

**THE CONSEQUENCES OF PERJURY AND
RELATED CRIMES**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED FIFTH CONGRESS
SECOND SESSION

ON
THE CONSEQUENCES OF PERJURY AND RELATED CRIMES

DECEMBER 1, 1998

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THE CONSEQUENCES OF PERJURY AND RELATED CRIMES

TUESDAY, DECEMBER 1, 1998

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met, pursuant to notice, at 9:45 a.m., in room 2141, Rayburn House Office Building, Hon. Henry J. Hyde [chairman of the committee] presiding.

Present: Representatives Henry J. Hyde, Bill McCollum, George W. Gekas, Howard Coble, Lamar S. Smith, Elton Gallegly, Charles T. Canady, Bob Inglis, Bob Goodlatte, Stephen E. Buyer, Ed Bryant, Steve Chabot, Bob Barr, William L. Jenkins, Asa Hutchinson, Edward A. Pease, Christopher B. Cannon, James E. Rogan, Lindsey O. Graham, Mary Bono, John Conyers, Jr., Barney Frank, Charles E. Schumer, Howard L. Boucher, Jerrold Nadler, Robert C. Scott, Melvin L. Watt, Zoe Lofgren, Sheila Jackson Lee, Maxine Waters, Martin T. Meehan, William D. Delahunt, Robert Wexler, Steven R. Rothman, and Thomas M. Barrett.

Majority Staff Present: Thomas E. Mooney, Sr., general counsel-chief of staff; Jon W. Dudas, deputy general counsel-staff director; Diana L. Schacht, deputy staff director-chief counsel; Daniel M. Freeman, parliamentarian-counsel; Joseph H. Gibson, chief counsel; Rick Filkins, counsel; Sharee M. Freeman, counsel; John F. Mautz, IV, counsel; William Moschella, counsel; Stephen Pinkos, counsel; Sheila F. Klein, executive assistant to general counsel-chief of staff; Annelie Weber, executive assistant to deputy general counsel-staff director; Samuel F. Stratman, press secretary; Rebecca S. Ward, office manager; James B. Farr, financial clerk; Elizabeth Singleton, legislative correspondent; Sharon L. Hammersla, computer systems coordinator; Michele Manon, administrative assistant; Joseph McDonald, publications clerk; Shawn Friesen, staff assistant/clerk; Robert Jones, staff assistant; Ann Jemison, receptionist; Michael Connolly, communications assistant; Michelle Morgan, press secretary; and Patricia Katyoka, research assistant.

Subcommittee on Commercial and Administrative Law Staff Present: Ray Smietanka, chief counsel; Jim Harper, counsel.

Subcommittee on the Constitution Staff Present: John H. Ladd, chief counsel; and Cathleen A. Cleaver, counsel.

Subcommittee on Courts and Intellectual Property Staff Present: Mitch Glazier, chief counsel; Blaine S. Merritt, counsel; Vince Garlock, counsel; and Debra K. Laman.

Subcommittee on Crime Staff Present: Paul J. McNulty, director of communications-chief counsel; Glenn R. Schmitt, counsel; Daniel J. Bryant, counsel; and Nicole R. Nason, counsel.

Subcommittee on Immigration and Claims Staff Present: George M. Fishman, chief counsel; Laura Ann Baxter, counsel; and Jim Y. Wilon, counsel.

Majority Investigative Staff Present: David P. Schippers, chief investigative counsel; Susan Bogart, investigative counsel; Thomas M. Schippers, investigative counsel; Jeffrey Pavletic, investigative counsel; Charles F. Marino, counsel; John C. Kocoras, counsel; Diana L. Woznicki, investigator; Peter J. Wacks, investigator; Albert F. Tracy, investigator; Berle S. Littmann, investigator; Stephen P. Lynch, professional staff member; Nancy Ruggero-Tracy, office manager/coordinator; and Patrick O'Sullivan, staff assistant.

Minority Staff Present: Julian Epstein, minority chief counsel-staff director; Perry Apelbaum, minority general counsel; Samara T. Ryder, counsel; Brian P. Woolfolk, counsel; Henry Moniz, counsel; Robert Raben, minority counsel; Stephanie Peters, counsel; David Lachmann, counsel; Anita Johnson, executive assistant to minority chief counsel-staff director; and Dawn Burton, minority clerk.

Minority Investigative Staff Present: Abbe D. Lowell, minority chief investigative counsel; Lis W. Wiehl, investigative counsel; Deborah L. Rhode, investigative counsel; Kevin M. Simpson, investigative counsel; Steven F. Reich, investigative counsel; Sampak P. Garg, investigative counsel; and Maria Reddick, minority clerk.

OPENING STATEMENT OF CHAIRMAN HYDE

Mr. HYDE. The committee will come to order. Today the committee holds an oversight hearing on the consequences of perjury and related crimes like subornation of perjury, obstruction of justice, witness tampering, misprision, and criminal contempt. All of these crimes thwart the proper workings of the justice system.

We hold this hearing because Rule X of the House of Representatives requires us to exercise continuing oversight over the "application, administration, execution and effectiveness" of the laws under our jurisdiction. Of particular relevance here, we have jurisdiction over the judicial system and the criminal code.

Commentators of all types have fiercely debated the gravity of these crimes in recent months. Otherwise responsible and thoughtful people have argued they are not so serious, particularly when they occur in civil cases or when they relate to hiding private sexual matters. Indeed, some have even suggested that being a gentleman requires one to lie under oath about sex.

By their very nature, these kinds of crimes attack the integrity of the judicial system. Indeed, that is why they are crimes. To argue that in certain instances these crimes mean little is to say that our judicial system means little. I reject that notion.

Remember the fundamentals. We have a judicial system because it is fairer and more civilized to settle disputes through judicial means rather than to settle them through brute force—trial by combat. When brute force prevails, the strong win and the weak lose—an efficient method but hardly a just one. It is particularly disturbing that many who generally claim to represent the weak

now argue that the powerful should be allowed a pass when they break the rules.

There is nothing just or fair in a double standard. We make perjury, subornation of perjury, obstruction of justice, and witness tampering crimes because a judicial system can only succeed if its procedures expose the truth. If citizens are allowed to lie with impunity or encourage others to tell false stories or hide evidence, judges and juries cannot reach just results. At that point, the courtroom becomes an arena for artful liars and the jury a mere focus group choosing between alternative fictions.

So for my friends who think that perjury, lying, and deceit are in some circumstances acceptable and undeserving of punishment, I respectfully disagree. Every citizen is entitled to her day in court, to have her claims considered under the rule of law and free from these abhorrent acts. That applies no matter how small or unpopular or unimportant that person is and no matter how great or popular or powerful her opponent is.

Chief Justice Burger resoundingly affirmed the seriousness of perjury when he wrote in *United States v. Mandujano*, 425 U.S. 564, 1976:

In the constitutional process of securing a witness's testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is, and even the solemnity of the oath, cannot ensure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by severe penalties. In no other way can criminal conduct be flushed into the open where the law can deal with it.

Similarly, our cases have consistently, indeed without exception, allowed sanctions for false statement or perjury. They have done so even in instances where the perjurer complained that the government exceeded its constitutional powers in making the inquiry.

Even when the weak dare to confront the strong, the truth is not trivial. Playing by the rules is not trivial. The whole history of our civilization tells us that justice is not trivial. Lying poisons justice. If we are to defend justice and the rule of law, lying must have consequences. We will explore the impact of lying on the rule of law and the implications of the double standard from our distinguished panel, whom I am pleased to welcome.

With that, I will recognize Mr. Conyers for an opening statement, and after Mr. Conyers we will go to our witnesses who are at the table. And all other members, if they have an opening statement, without objection it will be included in the record at this point.

[The prepared statement of Mr. Hyde follows:]

PREPARED STATEMENT OF HON. HENRY J. HYDE, CHAIRMAN, COMMITTEE ON THE JUDICIARY, AND A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Today, the Committee holds an oversight hearing on the consequences of perjury and related crimes like subornation of perjury, obstruction of justice, witness tampering, misprision, and criminal contempt. All of these crimes thwart the proper workings of the justice system.

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Remember the fundamentals. We have a judicial system because it is fairer and more civilized to settle disputes through judicial means than to settle them through brute force. When brute force prevails, the strong win and the weak lose—an efficient method, but hardly a just one. It is particularly disturbing, and indeed shameful, that many who generally claim to represent the weak now argue that the powerful should be allowed a pass when they break the rules. There is nothing just or fair in a double standard.

We make perjury, subornation of perjury, obstruction of justice, and witness tampering crimes because a judicial system can only succeed if its procedures expose the truth. If citizens are allowed to lie with impunity—or encourage others to tell false stories—or hide evidence—judges and juries cannot reach just results. At that point, the courtroom becomes an arena for artful liars and the jury a mere focus group choosing between alternative fictions.

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United States v. Mandujano, 425 U.S. 564, 576–77 (1976) (plurality opinion) (footnote and citations omitted).

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With that, I will recognize Mr. Conyers for an opening statement.

Mr. HYDE. Mr. Conyers.

Mr. CONYERS. Good morning, Mr. Chairman and members of the committee, and the distinguished judges, professors and lawyers who are our primary witnesses today. Now that we are 3 months into the third impeachment inquiry in the Nation’s history, I believe we ought to take stock of what this committee has done and where we are going.

During the first 2 months, all the committee did was to dump salacious grand jury material onto the Internet. The third month was spent hearing an incredibly one-sided presentation from the prosecutor, having no firsthand knowledge of the facts, and deposing two witnesses that have a peripheral relationship at best to the Independent Counsel’s referral.

