"

Defendant-Appellant.

No. 07-3068

Appeal from the
United States District
Court for the District
of Columbia

D. Ct. No. CR 05-394 (RBW)

**REPLY IN SUPPORT OF APPELLANT'S APPLICATION FOR
RELEASE PENDING APPEAL**

Theodore V. Wells, Jr.
James L. Brochin
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3089

Lawrence S. Robbins
Roy T. Englert, Jr.
Mark T. Stancil
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, NW
Suite 411
Washington, DC 20006-1322
(202) 775-4500

Date: June 25, 2007

Counsel for Appellant

TABLE OF CONTENTS

I	1
II	8
III	9
CONCLUSION	10

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>California Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.</i> , 519 U.S. 314 (1997)	5
<i>Edmond v. United States</i> , 520 U.S. 651 (1997)	1, 2, 3, 5, 6
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	2, 3, 4, 5
<i>United States v. Johnson</i> , 802 F.2d 1459 (D.C. Cir. 1986)	10
<i>United States v. Libby</i> , 429 F. Supp. 2d 27 (D.D.C. 2006)	2, 4
<i>Weiss v. United States</i> , 510 U.S. 163 (1994)	2
<i>Yee v. City of Escondido</i> , 503 U.S. 519 (1992)	7
Statutes and Regulations:	
18 U.S.C. App. 3 § 6(c)(2)	6, 7, 8
18 U.S.C. App. 3 § 14	6
28 U.S.C. § 510	2
28 U.S.C. § 519	4
28 C.F.R. Part 600	1, 3, 4

TABLE OF AUTHORITIES — Cont'd.

Page(s)

Other Authorities:

Hearings Before House Subcomm. On Legis., Select Comm. on Intell., 96th Cong., 1st Sess. (Sept. 20, 1979)	8
United States Attorneys' Manual 1-1.600	3

I. When a Special Counsel

- is directed to exercise the “plenary” authority of the Attorney General “independent of” *anyone’s* “supervision or control”;
- is exempted from the “limit[s]” of 28 C.F.R. Part 600 (which include the duty to “comply” with DOJ “rules” and “policies”);
- is authorized to prosecute any violation he deems “related to” his original mandate; and
- discharges CIPA authority that Congress reserved only to the *actual* Attorney General and a narrow set of other high-level officers not including the Special Counsel or U.S. Attorneys,

surely it is a “close” question whether he is a “principal” officer. Special Counsel Fitzgerald, backed by Judge Walton’s 30-page post-hearing memorandum (“Mem.”), contends otherwise, but does so unpersuasively.

A. There is nothing “mysterious about [our] reading of *Edmond* [v. *United States*, 520 U.S. 651 (1997)].” Opp. 4. *Edmond* unequivocally held that “‘inferior officers’ are officers whose work is *directed and supervised* at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.” 520 U.S. at 663 (emphasis added). If that language means what it says, then there is certainly at least a “close” question whether Special Counsel Fitzgerald is a principal officer.

Neither Judge Walton nor the Special Counsel has ever seriously grappled with the implications of *Edmond*. Indeed, in his *first* lengthy ruling on the issue, Judge Walton found no “need” to “confront th[e] analysis” of

Edmond at all because he thought that *Morrison* (alone) is controlling. *United States v. Libby*, 429 F. Supp. 2d 27, 45 (D.D.C. 2006). Now, in his latest ruling on the matter, Judge Walton suggests that perhaps the “directed and supervised” standard in *Edmond* is merely one “alternative” way of determining inferior-officer status (Mem. 21). But Justice Scalia’s opinion for a unanimous Court – describing this test as “evident” “generally speaking” (520 U.S. at 662-663) – strongly implies otherwise.¹

The reason that this case is governed by *Edmond*, and not by the multi-factor standard in *Morrison v. Olson*, 487 U.S. 654 (1988), is *not* that “*Morrison* was eclipsed by *Edmond*” (Opp. 3). We make no such contention. Rather, it is doubtful that *Morrison* even applies when the Executive Branch, not Congress, single-handedly creates the officer whose appointment is under challenge. See *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Souter, J., concurring).² Moreover, as *Edmond* noted, “*Morrison*

¹ The Special Counsel relegates his entire discussion of *Edmond* to a footnote (Opp. 5 n.5) that merely restates Judge Walton’s unadorned conclusion.