Now once again the committee is floundering into another unrelated area. Last evening we were informed that the committee would now widen its investigation into campaign finance matters. With that announcement, this committee now amazingly proposes to transform itself into the discredited Burton committee. Campaign finance has no relationship to the Starr referral. And, amazingly, this committee is now subpoenaing both the President of the United States and the Attorney General of the United States to provide documents that they don't have authority to provide without a court order, whose criteria this committee is yet to even satisfy.

Now, there are other flaws with our process at this time, perhaps fatal flaws. Ten days away from a proposed vote on articles of impeachment, and the American people and the President still don't know what the charges are. Neither do we. Well, Mr. Chairman, we cannot play hide and seek when you propose to overturn a national election. This close to such a monumental vote in the committee, you should be laying your cards on the table for ourselves and the American people.

And whether you like it or not, 1 week away from such a monumental vote is no time to commence an entirely new area of investigation into campaign finance and to transform this committee into the Burton committee. The American people and Democrats and others believe that the President's conduct was bad, but not impeachable.

Now, for today's hearings. I believe that there is some important discussion on perjury to be gleaned from some of our experienced witnesses here. But don't we all know that perjury is serious regardless of the underlying matter? We know that people go to jail when they perjure themselves, including civil proceedings. You learn that in first year criminal procedure.

But we are not teaching a criminal procedure course. Rather, we are—more aptly, you, the Republican majority on this committee—are proposing, if I hear you correctly, to impeach a President. And even Republican witnesses at the November 9 hearing said that the charges, if proven true, would not amount to impeachable offenses. It has been stated repeatedly on the record and in this hearing and in the constitutional scholars community. That is the point that really diminishes so much from this hearing.

Now, parenthetically, I for one think that while the President misled the country and his family, the legal case of perjury against him isn't particularly strong, and most likely would never have been pursued had he not been a President chased by a zealous prosecutor like Kenneth W. Starr. Why? Because his answers regarding Monica Lewinsky in the context of the Paula Jones litigation may not even meet the materiality test, and were in fact later excluded from the Paula Jones litigation entirely by a judge who referred to them as not relevant.

Second, no one has proven that the President's statements regarding Ms. Lewinsky at the Paula Jones deposition and grand jury appearance were not technically true. If so, they cannot possibly be grounds for perjury.

And, finally, I am concerned that the two judges appearing here today on behalf of the Republican majority should be very cautious,

because they may violate the spirit if not the letter of the judicial canons which I have right here by commenting on an ongoing case. Please, members of the judiciary, be careful.

Mr. Chairman, Henry Hyde, I am deeply saddened by what this process is becoming. Thank you.

Mr. HYDE. Thank you.

Our first witness is Ms. Pam Parsons of Atlanta, Georgia. Ms. Parsons holds Bachelor's and Master's degrees from Brigham Young University. In the late 1970's and early 1980's she was one of the most successful women's basketball coaches in the country, coaching at Old Dominion University and the University of South Carolina. In 1984 Ms. Parsons pled guilty to a Federal perjury charge based on her having given false testimony about a sexual relationship during a civil case.

Our second witness is Dr. Barbara Battalino of Los Osos, California. Dr. Battalino is a graduate of the College of Mount St. Vincent, the Philadelphia College of Osteopathic Medicine, Hahnemann University and La Salle University Law School. She is a doctor of osteopathic medicine, a board certified psychiatrist, and a lawyer. She has also been a high school teacher.

In 1998 the Clinton Administration brought obstruction of justice charges against Dr. Battalino based on her having given false testimony about a sexual relationship during a civil case. Dr. Battalino pled guilty to the charge and is currently serving a sentence of 6 months home detention.

I would note for the record that the committee sought the permission of Chief Judge Edward Lodge of the U.S. District Court for the District of Idaho for Dr. Battalino to be excused from the home detention for her to appear today. We appreciate Chief Judge Lodge's cooperation in granting that permission and allowing Dr. Battalino to appear this morning. Dr. Battalino is accompanied by her attorney, Mr. Curtis Clark.

Ms. Parsons, if you have a statement, please feel free to share it with us.

STATEMENT OF PAM PARSONS, ATLANTA, GEORGIA

Ms. PARSONS. Thank God I could finally say "I'm guilty." When you commit perjury, you are the only one that truly knows you have done it. It may take some time for you to get clear with yourself. Anything that I ever denied about myself was what created a spiraling journey through hell, and that day that I got slapped into recognizing that, yes, there are things that you pay consequences for, my life had a chance to turn around.

You know, I enjoyed creating the opportunity to say that I was good at some things in my life. I loved trophies and medals and winning. But to turn around and take a look at that other side of me took more guts than it ever took to win a ball game. Now, I truly know what it is like to be a part of a team, and when that team can't trust you, you have lost it all. And I would rather be who I am today than to have continued coaching with a lie.

I didn't have to come here today. But in fact, some level of destiny, yes, I did. Because when you are in a leadership position, no matter what it is you must tell the truth about, you have got to

search your soul and recognize what it means if you don't—you don't, no matter what the price.

The legal system was very kind to me. The judge didn't want to send me to jail. The reduction to 4 months was a blessing. I picked up cigarette butts for 4 months in Lexington, Kentucky, and I did it every day with a smile on my face to pay back humanity for my ignorance in the seriousness about the law. I served 5 years' probation, and in 1990 I was released. That is a long time to still be talking about your past, and here it is 1998 and I am with you and I can almost not cry anymore.

Yes, after my probation I started my personal work, and I took a look at what created my inability to tell the truth. In 1996 I went back and apologized to everyone that I could, as I had reached a point that I could start being myself and embrace all parts of me, that bad girl side, and the good girl side, too. And today is my final apology before the Federal system to say yes, it is important that we recognize that our whole structure is based on the ability to tell the truth.

And my inability to not be able to do it may have been my personal journey about my emotional self and my mental capacities. Incapability to tell the truth is not an excuse. It is your personal journey to get in touch with yourself. It is not a punishment to serve time. It is a consequence. And there were times that it wasn't easy for a person who had also been on a very enjoyable ride in life, in a leadership role, to be in the position that I was in, but the character of self is developed when you can look at both sides and be okay about it.

So I came today to say very strongly that from a personal experience level, perjury is one of the most valuable parts of our system, and may we never look over the importance of teaching all of us, as we learn through this experience of ourselves and what has happened around us, that it is important to understand the code of the law. Thank you.

Mr. HYDE. Thank you very much, Ms. Parsons.

Dr. Battalino.

**STATEMENT OF BARBARA BATTALINO, LOS OSOS,
CALIFORNIA**

Ms. BATTALINO. Thank you. Chairman Hyde—

Mr. HYDE. Can you pull that mike a little closer, please?

Ms. BATTALINO. Chairman Hyde, ladies and gentlemen, members of the Judiciary Committee and my fellow Americans, let me begin by expressing my gratitude to the Judiciary Committee for inviting me here today to share with you some of my thoughts and feelings about the consequences of perjury and related crimes.

I am neither a historian nor a constitutional scholar. I am an American who worked hard to complete both a medical and law degree, and have practiced in public and government service for over 20 years, until I became a convicted felon in April of 1998. I am presently fulfilling the consequences imposed upon me as a result of this conviction.

I have spent many hours of prayer, a great deal of soul searching, and much mental deliberation in preparing this statement. I believe this is and ever will be one of the most important actions

I do in my life. So many historical hearings, speeches and decisions have occurred in this room. It is with humility, reverence and awe that I sit in this Chamber sharing my simple impressions with you today.

Before April 1998, I was like most of you watching or listening to these proceedings. That is, I was a good, loyal, upstanding U.S. citizen. I worked, voted, paid my taxes with honesty and was respected by my profession, church and family. What changed that? One simple lie, misstatement of fact, one falsehood before a Federal magistrate, that is what.

The falsehood centered around my reticence to acknowledge the one act of consensual oral sex which occurred between myself and an unmarried male adult on Veterans Affairs premises. A civil suit was filed, complicated by the male party having secretly recorded phone conversations he and I had during the months an intimate relationship developed. These very tapes were instrumental in having the civil suit dismissed in September of 1998 with no monetary award or settlement being made by myself or the Veterans Affairs Administration.

So, how is it that I am a convicted felon? In early 1998 my attorney received word that the Department of Justice planned to indict me for perjury based on an untruthful response I gave to a question regarding whether anything of a sexual nature had occurred between myself and that individual on June 27, 1991. Understanding that I would be subjecting myself to unwarranted civil exposure if I told the truth, I justified in my own mind that this deception was warranted in order to protect my personal and professional self-interest. In an attempt to save myself and my family any further embarrassment and/or financial loss, I agreed to accept a negotiated disposition of the criminal case.

There are three main points I would like to address regarding today's issue, the consequences of perjury and related crimes. One, honesty is the best policy, and necessary to the preservation of the rule of law. Two, there are adverse consequences if this principle is not adhered to. Three, when a failure to adhere to the principle of truth is admitted and the consequences are assumed, healing and restoration can occur.

I was wrong to lie before Judge Mikel that July 1995 date. I merit punishment for breaking a fundamental law of God and society. Making false and/or misleading statements, especially under oath, and regardless of the subject matter, is wrong for me and anyone who accepts the U.S. Constitution, Declaration of Independence, and the rule of law upon which this great land of ours is founded and persists.

On that July 1995 date, I stepped over the fine line between truth and falsehood, and I can assure you once it is crossed, it is impossible to return to the state of truthfulness without repercussion or consequences.

Consequences of wrongdoing undoubtedly affect the individual. My sentence will not end on February 27, 1999, when the electronic monitoring device is removed from my ankle, nor will it end on July 19, 1999 when my formal probationary period is completed. In a very real sense, I am condemned to a life sentence. I have lost

my professional standing, my life as it had been, and my cherished privacy. These consequences are irrevocable.

The consequences of wrongdoing also interfere with the lives of those near and dear. Family members must be exposed to the sneers and jeers of coworkers and to the embarrassment of reading unkind and sordid misrepresentations of the facts often published by journalists who are more interested in sensationalism than journalistic integrity. Sometimes the consequences extend beyond one's ordinary geographic boundaries, as in what happened to me. Public notoriety also has been thrust upon me.

Admitted wrongdoing and acceptance of consequences can, however, become the cornerstone for restoration and healing. I can assure you that the pain and embarrassment felt when I publicly apologized to Judge Mikel Williams and the judicial system I had violated was far surpassed by the sense of relief and the spirit of peace it afforded me. I had already made peace with God, but we are societal beings, so we must be at peace with our neighbors as well in order to have true and complete restoration and healing. Once this occurs, life, liberty and the pursuit of happiness can take on a new dimension. I pray that I and others experiencing similar conditions will be afforded this blessing.

Unfortunately sometimes agents of the government also fail to fully honor the truth. In my case, Assistant U.S. Attorney Jonathan Mitchell stepped over the line when he failed to file the motion for a two-point downward departure from the Federal sentencing guidelines which was part of our plea bargain agreement. Mr. Mitchell crossed the line, and he will in some way, some time, pay the consequences.

Because a President is not a king, he or she must abide by the same laws as the rest of us. Whether Mr. Clinton is impeached or not is in the hands of this committee, of the House of Representatives and the U.S. Senate. But even if justice does not prevail, Mr. Clinton's consequences will be reserved for God and history to determine.

We all make mistakes in life, but common frailty does not relieve us from our responsibility to uphold the rule of law. This Nation must never let any person or people undermine the rule of law. Without it, atrocities like slavery, genocide, potential nuclear and biological warfare and oppression are sure to rear their ugly heads once again. If liberty and justice for all does not reign, we, like great civilizations before us, will surely perish from the face of the Earth.

Thank you.

[The prepared statement of Ms. Battalino follows:]

PREPARED STATEMENT OF BARBARA BATTALINO, LOS OSOS, CA

Chairman Hyde, Ladies and Gentlemen Members of the Judiciary Committee, and my Fellow Americans: Let me begin by expressing my gratitude to the Judiciary Committee for inviting me here today to share with you some of my thoughts and feelings about *The Consequences of Perjury and Related Crimes*.

I am neither a historian nor a Constitutional scholar. I am an American who worked hard to complete both a medical and law degree, and have practiced in public and government service for over 20 years until I became a convicted felon in April of 1998. I am presently fulfilling the consequences imposed on me as a result of this conviction.

I have spent many hours of prayer, a great deal of soul searching, and much mental deliberation in preparing this statement. I believe this is and ever will be one of the most important actions I do in my life. So many historical hearings, speeches and decisions have occurred in this room. It is with humility, reverence and awe that I sit in this chamber sharing my simple impressions with you today.

Before April 1998, I was like most of you watching or listening to these proceedings. That is, I was a loyal, good, upstanding U.S. citizen. I worked, paid my taxes with honesty, and was respected by my profession, church and family. What changed that? One simple lie, misstatement of fact, one falsehood before a federal magistrate—that's what.

The falsehood centered around my reticence to acknowledge the one act of consensual oral sex which occurred between myself and an unmarried male adult on Veterans Affairs premises. A civil suit was filed, complicated by the male party having secretly recorded phone conversations he and I had during the months an intimate relationship between us developed. These very tapes were instrumental in having the civil suit dismissed in September of 1998, with no monetary award or settlement being made by myself or the Veterans Affairs Administration.

So how is it I am a convicted felon? In early 1998 my attorney received word that the U.S. Department of Justice planned to indict me for perjury based upon an untruthful response I gave to a question regarding whether anything of a sexual nature had occurred between myself and that individual on June 27, 1991. Understanding that I would be subjecting myself to unwarranted civil exposure if I told the truth, I justified in my own mind that this deception was warranted in order to protect my personal and professional self-interest. In an attempt to save myself and my family any further embarrassment and/or financial loss, I agreed to accept a negotiated disposition of the criminal case.

There are three main points I would like to address regarding today's issue, *The Consequences of Perjury and Related Crimes*:

1. Honesty is the best policy, and necessary to the preservation of the Rule of Law.
2. There *are* adverse consequences if this principle is not adhered to.
3. When a failure to adhere to the principle of truth is admitted and the consequences are assumed, healing and restoration can occur.

I was wrong to lie before Judge Mikel that July 1995 date; I merit punishment for breaking a fundamental law of God and society. Making false and/or misleading statements, especially under oath and regardless of the subject matter, is wrong for me and anyone who accepts the U.S. Constitution, Declaration of Independence and the Rule of Law upon which this great land of ours is founded and persists.

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Because a president is not a king, he or she must abide by the same laws as the rest of us. Whether Mr. Clinton is impeached or not is in the hands of this Committee, the House of Representatives and the U.S. Senate. But even if justice does not prevail, Mr. Clinton's consequences will be reserved for God and history to determine.

We all make mistakes in life. But, common frailty does not relieve us from our responsibility to uphold the Rule of Law. Regardless, this nation must never let any person or people undermine the Rule of Law. Without it, atrocities like slavery, genocide, potential nuclear and biological warfare and oppression are sure to surface their ugly heads once again.

If liberty and justice for all does not reign, we—like great civilizations before us—will surely perish from the face of the earth.

Mr. HYDE. Thank you very much.

Mr. McCOLLUM.

Mr. McCOLLUM. Thank you, Mr. Chairman.

Ms. PARSONS, am I correct that you were basketball coach at the University of South Carolina when the occasion of this perjury that you were convicted of arose? Am I right about that?

Ms. PARSONS. No, I had resigned.

Mr. McCOLLUM. You had resigned. But you had been previously.

Ms. PARSONS. I had been previously.

Mr. McCOLLUM. Am I correct that the subject of your perjury was consensual sex?

Ms. PARSONS. No.

Mr. McCOLLUM. What was the subject of the perjury, then? Please clarify that.

Ms. PARSONS. Well, it is really kind of funny. There is a gay bar called Puss and Boots in Salt Lake City, Utah. It wasn't easy to say. I have been there. That occurrence was 2 years after, then, the things that I was suing Sports Illustrated for. It wasn't a pretty picture for me. I thought I had many reasons for why I could say no, but it was an out-and-out lie. I had been there.

Mr. McCOLLUM. And that is what the perjury was about, about whether you had been to that bar or not?

Ms. PARSONS. Yes. Now, I went to the FBI about that.

Mr. McCOLLUM. Let me ask you this question. You mentioned leadership and you mentioned the fact that it bears a heavy responsibility, and that is the reason I raised the basketball coach question with you. You were in a position at one time of leadership.

Ms. PARSONS. Absolutely. I was also an athletic director.

Mr. McCOLLUM. There you go. The President of the United States is the top leader in this country. What kind of a message do you think it sends if we conclude that he committed perjury and do not impeach him and he gets away scot free? What kind of message would that send, considering what you have been through and what ordinary Americans can expect to go through, presuming that perjury is found to be the case in a civil case?

Ms. PARSONS. Please let me give this answer. I am ready. Mixed message. We cannot raise our young people with mixed messages. There are no secrets, but the discretion of when to tell them things is what maturity is about. But secrecy doesn't cut it when we are raising young children.

Mr. McCOLLUM. Dr. Battalino, what is your thought about the double standard we might be creating if we conclude the President committed perjury and we don't impeach him, with respect to people such as yourself who are convicted and sent to jail or put in

house arrest for perjury regarding consensual sex, in the Federal system? Is this fair?

Ms. BATTALINO. I believe that we as a people, as a country, must not give the impression to our citizens, to our young people, to the world that we are indeed a country that does not take seriously the rule of law and liberty and justice for all.

Mr. MCCOLLUM. And is it wrong to have the President of the United States, the highest ranking law enforcement officer of this country, walk away from a situation which would be presumably very similar to yours, if indeed we conclude that he committed perjury involving consensual sex? Would that be wrong and the wrong message?

Ms. BATTALINO. I think it would be a very wrong message, and I would hope that that is not what indeed occurs. At the same time, I do believe that history will ultimately determine whether or not our country remains the country of justice and liberty for all.

Mr. MCCOLLUM. Thank you very much. Thank you, Mr. Chairman.

Mr. HYDE. Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman. I will reserve my time, please.

Mr. HYDE. Mr. Frank.

Mr. FRANK. Mr. Chairman, I want to express my admiration for the witnesses for coming forward. It is not easy to come forward in a situation like this.

Ms. Parsons, I understand particularly your reticence over time to talk about some aspects of your personal life. It is a reticence I share, and I agree with you that dealing with it and getting it over with is a very healthy thing.

What I want to talk about is not directly relevant to these two witnesses, though, because I want to talk about the difference between the accusations against President Clinton and the cases of these witnesses. I note that the chairman began by describing this as a general oversight hearing which we just happen to be having at this time. I guess it is kind of a dead time, early December, and oversight on perjury in general just happened to fill an empty agenda.

But not everybody has stuck to the script that this was simply an abstract exercise in discussing perjury. Clearly this is part of—it is actually an interesting hearing. I have never seen a hearing before that was part of the whip operation of one of the two parties. This is an effort to increase votes on the floor because they are in a little bit of trouble. But that is okay. We have a lot of discretion.

But it does seem to me we ought to talk about the difference. With regard to the accusations against the President, the first go to the *Paula Jones* case, and there we have a very real difference between the President's situation and that of the two witnesses here.

In both cases they have very fairly acknowledged and in a very admirable way, and I think they deserve a great deal of credit for the openness and the straightforwardness with which they discussed this. They were accused of perjury on matters which were central to the case at issue, the question of whether or not the pa-

tient had been mistreated, the question of a sexual relationship for one of the coaches. They were really quite central.