² It is no answer to state, as the Special Counsel does, that Fitzgerald’s appointment also “involved an act of Congress” – specifically 28 U.S.C. § 510, which permits the Attorney General to delegate authority. Opp. 4 n.4. There is a world of difference between a generic delegation statute and (as in *Morrison*) a congressional act that expressly created the very prosecutorial office under constitutional attack.

did not purport to set forth a definitive test for whether an office is ‘inferior’ under the Appointments Clause.” 520 U.S. at 661. By contrast, *Edmond* did set out a generally applicable test – and that generally applicable test strongly favors our position.

B. Even if this case is governed by the *Morrison* multi-factor test, however, Fitzgerald’s inferior-officer status remains an exceedingly close question. That is true for several reasons.

1. First and foremost, it is (to say the least) a close question whether Fitzgerald was required (as IC Morrison was) to comply with DOJ policies. The letters appointing Fitzgerald gave him the “plenary” authority of the Attorney General – and the AG is expressly empowered to make new DOJ policy, which becomes “effective upon issuance.” U.S.A.M. 1-1.600. The appointing letters also provided that Fitzgerald’s “authorities” were not “defined and limited by 28 C.F.R. Part 600.” The central “limit” imposed by 28 C.F.R. Part 600 is the duty to follow DOJ policies. By its plain terms, Comey’s appointing language would seem to have relieved Special Counsel Fitzgerald from having to “comply” with DOJ policy.

The Special Counsel contends, however, that because 28 C.F.R. Part 600 applies only to special counsel who are selected from *outside* DOJ, it

somehow follows that AAG Comey was *not* exempting Fitzgerald from DOJ policy when he exempted him from 28 C.F.R. Part 600.³ If there is any “bit of sophistry” (Opp. 6), it is this argument, not ours. Even if 28 C.F.R. Part 600 does not govern Fitzgerald by its terms, the fact remains that Mr. Comey took the trouble expressly to exempt Fitzgerald from the “limits” imposed by that law. Neither the Special Counsel nor Judge Walton ventures any explication of that exemption *other* than an exemption from DOJ policy.⁴

As Judge Walton observed during the bail hearing, a belief that Fitzgerald was subject to DOJ policy was “crucial” to his determination that *Morrison* is dispositive. 6/14/07 Tr. 22. In light of the explicit exemption from 28 C.F.R. Part 600 and its “limits,” it is at least a “close” question whether *Morrison* controls.

³ The Special Counsel also contends that because Fitzgerald was a “Department insider,” he was necessarily obligated to comply with DOJ policy. When Fitzgerald was acting as a U.S. Attorney, that was doubtless true. But when he became invested with the “plenary” authority of the Attorney General, he no longer bore all the limitations of a mere “Department insider.” For example, whereas U.S. Attorneys are subject to the Attorney General’s “direct[ion]” (28 U.S.C. § 519), Fitzgerald, in his Special Counsel capacity, was expressly exempted from such oversight. Moreover, Fitzgerald has conceded he was *not* “obligated” by at least one (pivotal) DOJ policy. 6/14/07 Tr. 47-48.

⁴ The Special Counsel attaches a post-hoc affidavit filed by Mr. Comey stating his purported “intention that the Special Counsel would follow Department policies” (Opp. Ex. E), but Judge Walton disregarded that filing as having been procured solely for litigation purposes. 429 F. Supp. 2d at 39 n.7.

2. Then, too, there is the *breadth* of Fitzgerald’s jurisdiction. Unlike IC Morrison, who sought without success to secure from the Attorney General the right to pursue cases “related” to her original mandate (see 520 U.S. at 667-668), Special Counsel Fitzgerald received that authority right from the outset. “Related to” jurisdiction, it need hardly be added, is extraordinarily capacious.⁵ The Special Counsel elides this distinction from *Morrison* entirely.

3. Judge Walton and the Special Counsel find *Morrison* controlling principally because, in their view, Fitzgerald is “removable at will by the Acting Attorney General.” Mem. 25; see Opp. at 7. But neither Judge Walton nor the Special Counsel has explained how the after-the-fact, all-or-nothing power *to remove*, unless coupled with the right *to be informed*, could constitute “direction and supervision.” As Fitzgerald conceded below, he has no duty to report what he is doing to *anyone*. 6/14/07 Tr. 47-48.