In the case of the Paula Jones situation, the questions were entirely peripheral, ultimately ruled not to be directly relevant, and this troubles me in this case where you are talking about general principles. We have a situation in this country where almost anybody can sue almost anybody else. My Republican colleagues have tried to restrict that, and I have joined with them more often than many of my Democratic colleagues. I think we should rein in excessive litigiousness.

But we have this problem. People have said sometimes, "Well, you've been sued. If you were wrong, why don't you just resist it?" Well, one of the reasons is that we have in this country virtually unlimited discovery. Once you are sued, you are then subject to a great deal of investigation. I am troubled by a situation in which you can have people sued, even if there is an expectation that the ultimate suit will not be successful, and people then use the fact of the suit to use broad discovery.

And here is the problem I have in the situation involving the President in the *Paula Jones* case. I believe that the clearly consensual relationship he had with Ms. Lewinsky, initiated by Ms. Lewinsky, improper, wrong of the President to engage in but clearly, indisputably consensual, was in fact irrelevant in every way to the Jones situation. I think that was what was ultimately decided.

If you say that once you are sued, no matter how meritorious the lawsuit, you are then subject to unlimited discovery even on subjects not relevant and material to the case, and if you do not confess the most intimate details of your life in that situation, even if they were not relevant to the case, you are subject to perjury, we erode privacy.

That is why I think there is a great deal of reluctance on the part even of some of my Republican colleagues to proceed against the President in the *Jones* case, because the precedent you set frankly goes contrary to what I think is a sensible thrust on the part of many of the Republicans, namely to limit the extent to which litigation can be used as a weapon, not to solve a particular claim but as a weapon in general. And if you say unlimited discovery and perjury for any aspect of those questions asked, even if they are later ruled nonmaterial, you are greatly broadening that.

Then we have the perjury before the grand jury. Now the grand jury is a different story. Obviously it was somewhat material, as that was the only reason they had it. The problem here is that for—from the Republican standpoint, there is no way that anybody has been able to prove that the President committed perjury.

And my time is starting to run out. Let me give one example of how absolutely insignificant those allegations are, as well as being difficult to prove.

There are three charges in Mr. Starr's report that the President perjured himself before the grand jury. The first is that in August of 1998 he remembered the sexual activity as having begun in February of 1996 and she said it was November of 1995. That is, A, very easy to understand how someone 2-plus years later might have forgotten which month it was. Two, it seems to me very hard to prove.

And, three, the notion that you are going to impeach the President because he said sexual activity which he acknowledged happened and he acknowledged was improper began in February rather than November is silly, especially since nothing turns on it. She reached no magic age in between then.

Mr. Starr says, "Oh, well, she stopped being an intern. She was an intern in November and she was not an intern in February. That's why the President lied." She did not go from being an intern to being the Under Secretary of Health and Human Services. She went from being a young intern to being a young, fairly insignificant employee. Nothing turned on that.

The notion that you would impeach the President of the United States because more than 2 years after a sexual encounter which he admitted to the grand jury when he was before the grand jury and no other target would have been—you would impeach him in part because he said he remembered it as having been 2 years and 3 months previous or 2 years and 6 months, and in fact it was 2 years and 8 months, there is a very real difference between, it seems to me, that accusation and the very central issues that these two witnesses have both fairly decided.

Mr. HYDE. Mr. Frank, your time for questions has elapsed.

Mr. Gekas.

Mr. GEKAS. I thank the Chair. The gentleman from Massachusetts has articulated the problem that is before this Judiciary Committee. He scoffs at and finds inconsequential some of the items which have been recounted as possible statements that would be perjurious, either before the grand jury or before the Jones trial or deposition. What he is saying is there are some, like him, believe they are so inconsequential, even though they are lies before a grand jury, under oath, that they should be discounted automatically.

There are some that feel perhaps a pattern has evolved from all these, what he calls inconsequential, I am using a term that he may not adopt but at least that is the impression I get, that he feels that they are inconsequential, yet a pattern has existed both in the Jones trial and in grand jury that indicates to some that a finding could be made that perjury was indeed committed. And that is what we have to decide, not whether the President is guilty of perjury or innocent of perjury, but whether or not there is enough evidence cumulatively from which Barney could determine there was no perjury committed, or someone of some other point of view could find that yes, indeed, there is some evidence from which a jury could find that perjury was committed.

Is there probable cause, in other words, on the part of this committee to be able to make a finding that an article of impeachment on perjury should lie? That is the question. And I think that the gentleman from Massachusetts has confirmed what our duty is here. He finds in drawing some conclusions that nothing has occurred. Others, looking at it as a pattern and looking at other questions that surround the testimony of the President in the Paula Jones depositions and in grand jury, could find otherwise.

And that is what our duty is, to determine whether there is enough evidence, sufficient and credible, to be able to present to the trier of fact. That is the only thing before us. And we may dif-

fer on that in the final vote that may be taken on a possible articles of impeachment.

I would like to ask the witness Battalino just one question. You had a complaint about a prosecutor who may not have fulfilled a plea bargain with you, et cetera. Do you believe that his action in any way, as sour as you think it was, do you think that that in any way mitigates the perjury that you committed?

Ms. BATTALINO. No, sir, not at all.

Mr. GEKAS. I have no further questions.

Ms. BATTALINO. The point I was trying to make, if I may make it, the point I was trying to make is that truthfulness must be in every action, in every contract that we make with each other, as individuals and as a society.

Mr. GEKAS. Thank you for the testimony.

Mr. HYDE. The gentleman from New York, the distinguished—

Mr. GEKAS. I yield back the balance of my time.

Mr. HYDE. I just took it away from you.

Mr. GEKAS. Well, I yield it.

Mr. HYDE. Thank you. It is a pleasure to recognize the distinguished Senator-elect from the great State of New York, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman.

Mr. Chairman, as I sit here today, I am convinced this committee needs help. We have before us 11 witnesses who share practically nothing in common. We are given 5 minutes to ask them questions and glean insight into the most serious matter our committee can consider, that of passing articles of impeachment to remove a duly-elected President from office. Later today we will issue new subpoenas on unrelated matters, again to impeach the President.

We are hurtling headlong into a constitutional crisis which the American people in their wisdom have begged us to rein in and reject. All across the political spectrum, including mainstream Republicans in your own caucus, people know that the President's actions are not impeachable and that these proceedings should end, yet here we are moving closer and closer to impeachment.

Why? Because, in my judgment, there is one small segment on the far right who have lost all objectivity and are determined to impeach the President at all costs. Their hatred of the President exceeds their caring about this country and its people. And that small segment, which would represent a minority view anywhere else in America, dominates this committee. That is why we need help.

We have a new Speaker of the House. This is his first crucial test. I guess I am making a plea here, and that is to Mr. Livingston, to step in and take control of this runaway train before we go over a cliff. The new Speaker-elect should put an end to the hearings. He should put an end to secret depositions. He should allow a motion to censure or a motion to rebuke to be debated and voted on the floor of the House. In my judgment, at least, he should join with Democrats and other Republicans to sponsor that notion. He should lead the House back to the sensible middle.

Mr. Chairman, I believe you have tried to be fair and I don't envy your task. But these new hearings, these new subpoenas wave a red flag that common sense and common wisdom are not welcome

here. Mr. Livingston, this may be the first and most important test you will ever face as Speaker. Lead us out of this abyss.

I yield back my time.

Mr. HYDE. The gentleman from North Carolina, Mr. Coble.

Mr. COBLE. I thank the chairman. Good to have all of you with us this morning. Thank you for being here.

Dr. Battalino, you indicated that the person with whom you had your sexual involvement was unmarried.

Ms. BATTALINO. Yes.

Mr. COBLE. You did not divulge your marital status at the time.

Ms. BATTALINO. I was unmarried also, sir.

Mr. COBLE. So you were both unmarried?

Ms. BATTALINO. Yes.

Mr. COBLE. Dr. Battalino and Ms. Parsons, did either of you lose your jobs or positions as a result of your convictions?

Ms. PARSONS. No.

Ms. BATTALINO. I did.

Mr. COBLE. You did, doctor. And Ms. Parsons, you had previously resigned, is that the—

Ms. PARSONS. Yes.

Ms. BATTALINO. Not only did I lose my job, sir, but I also have lost my professional standing as a physician and I can no longer pursue my legal profession, either.

Mr. COBLE. You are reading my mind. My next question was going to be if either of you have been forced to surrender your respective licenses.

Ms. BATTALINO. Yes, sir, I have.

Mr. COBLE. Both medical and law?

Ms. BATTALINO. Yes.

Mr. COBLE. How about you, Ms. Parsons?

Ms. PARSONS. I have never tried to use them. I don't know.

Mr. COBLE. Folks, we were visited some days ago by the country's best constitutional and historical and legal scholars, the best in the land, and for the most part that was a good day, I think, Mr. Chairman. One or two of those witnesses laced his testimony with a good deal of arrogance, but I guess scholars and outstanding people have that latitude. But I think that notwithstanding the fact that—on balance it was a good day.

But that notwithstanding, ladies, I believe that your testimony today describes the issue at hand more succinctly and with more gravity than did the illuminating information that we received from that battery of scholars several days ago, and I thank you for being here.

Mr. Chairman, I have no further questions.

Mr. HYDE. The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Thank you, Mr. Chairman. In the interest of time, I am going to reserve my questions for the subsequent panels.

Mr. HYDE. Thank you.

The gentleman from Texas, Mr. Smith.

Mr. SMITH. Thank you, Mr. Chairman. I, too, would like to thank the witnesses for their testimony this morning. Quite frankly, I am not sure that we have heard more candid, more heartfelt, more trenchant testimony than what we have heard from you all today,

and I appreciate the courage that it took to be here and the humility that it took to admit that you were wrong.

It seems to me that there are similar points that you both made, and you also have some similarity in that you were both government employees, for example, and that you both have suffered severe consequences.

Dr. Battalino, in your testimony you said, "I was wrong to lie. I merit punishment for breaking a fundamental law of God and society. Making false and/or misleading statements, especially under oath, and regardless of the subject matter, is wrong for me and anyone who accepts the U.S. Constitution, Declaration of Independence, and the rule of law upon which this great land of ours is founded."

And Ms. Parsons, you mentioned the consequences for your actions, and I think you said in so many words it was a lot tougher to tell the truth than it was to win a ball game.

And Dr. Battalino, you also mentioned that common frailty does not relieve us from our responsibility to uphold the rule of law. This Nation must never let any person or people undermine the rule of law.

And Ms. Parsons, you spoke, I think very persuasively, about the danger of undermining what you called a code of law, which I think is the same thing, and reinforces I think the importance of it.

So let me address questions to both of you, if I may, and the first one is, do you think that we should have different standards that apply to high level government officials, and apply different standards to them than we have seen applied to yourself? In effect, should we have exceptions to the rule of law or should we not? And Dr. Battalino, if you want to reply first.

Ms. BATTALINO. I think we should not. I think that this country was grounded on liberty and justice for all, and therefore no citizens of the United States, regardless of rank, financial status, any reasons, should be treated differently or separately from other citizens.

Mr. SMITH. Ms. Parsons, if you want to follow up on that, and also maybe address the larger question that if we should mistakenly apply different standards to different individuals depending on their level of employment, what does that do as far as the American people's respect for our judicial or for our justice system?

Ms. PARSONS. This is a toughie. With more responsibility, and the more you are in the eye of the public and taking responsibility for this huge circle that you are creating, how much does it affect all of them when you lie? I know this. I can't get past all the ripples of what I created yet, and I was just a coach in a small State. I have some feeling that the level of position you hold makes, at least in my heart, a feeling that there is more responsibility to make sure that you do tell the truth.

Mr. SMITH. So you think there is perhaps even a higher standard to be applied if one holds a high-level office?

Ms. PARSONS. I hope so. If we have picked him out to be a leader.

Mr. SMITH. And you agree with that, Dr. Battalino?

Ms. BATTALINO. Absolutely.

Mr. SMITH. The last question is this, that if we do apply the same standards or perhaps even higher standards, which should

the solution be for this committee that is perhaps dealing with the highest level of individual? Should the individual—

Ms. PARSONS. Isn't this incredible, that we are in this position, first of all? Because I remember when I was in that position of hearsay or whatever happening around and about me. When our President travels to Japan and we hear from the stands things about what is happening related to those things, it is not cool.

And I think that the one thing is that there are certain things that, though, need to be found out behind closed doors, just like we have certain military secrets we don't want out to the rest of the world. Because of the way that it makes us look, you don't give things out. I don't know if those words are correct, treason or whatever you do when you give things you shouldn't.

There is a time to find out certain information quickly and as expediently as possible, so that you can get on with the rest of the business of life. But if there is something that is decaying away, that is corrosive to the morale of the whole environment, then something does have to be done, and all I can say is as expediently as possible.

Mr. SMITH. Dr. Battalino, real quickly, would you apply the same sanctions to the President that have been applied to you?

Ms. BATTALINO. Absolutely.

Mr. SMITH. Thank you both. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman's time has expired.

The gentleman from New York, Mr. Nadler.

Mr. NADLER. Thank you.

Ms. Parsons, were you tried, or were you tried and did you have a verdict, or did you plead guilty?

Ms. PARSONS. I pleaded guilty.

Mr. NADLER. Okay. But before that, you were aware that you had the option of going to trial?

Ms. PARSONS. Yes.

Mr. NADLER. And were you given to understand that if you went to trial, your attorney could cross-examine the witnesses against you?

Ms. PARSONS. It never went that far. It wasn't necessary.

Mr. NADLER. No, but did you understand that if you went to trial, that that is what would happen?

Ms. PARSONS. Back then did I understand that, or today? Let's see. I don't remember about then, but what you are telling me now is they could. I don't know.

Mr. NADLER. Okay. Mr. Chairman, the point I want to make is several-fold, and I am not going to ask any further questions.

Number one, Ms. Parsons, Dr. Battalino, had they gone to trial, would of course have had the rights any defendant has; namely, that the witnesses against them would have had to come forward and testify; they would have had the opportunity to cross-examine those witnesses and to call witnesses on their own behalf.

That is not what is happening in this committee. There has been no witness called in front of this committee against the President. Mr. Starr is not a witness. He has no personal knowledge of anything that happened. He wasn't there, he didn't see anything, he didn't even depose the actual witnesses. Those witnesses haven't been called, and it is elementary in this country that if you are

going to charge someone with something, you produce the witnesses to testify against them. And it is a failure of the Chairman of this committee that we are going to consider voting impeachment, having heard no witnesses whatsoever against the President, and nothing, nothing can eliminate that failure, unless those witnesses are called.

Now, I do not want to say that I want those witnesses called. I don't want them called. This entire thing should be dismissed, because nothing that was alleged, even if true, is impeachable. But if you want to prosecute the President to an impeachment, it is the responsibility of the prosecution to prove the guilt of the accused, not the responsibility of the accused to prove his innocence. And those 81 questions which were an attempt to convict, have the President convict himself out of his own mouth to avoid the necessity of bringing witnesses, were frankly unworthy of the committee, unworthy of the Congress, and failed in its purpose.

The second point I want to make is in response to something the distinguished gentleman from Pennsylvania said, when he said that it is our job to determine whether there is enough evidence to send to trial, to send the case to the trier of fact, that we have to see whether there is probable cause. The analogy obviously is that our role is similar to the role of the grand jury. Well, the fact is, it is not.

That is an analogy often made, simply because impeachment under our system is a two-step process. But the fact is there is a great difference between an indictment and a vote of impeachment. The former Chief Judge of the Court of Appeals of the State of New York, in his famous statement, said any good prosecutor can get a grand jury to indict a ham sandwich because probable cause is not much of a requirement, it is a low threshold.

For us to send, for the House of Representatives to impeach a President and subject the country to the trauma of a 4- or 6- or 7-month trial in the Senate is one heck of a thing, is one heck of a thing to do, and we should not do it simply on probable cause. We should use the same standard that I believe they used in the Nixon case; namely, clear and convincing evidence, not guilt beyond a reasonable doubt but at least clear and convincing evidence, and that has not been shown. It has not been shown that the President committed perjury by clear and convincing evidence or any persuasive evidence at all.

To adopt a contrary view, to adopt Mr. Gekas's view, would be to say that the role of this committee of the House is a mere transmission belt or rubber stamp for the special prosecutor. The special prosecutor laid out evidence of the President committing an impeachable offense. If all we need is probable cause, what do we need the House for? We have his referral; send it over to the Senate. What do we need hearings for?

Well, of course we haven't had hearings, not hearings of witnesses, not real hearings, we have only had shams. So maybe that is the belief of this committee, that this is a sham proceeding, that all we need is to act as a transmission belt for the special prosecutor and needn't establish anything on our own.

As of today, we have had no witnesses. To repeat, we have had no witnesses, no opportunity to cross-examine those witnesses.

Fundamental fairness, elementary due process, we have all paid lip service to. At least since the Magna Carta, we demand that before we vote on impeachment, we at least follow the normal processes, and that we find clear and convincing evidence before we send anything to the Senate. Unlike what would have been afforded, the right that would have been afforded to these two witnesses or to any other criminal defendants in this country, these rights have not been afforded in this case, these procedures have not been followed, and it is shameful.

I yield back the balance of my time.

Mr. HYDE. Thank you.

The gentleman from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you very much, Mr. Chairman.

Dr. Battalino and Ms. Parsons, thank you for being here today. During this whole process, I have thought so many times what a difficult job we have sitting up on this side of the dais. This is certainly without question the most uncomfortable series of hearings that I have had to sit through in my years sitting on this Judiciary Committee. But looking at the two of you out there today, I certainly don't envy you sitting on the other side, and I just want to thank you very much for coming forward to this committee today and baring your soul and expressing things that I know are difficult. You must be here for a reason that you think is for the betterment of this Nation moving ahead.

Dr. Battalino and Ms. Parsons, during the time that you were going through your cases, did anyone at the Department of Justice or anyone else, for that matter, ever suggest to you that you could not or would not be prosecuted because you testified falsely in a civil case as opposed to a criminal case? Dr. Battalino.

Ms. BATTALINO. No, sir.

Mr. GALLEGLY. Ms. Parsons.

Ms. PARSONS. No one said that to me directly.

Mr. GALLEGLY. Dr. Battalino, I understand that your prosecution by the Department of Justice took place just in 1998, is that correct?

Ms. BATTALINO. Yes, uh-huh, correct.

Mr. GALLEGLY. And that would also be during the time that President Clinton was in charge of the Justice Department; is that also correct?

Ms. BATTALINO. Yes, that is correct.

Mr. GALLEGLY. Ms. Parsons, maybe we could focus just for a second on the issue which you touched on in your testimony. In your position of leadership when you were a former college basketball coach, what do you feel, personally feel, is the impact of lack of honesty or lack of integrity by persons in leadership roles on the young people that you are so familiar with as a coach?

Ms. PARSONS. You affect them for the rest of your life. No one ever gets over what you have done. It gets easier. They are looking to you, in how you are experiencing life, as they are stepping along too. It is a masterful position and requires tremendous maturity.

Mr. GALLEGLY. Ms. Parsons, Dr. Battalino, thank you for being here.