So how, exactly, would an AAG learn enough about Fitzgerald’s conduct to exercise his power of removal as a form of “direct[ion] and

⁵ See *California Div. Of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring) (“applying the ‘relate to’ provision according to its terms was a project doomed to failure, since, as many a curbstone philosopher has observed, everything is related to everything else”).

supervis[ion]”? Fitzgerald suggests that “much information about the Special Counsel’s significant investigative steps was in the public record” (Opp. 7); but, in a case shrouded both in grand jury and CIPA secrecy, that is cold comfort indeed. In this critical respect, as well, Fitzgerald enjoyed powers Alexia Morrison could only have dreamed of: If Special Counsel Fitzgerald was removable at all, it was by someone who would never learn important details of what he was doing in the first place. “[I]n the context of a Clause designed to preserve *political accountability*” (*Edmond*, 520 U.S. at 663 (emphasis added)), such a hollow form of removal authority cannot possibly constitute “direction and supervision.”

C. Compelling evidence that no one has exercised “supervision and control” over Fitzgerald is his now-acknowledged violation of Sections 6(c)(2) and 14 of CIPA. This dereliction has *everything* to do with the Appointments Clause challenge in this case.

To be clear: Special Counsel Fitzgerald signed and submitted a Section 6(c)(2) affidavit certifying that the disclosure of certain otherwise admissible classified information “would cause identifiable damage to the national security.” of the United States. As both Fitzgerald and Judge Walton correctly recognize (Opp. 9; Mem. 16-17), that certification power

resides only in the *actual* Attorney General and certain specified delegees, not including Fitzgerald. By exercising this unlawful authority, Fitzgerald succeeded in preventing the defense from offering classified information that the district court had determined to be relevant and otherwise admissible.⁶

Both the Special Counsel and Judge Walton contend, however, that this CIPA dereliction sheds no light on whether Fitzgerald is a principal officer. In their view, the fact that Fitzgerald may have exceeded the authority he was given does not mean that the grant of authority *itself* was excessive. Surely that is a close question, however. AAG Comey never protested that his appointee was exercising authority that Congress had vested only in the Attorney General (and specified delegees). Comey either acquiesced in this exercise of CIPA authority (confirming that Fitzgerald was given powers that Congress forbade), or he never learned about that exercise (which is exactly what happens when a prosecutor is given the “plenary” powers of the Attorney General and “directed” to exercise them

⁶ Both the district court (Mem. 15-16) and the Special Counsel (Opp. 8-9) suggest that Libby waived this point by not raising it at the time Fitzgerald actually violated CIPA. But we are simply advancing another argument in further support of our Appointments Clause challenge. “Once a federal claim [has been] properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.” *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

“independent of the supervision or control of any other officer of the Department”). Either interpretation confirms that Fitzgerald is a principal officer.

In Fitzgerald’s view, his 6(c)(2) filing was purely “ministerial” because he simply “relied on an attached affidavit of a CIA representative.” Opp. 10-11 & n.11.⁷ But that blanket deference to the CIA is precisely what Congress was trying to avoid by interposing the independent judgment of the Attorney General or other specified high officials.⁸ By simply deferring to the affected agency – which would be institutionally biased in favor of excessive secrecy – Fitzgerald ceded away the very check-and-balance powers Congress wanted the Justice Department to exercise. If Fitzgerald was *not* a “principal” officer at that moment, who exactly was?

II. The Special Counsel’s response on the memory-defense rulings misses two basic points. First, the fact that defense counsel predicted during the CIPA process that Libby himself would lay the relevance foundation for

⁷ Fitzgerald also contends that the AG’s powers under 6(c)(2) must be ministerial because the statutory language is permissive. Opp. 10-11. But the fact that the AG may *choose* whether or not to block the disclosure of classified information in a criminal case hardly makes that choice “ministerial.”