I yield back, Mr. Chairman.

Mr. HYDE. I thank the gentleman.

The gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, the question before us is not whether or not perjury is a crime or whether it applies to sex or whether it applies in civil cases; the question before us is whether or not we should vote to impeach the President. That question should be resolved in a fair and orderly process, but our process has not been fair or orderly. We have not followed the orderly process that was outlined in the Democratic alternative where we said we should first determine which allegations, even if true, could constitute impeachable offenses.

If we followed the directions that we have had from many constitutional scholars, of course we would have concluded that none of the allegations before us constitute impeachable offenses. But if any do, then we should get the facts on those allegations and determine whether or not the allegations were true, and if any of those allegations were true, we would vote to decide—we would have a vote to determine whether or not those impeachable offenses that we determined that the President committed were substantial enough to warrant his removal from office.

Instead of that orderly process, Mr. Chairman, we received a referral and released it without even reading it. Mr. Starr has now said that it was not his responsibility, that he is not responsible for the release, and absolved himself of blame for the fact that sexually explicit material was placed on the Internet. We followed that by weeks of determination of what other sexually explicit material should get on the Internet. We followed an arbitrary process where we would make up the rules as we went along.

The President was sent questions. That was without consultation or notice. Most of us found out that the questions had been sent when the media notified us. We were at the same time denied the opportunity to take depositions of witnesses that we wanted.

Mr. Chairman, without consultation, a deadline was set for the President to respond to those questions. We then had the spectacle of watching the prosecutor try to testify as a fact witness, and the last time we were here, the chairman admonished me for calling him a prosecutor. The chairman said that Mr. Starr was an independent, independent counsel, and not a prosecutor. Of course, the very next day his ethics advisor quit because he was being too much of an advocate.

Mr. Chairman, there is a pronouncement without consultation that all of the hearsay, rumor and innuendo would be presumed to be true unless the President came up with proof that it was not true. That is without even a statement of what the allegations have been, and is a virtual presumption of guilt, and it is in the midst of an expansion of our scope, without notice, again.

Mr. Chairman, I think just in closing that we should focus on our constitutional responsibility, determine whether or not we have impeachable offenses before us, even if they are true, and then determine what to do if they are impeachable offenses after we determine that they be true, if we ignore the advice that we received from many constitutional scholars who have told us that none of these allegations are impeachable offenses. That process can be completed in a swift matter of time. It should not take long.

But here we are, we don't even have the allegations before us that we are going to be pursuing, and the referral came in early September. When we have the allegations, then we can go into fact-finding and can bring this to a conclusion. I don't believe that thus far the proceeding has been helpful in helping us resolve that question. Thank you.

Mr. SMITH [presiding]. The gentleman from Florida, Mr. Canady.
Mr. CANADY. Thank you, Mr. Chairman.

I want to thank both witnesses for being with us here today. I know it is not easy to appear in a proceeding such as this with these circumstances, and we are very grateful for your testimony. I think your testimony is quite relevant to the core issue that the committee confronts, and as I have listened to your testimony, it has reminded me of statements that various Members of the Judiciary Committee made during the course of the committee's consideration of impeachment articles with respect to Richard Nixon.

I was struck particularly by the parallel with comments that Mr. Brooks made at that time. Now, Mr. Brooks wasn't chairman of the committee then, of course, Mr. Rodino was. Mr. Brooks subsequently served as chairman of this committee during my first term as a Member of the Congress and a member of this committee, and Mr. Brooks, the gentleman from Texas, was our chairman.

In the Nixon matter, he said this: "No man in America can be above the law. It is our duty to establish now that evidence of specific statutory crimes and constitutional violations by the President of the United States will subject all Presidents now and in the future to punishment."

Mr. Brooks went on to say, "No President is exempt under our U.S. Constitution and the laws of the United States from accountability for personal misdeeds, any more than he is for official misdeeds."

I think that we on this committee, in our effort to fairly evaluate the President's activities, must show the American people that all men are treated equally under the law.

I would like to ask you, both the witnesses, to tell us whether you would agree with the sentiments expressed by Mr. Brooks during the Nixon inquiry. Dr. Battalino.

Ms. BATTALINO. I was an adult during the Nixon impeachment hearings, and I was very impressed with the manner in which the committee conducted the proceedings, so I would certainly agree with the statements that you have made that Mr. Brooks made. I would hope that this committee will have the same unbiased approach to dealing with the justice and fairness for all issue.

Mr. CANADY. Ms. Parsons.

Ms. PARSONS. It is another one of these questions that—I remember when I was serving time, people would ask me, "Do you feel like you should have served time if President Nixon didn't?" I couldn't necessarily relate, because I don't compare oranges and apples, but I know this: that we have certain basic things that must be addressed with all of us, no matter what position we are in at any given time. It is unfortunate if you are in a high position of authority and in the public eye, but it might come up at that time, and it still has to be dealt with.

Mr. CANADY. Thank you. I would like to now respond to some of the points that have been made which I think are totally without merit.

The contention has been made that essentially this committee has the responsibility to conduct a proceeding in the nature of a criminal court trial. That couldn't be further from the truth. The Constitution gives the sole power to try impeachment cases to the U.S. Senate. Now, we do have a responsibility to make certain that we act on a solid basis. We should not move forward with articles of impeachment on the basis of insubstantial evidence. I think all of us agree on that.

The fact of the matter is that we have a mountain of sworn testimony that points to the conclusion that the President is guilty of various offenses, including lying under oath. There are those who believe that that evidence is unreliable, that the witnesses were not telling the truth. They have an opportunity to request that those key witnesses be called before the committee. I don't sense that they are really interested in doing that. I don't think they want to do that.

Because the real defense that is being waged here is not that the facts are untrue but that it really doesn't matter. It is what has been referred to as the "so what" defense. Even if the President did all of these things, it doesn't really matter. We have no real recourse to hold him accountable under the Constitution.

Well, I have to say that I disagree with that perspective. I think that is inconsistent with the precedents and the history of the impeachment power, and I hope that that viewpoint will not prevail.

I thank the witnesses again.

Mr. HYDE. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I adopt as if it were my own the statement of my colleague, Mr. Scott, from Virginia. I have no questions of these two witnesses, and I yield back the balance of my time.

Mr. HYDE. I thank the gentleman.

Mr. Inglis, the gentleman from South Carolina.

Mr. INGLIS. Thank you, Mr. Chairman.

Congratulations to our two witnesses. You have done what nobody else has been able to do. You have just thrown a wrench in the White House spin machine. It is incredible. For the first time since this whole thing began, you have single-handedly done it. Have you noticed that nobody on the other side has asked you a single question? And particularly, that nobody has yet attacked you?

Now, there is time left. We will see. But the thing that you have accomplished here that no one else has accomplished is to stop the attack on the attacker. That is all the White House has done in this whole proceeding. That is all our friends on the other side have done, is attack the attacker. It goes along with the defense that Mr. Canady just mentioned, the "so what" defense, but the way that you lead into that "so what" defense is to begin by attacking the attacker. So congratulations to both of you. You have shut them down for a matter of minutes now. We do have time left, we will see.

But it occurs to me that what you have also done is you have shifted the focus. You see, the White House spin machine likes to talk about vast right-wing conspiracies, and they like to talk about procedural fairness, and they are real big on that. But the thing that eludes them is that there is another aspect of fairness, and that is the equal application of the law.

Dr. Battalino, I would like to ask you, you were in law school as I was years ago; in fact, Dr. Steve Saltzburg may not remember this, but I was one of his students in evidence. So I will ask you to do what probably he asked Mr. Inglis to do at UVA Law School: Distinguish the case, Dr. Battalino, between your situation and President Clinton's.

Ms. BATTALINO. Well, unfortunately, I think there are very many similarities, so in some respects I can empathize with Mr. Clinton's position and his embarrassment and avoidance of discussing a private sexual encounter, especially consensual, and also the fact that there were tape recordings. Unlike Mr. Clinton, the gentleman with whom I had a relationship did the taping of the conversations that we had.

I think too the most important similarity is that initially there is a hesitancy, and there appears to continue to be a hesitancy on Mr. Clinton's part to assume the full responsibility of the fact that lying, whether it be about sex or about stealing or about anything, is wrong, and we cannot permit the concept that certain lies are okay and other lies are not acceptable. That is destructive to our youth, it is destructive to our Nation as a whole, and I believe that in the depths of my soul. If there was anything that I could change, it would be that day never to have lied.

Mr. INGLIS. Let me ask you this. Do you see any distinguishing facts between your case and the President's?

Ms. BATTALINO. Well, certainly I was not able to have the great availability of great legal minds that the President has. In addition, I did not have the financial backing or ability to pursue going to a trial, and that is the main reason why I plea bargained.

Mr. INGLIS. So in other words, other than the circumstances of your own situation of lacking the power of the presidency, the wealth of the presidency in terms of the ability to have lawyers, you don't see any distinguishing facts between your situation and his?

Ms. BATTALINO. Well, I certainly see the other distinction being that I was in a sense able to acknowledge that I must assume full responsibility for my actions; that it is not right to tell a lie. And by simply suggesting that once you apologize for the lie, it just should go away and we should move on, that is not the way our country is based. That is not the way our society is based. There do have to be consequences.

And I would not in any way attempt to describe what those consequences should be. That is way beyond my level of expertise or condition. But I do say that there should be consequences, and that the consequences have to be significant and serious consequences.

Mr. HYDE. The gentleman's time has expired.

The gentlewoman from California, Ms. Lofgren.

Ms. LOFGREN. Mr. Chairman, I think my colleague, Mr. Scott, spoke well and really articulated what is on my mind. When last

the committee met, I mentioned that the entire issue before us was one of the most embarrassing segments of American history, and this hearing certainly does not change that. In fact, I wish that I had followed Mr. Berman's example and not come here at all today.

It is not the fault of the witnesses, who I credit for coming forward and being honest and going through their own embarrassment. It is not their fault that we are sitting here asking these two ladies questions that have nothing to do with the constitutional issue that faces this committee and the country.

I am not going to ask them any questions, because I don't know that they have insight into whether the President's behavior matches that envisioned by George Mason and James Madison when they drafted the impeachment provision in the Constitution. I have no questions for the witness. I have questions for the committee on why we are sitting here when we do actually have some judges waiting in the audience who may actually have points of law to share with us, and I would yield back the balance of my time.

Mr. HYDE. I thank the gentlelady. I think I will speak out of turn to answer the gentlelady's question. Why are we sitting here?

Well, I can give you some reasons why we are sitting here. We are exploring the double standard. We are exploring whether there is one rule of law for the powerful, for the rulers, and another one for the ruled. We still believe this is a country and a nation governed by laws and not men, and we are exploring whether there are different consequences for different people in our government. That may be a sterile inquiry for the gentlelady, but I think it is important.

Now, we have been criticized by the distinguished gentleman from New York for not producing witnesses to cross-examine, as though this is where the adjudicatory function is, and I guess the Senate is left for the accusatory function. It is the other way around. We accuse; they adjudicate.

But I will say this. We have not called a lot of witnesses because you have pled *nolo contendere*. I have a quote here from the distinguished gentleman, he is not here now, Mr. Schumer: "It is clear that the President lied when he testified before the grand jury, not to cover a crime, but to cover embarrassing personal behavior. To me, Mr. Chairman, it is clear the President lied when he testified before the grand jury."

Another member of this committee, not here: "The President had an affair. He lied about it. He didn't want anybody to know about it. Does anyone reasonably believe that amounts to subversion of government?"

Well, that is what we are here to discuss.

So you have conceded on the facts; you never produced witnesses to question the facts. It is all process and procedure, and personal attacks on the chairman. I just think that is interesting.

But the one person in this country that is sworn, as the chief law enforcement officer, who is sworn to take care that the laws are faithfully executed, if he perjures himself, what are the consequences of that perjury? You would say none. Maybe a rebuke not provided for in the Constitution or anywhere else. Some of us think it should be stronger than that. That is what we are discussing here.

Mr. NADLER. Mr. Chairman, point of personal privilege.

Mr. HYDE. No, sir. I let you wander on—

Mr. NADLER. Mr. Chairman, it is a point of personal privilege.

Mr. HYDE. All right. What is your point?

Mr. NADLER. My point, Mr. Chairman, is that—it is twofold. One, some members of this committee on both sides of the aisle may have concluded the President lied; some may even have concluded he lied under oath. Some have not so concluded, and we have not pleaded *nolo contendere*. I have not concluded that he committed perjury. I have seen no proof that he committed perjury, and that is very much at issue.

Mr. HYDE. Well, have lunch with Mr. Schumer. Maybe he will inform you.

Mr. NADLER. The second point, he is entitled to his opinion and I am entitled to mine, and the President is entitled to the same due process as everybody else. It has been repeatedly stated, and you just said, that what we are saying or what some of us are saying is that it doesn't matter, that perjury isn't very important. I think what some of us are saying is that perjury, even though not impeachable, is prosecutable, and that is what upholds the rule of law.

Mr. HYDE. Well, thank you for informing me of that. That comes as a surprise to me that that is your position.

The fact is, the referral from Judge Starr has a lot of information under oath, grand jury testimony, sworn statements, depositions, and you have yet to provide a witness to contradict the factual assertions in the referral. We wait with baited breath for that to happen. We give you a full day or more. If you have any exculpatory witnesses, where are they? You don't question about it, you don't—all you do is browbeat the chairman and this side of the aisle for trying to do its job, and it is not an easy one.

Yes, I yield to my friend from Massachusetts.

Mr. FRANK. Thank you, Mr. Chairman. I promise not to browbeat you in my response, and I apologize for the stress that you—

Mr. HYDE. Oh, go ahead. Why should you be different?

Mr. FRANK. Well, I don't know why I am different, Mr. Chairman, but I just am.

Mr. HYDE. But why should you be?

Mr. FRANK. The point I was making is that it is inaccurate to assert that we have conceded the point. I do not believe perjury has come close to being proven before the grand jury, and I clearly believe that the witnesses themselves refute the notion of an obstruction of justice. The obstruction of justice presumably involved Monica Lewinsky, Vernon Jordan, Betty Currie and Bill Clinton. There are four people who deny that an obstruction of justice took place: Monica Lewinsky, Vernon Jordan, Betty Currie and Bill Clinton. If it had been a prosecution, they would be a witness on this one. So no, we don't admit there has been an obstruction of justice. We argue her volunteered statements that no one asked her to lie, no one offered her a job, they refute that. So I just want to differentiate myself from this view.

Also with regard to perjury before the grand jury, I don't think anybody has proven that the sex began in November of 1995, not February of 1996, and that the President, in August of 1998, con-

sciously and deliberately misrepresented that. I don't think anyone has proven perjury at all.

Mr. HYDE. I thank the gentleman for his contribution, but I just want to say the reason we are here with these two exceptionally productive witnesses is to illustrate the fact that there are very serious consequences for perjury—for lying under oath. They have borne those very serious consequences to their detriment. They have been brave enough to come in and tell us about it, and I just think it is important that we understand that there are consequences for perjury, notwithstanding the trivialization of lying under oath and misstatements and misleading under oath. There are very serious consequences that some people have to pay. It is a shame everybody does not.

Mr. FRANK. Mr. Chairman, one more question.

Mr. WATT. Mr. Chairman, parliamentary inquiry.

Mr. HYDE. The gentleman from Massachusetts.

Mr. FRANK. Are you saying that if you were a prosecutor, you would prosecute the President for having remembered that the sexual activity began in February of 1996 rather than November of 1995? That is one of the three counts of perjury to the grand jury that Kenneth Starr has put forward. February of '96 versus November of '95, more than 2 years after the fact. Do you believe that that is something for which he should be prosecuted?

Mr. HYDE. I would rather not answer that. It does not strike me as a terribly serious count. I don't rank that up with lying to the grand jury, saying he didn't have a sexual relationship.

Mr. FRANK. That is one of Mr. Starr's arguments in his referral, one of his three points in his referral.

Mr. HYDE. Mr. Starr is Mr. Starr and I am myself.

Mr. WATT. Mr. Chairman, a parliamentary inquiry.

Mr. HYDE. The gentleman from North Carolina.

Mr. WATT. Could I inquire of the Chair what the regular order is? Is the Chairman using his 5 minutes?

Mr. HYDE. Yes, I used my 5 minutes, although I yielded, as you lawyers say—

Mr. WATT. I just wanted to be clear on what the regular order is.

Mr. HYDE. I hope you don't think I was violating the regular order.

Mr. WATT. It has been known to happen before, Mr. Chairman.

Mr. HYDE. Well, but I am very concerned about what you think, so I want to make sure you think I wasn't violating.

Mr. WATT. It is quite obvious you are very concerned about what I think, Mr. Chairman. Thank you, Mr. Chairman.

Mr. HYDE. I hope you notice I am recognizing you more and more.

Mr. Goodlatte, the distinguished gentleman from Virginia. We will get back on track.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, my understanding of the work of this committee is to uphold the Constitution of the United States and to see that the rule of law in this country is preserved, and I think these witnesses are very fine contributing panelists as we address that issue. Quite frankly, for months, some on the other side in this

committee have asked us to address the issue of whether or not the actions taken by the President were indeed impeachable offenses, and to point out regarding the comments of the gentleman from Massachusetts, it is far more than whether or not the President remembered the date that some of these activities started, and I would like to refresh his recollection.

On December 23, 1997, the President signed an affidavit in which he swore to tell the truth, the whole truth and nothing but the truth in answers to written questions asked in the *Jones v. Clinton* case. Such written questions are necessary in civil rights lawsuits in order for the court and the parties to ascertain the true facts of the case. In those answers, the President swore that he had not had sexual relations with any Federal employees.

The evidence presently before this committee, unrebutted by the President, indicates that he lied. The President told a series of lies under oath, based upon the evidence before the committee, after swearing to tell the truth in a deposition given in the *Jones v. Clinton* case, in order to thwart that Federal civil judicial proceeding.

On January 17, 1998, the President swore to tell the truth, the whole truth and nothing but the truth in a deposition given in the *Jones* case. The President swore that he did not know that his personal friend Vernon Jordan had met with Monica Lewinsky, a Federal employee and subordinate and a witness in the *Jones v. Clinton* case in which the President was known as the defendant, and talked about the case. The evidence before the committee, unrebutted, indicates that he lied.

The President swore that he did not recall being alone with Ms. Lewinsky. The evidence before the committee indicates that he lied.

The President swore that he was not sure whether he had ever talked to Monica Lewinsky about the possibility that she might be asked to testify in the *Jones v. Clinton* case. The evidence before the committee indicates that he lied.

The President swore that the contents of an affidavit executed by Monica Lewinsky in the *Jones v. Clinton* case, in which she denied they had a sexual relationship, were absolutely true. The evidence before this committee indicates that he lied.

The President told a series of lies under oath, according to the evidence before this committee, after swearing to tell the truth, the whole truth and nothing but the truth before a Federal grand jury that was investigating his alleged misconduct.

On August 17, 1998, 7 months after his deposition in the *Jones v. Clinton* case, the President swore to tell the truth before the grand jury. The President swore that he did not want Monica Lewinsky to execute a false affidavit in the *Jones v. Clinton* case. The evidence before this committee indicates that he lied.