⁸ See Hearings Before House Subcomm. On Legis., Select Comm. on Intell., 96th Cong., 1st Sess., at 145 (Sept. 20, 1979) (statement of CIA General Counsel Daniel Silver) (after CIA objects to the use of classified information, “there is vigorous debate, frequently leading to resolution only at the highest levels of the Justice Department or, on occasion, of the executive branch”).

certain classified information cannot possibly foreclose the admission of the CIPA substitutes if *some other relevance predicate* is eventually laid. As we explained in our opening brief – and the Special Counsel does not contradict – there was more-than-ample foundation laid for both the Statement and the Briefers summaries through the testimony of other witnesses.

As for the Special Counsel’s suggestion that the preclusion of this evidence was harmless (Opp. 16-17), that misapprehends the central dynamic of this trial. Only the prosecution was permitted to show the jury precisely what Libby heard and said on particular dates in June and July 2003; because Libby didn’t take the stand, the defense was relegated to highly generic summaries of what Libby heard and did over a nine-month swath of time. In a case in which the central defense is that important national security matters competed in Libby’s memory with information about Ms. Wilson, these rulings deprived Libby of a level playing field.

III. The Special Counsel’s defense of the Andrea Mitchell ruling is especially anemic. True, Mitchell’s attorney apprised the district court that, if called to the stand, his client would disavow her previous exculpatory statement. But that’s why lawyers get to do cross-examination.⁹ In the face

⁹ The fact that defense counsel declined the district court’s offer to permit them to examine Mitchell outside the presence of the jury is scarcely a

of questioning under oath, Mitchell may have gone back to her first story – and if she didn’t, the jury might have credited her first version anyway. As we explained in our opening brief (and as the Special Counsel fails to dispute), there was abundant corroboration for Mitchell’s prior statement.¹⁰

Only under a truly extravagant reading of *United States v. Johnson*, 802 F.2d 1459 (D.C. Cir. 1986), could such routine but crucial cross-examination be precluded. But precluded it was. Because Mitchell’s testimony cut right to the quick of Russert’s contradiction of Libby – a proposition that the Special Counsel does not dispute – the preclusion of this vital witness is yet another close question on appeal.

CONCLUSION

For the foregoing reasons and those stated in the Application, Appellant should be granted release pending appeal.

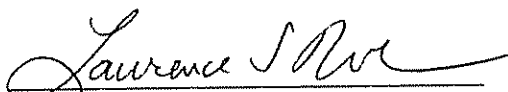
“waive[r]” (Opp. 18 n.21) of their right to establish that Mitchell’s *prior* story was the truth. We are unaware of any rule of criminal practice requiring defense counsel, on pains of waiver, to do a dry run of their cross-examination outside the presence of the jury.

¹⁰ The Special Counsel cites Judge Walton’s description of Mitchell’s prior statement as “ambiguous.” Opp. 17. We implore the Court to view the Mitchell statement for itself, together with her subsequent efforts at retraction. They are attached to our application and speak loudly for themselves.

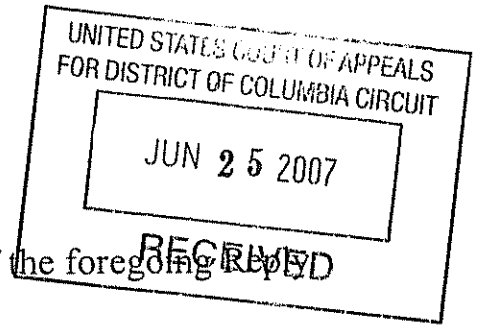
Dated: June 25, 2007

Respectfully submitted,

Theodore V. Wells, Jr.
James L. Brochin
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3089


Lawrence S. Robbins
Roy T. Englert, Jr.
Mark T. Stancil
ROBBINS, RUSSELL, ENGLERT,
ORSECK & UNTEREINER LLP
1801 K Street, NW, Suite 411
Washington, DC 20006-1322
(202) 775-4500

CERTIFICATE OF SERVICE



I, Lawrence S. Robbins, certify that two copies of the foregoing ~~copy~~ in Support of Appellant's Application For Release Pending Appeal were served by hand and with courtesy copies by electronic mail on the 25th day of June, upon:

Patrick Fitzgerald
Office of Special Counsel
Bond Building
1400 New York Avenue, N.W.
Ninth Floor
Washington, D.C. 20530
202-514-1187


Lawrence S. Robbins