The President swore that he did not allow his attorney to refer to an affidavit before the judge in the *Jones v. Clinton* case that he knew to be false. The evidence indicates that he lied.

The President swore that he did not give false testimony in his *Jones v. Clinton* deposition, and clearly the evidence before this committee indicates that he lied.

The President has been afforded the opportunity, members of this committee have been afforded the opportunity, the President's

counsel has been afforded the opportunity to come forward and rebut this evidence. We have not even begun to talk about subornation of perjury, obstruction of justice and abuse of power.

So these witnesses are very pertinent because of their own testimony regarding their own experiences and the consequences they confronted.

Dr. Battalino, it is my understanding that in your circumstances there were tape-recorded conversations with a trusted person that were used in the prosecution of you in that case; is that not correct?

Ms. BATTALINO. Yes, that is right.

Mr. GOODLATTE. And it is my understanding that in that case you were deprived of your employment as a result of this prosecution; is that not correct?

Ms. BATTALINO. Yes.

Mr. GOODLATTE. It seems to me that there are very substantial similarities. Do you have any other similarities that you would point out to the committee between the circumstances I just described about allegations regarding the President and the circumstances that you have very courageously talked about today?

Ms. BATTALINO. I think since the issue has come up about due process, that I plea bargained, I agreed to negotiate a settlement. So in many respects I did not have the full due process right that I would have had, had I had the opportunity and the financial and other support of background to have a full trial. I opted not to do that as a means to not subject my family to any more financial loss, and myself, and/or any further embarrassment.

Mr. GOODLATTE. Let me interrupt and point out another similarity that—

Mr. HYDE. The gentleman's time has expired.

Mr. GOODLATTE. Mr. Chairman, if I might ask one additional question that would point that out.

Mr. HYDE. Very well.

Mr. GOODLATTE. Thank you, Mr. Chairman.

It is my understanding that the underlying civil suit that you were a party to was dismissed; is that not correct?

Ms. BATTALINO. Yes, that is correct.

Mr. GOODLATTE. So you nonetheless still were convicted of perjury in that suit and lost your Federal Government job as a result of that?

Ms. BATTALINO. I was prosecuted before the settlement of the case, the final dismissal of the case, yes.

Mr. GOODLATTE. Thank you, Dr. Battalino. I appreciate you taking the time, and both of you having the courage to come before us today and talk about equal justice under the law.

Mr. HYDE. The gentlelady from Texas, Ms. Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

I too want to add certainly my respect and my appreciation for the willingness of the two witnesses to come before us today. I think it is difficult for you and for those of us who have offered a different perspective, for our questions are not directed personally at you or to in any way disrespect, as I indicated, the courage you have offered today or what you have gone through.

And I think your presence here today is a testament to your leadership as an American. You were willing to accept the invitation for, in some sense, what you might add to a very important process. And so in this instance may I say, whatever happened to you in the past, you are great Americans and we should acknowledge that.

I do want to indicate to the chairman, however, where we are today. And in the course of doing so, I will have one or two questions for the witnesses.

We are here today as a result of a September 11th, 1998 referral from the Office of Independent Counsel dealing with the question of impeachment of a President of the United States of America. We are also here pursuant to a resolution passed on the Floor of the House, drafted by Republicans to indicate that the world was their oyster, whatever might come, they would look at it. So we are here today.

As we have proceeded, I had hoped that as Chairman Rodino in 1974, with the trust of the American people, with the eyes of the world watching, on something so somber as removal of a President, we would have proceeded possibly in executive session, as did the Rodino committee; cross-examining and examining vigorously, and I assume debating, which of course those records are still somewhat in executive session; and finally reaching a common consensus on the direction that we should recommend to the full House. We only know the Rodino result by way of that 1 day in August when Members of that committee offered their thoughts. We ultimately know that several of the members, of the Republican members of the committee, voted in favor of articles of impeachment.

This time, today, however, December 1st, 1998, we have had no fact witnesses; we have had a hearsay witness, we have had Mr. Starr. He indicated that his world was a world of law, and not of public opinion and television appearances, though he took to appearing before us on November 19th in front of the television cameras and proceeded to move to 20/20 to make his advocacy even more heightened before the American people, and possibly an attempt to as well make himself the darling of those who would desire impeachment. We had no further calling of witnesses.

We had articles of impeachment drafted and notice given to those of us who are Democrats by the airwaves of the public media. Frankly, we now are looking at further investigations, pursuant to again the notice of the media, on campaign finance issues that have been reviewed by several committees, one in the Senate and in the House.

So I would simply say that it would be in order for you to be here if we had proceeded uniformly, but we have ignored the language of the Constitution, that impeachment is grounded on treason, bribery and other high crimes and misdemeanors. This is not to take away from what happened to you, the tragedy of your life, and now you have, if you will, repented or acknowledged and are now offering your insight. But we are here to be guided by the constitutional standards of treason, bribery, high crimes and misdemeanors.

What our Republican friends fail to tell America as they divide over this very tense issue is that the President can be prosecuted under these alleged crimes once leaving office. Our job is not sim-

ply to abide by the public understanding of lying. The President has apologized for misleading the American people. I assume he was embarrassed; he has embarrassed his family, he has embarrassed and tainted his legacy. But our charge is simply to determine whether these are impeachable offenses.

I would simply say to you, Ms. Parsons, that I thank you for your presence. It is my understanding that your involvement dealt with allegations dealing with another female, and I would simply ask both of you at the time, not today, at the time that you might have said an untruth, were you avoiding embarrassment? Were you avoiding hurt to your family members, or to yourself, or to your setting? Was it one where you thought that, "If I do this," putting aside what happened later, that "it would be an ultimate embarrassment to all who love me and respected me in this private matter." Ms. Parsons, not now today, but when it happened, were you embarrassed about what you were charged or asked to answer the question on?

Ms. PARSONS. No.

Ms. JACKSON LEE. You were not embarrassed?

Ms. PARSONS. No. What I was, was manipulating my way around who wouldn't understand what I was doing.

Ms. JACKSON LEE. And what a tragedy that a private matter like that had to be considered, where you had to manipulate.

Dr. Battalino.

Ms. BATTALINO. I think, Ms. Jackson Lee, as I mentioned in my statement, that yes, that was certainly one of the thoughts and feelings that had crossed my mind; that I was, indeed, embarrassed, and that I was making an attempt to justify that because I was embarrassed and because it was something of a personal nature, that adjudicated my not telling the truth, but that was wrong, and I knew that it was wrong at the time. I don't think that embarrassment or exposing a feeling and an experience that is personal is acceptable to not tell the truth, especially when it is under oath or it is a statement directly to the American people.

Mr. HYDE. The gentlelady's time has expired.

Ms. JACKSON LEE. In these instances, as the witnesses have said, Mr. Chairman, I thank you for your indulgence, that they had plead and that they had indicated their untruth themselves. In this instance, we have none of that at this point, and we simply need to analogize this to whether these are impeachable offenses for the President of the United States.

I do thank you for appearing here and telling us of your stories under your fact situations, which are so different from that of the President.

Mr. HYDE. The time of the gentlelady has expired.

Ms. JACKSON LEE. I thank the chairman very much for his indulgence.

Mr. HYDE. You are welcome.

Mr. Buyer.

Mr. BUYER. I want to thank the chairman for having orderly proceedings, because our function here under the Constitution is like the grand jury function, the accusatory function, which you have said before. So I want to thank you.

I also would say that I find perjury under the same classification of bribery, meaning when it is said of treason, bribery or other high crimes, I believe perjury constitutes other high crimes. So I wanted to be instructive to my colleague there that lacked that scope.

I also want to share with Ms. Parsons, when I was back home during Thanksgiving, my daughter plays high school basketball, and while I was in the stands, I couldn't help but my own friends would talk to me about this case and the proceedings, and what I found was very interesting. What some of my friends who weren't focusing on the legal technicalities and the legal side of this issue with the President, they are sitting in the stands watching a high school basketball game, they remember and they can't get out of their mind the President shaking his finger into their face on television saying, I didn't have sexual relations with that woman. And then they immediately say, "Well, don't impeach him because of an affair."

See, I think that was highly representative of I think a lot of people in America. They just remember that shaking the finger and they think that somehow this impeachment is about that affair.

So I have to agree with my colleague here, Mr. Inglis. He put it very eloquently. You two have done something that no one else could do, and that is to keep the extreme partisans quiet here today. The extreme partisans are trying to play into what my neighbors were then saying, "Well, don't impeach him because of a sexual affair." No, you went to jail over perjury.

So let me just take a step back here, and what I would now say to my neighbors at home and to the rest of you and to America is that in May of 1994, Paula Jones, a citizen of the United States, filed a civil rights lawsuit, a civil proceeding, against the President, alleging that he sexually harassed her and that he was, while he was Governor of Arkansas in the *Jones v. Clinton* case. The Supreme Court unanimously affirmed her right to bring that case and her right to have a fair hearing and an orderly ruling as guaranteed by the Constitution.

In that case the judge ruled that the President was required to testify, as is common in harassment cases and in any sexual relations—about any sexual relations he had or sought to have with any State or Federal employees within a relevant time frame. This information is often necessary for plaintiffs who bring civil rights sexual harassment cases, for to prove those cases, especially when those—when the harassing conduct occurred in private and is the "he-said, she-said" situation. This information is used in court to lend credibility to the plaintiff's case.

It is alleged that in relation to his duty to testify truthfully in the *Jones v. Clinton* case, the President lied under oath, encouraged others to lie under oath, tampered with witnesses, obstructed justice. It is also alleged the President committed the same offenses and abused the power of his office in relation to Federal criminal proceedings that grew out of his misconduct relating to the case of *Jones v. Clinton*.

So there are some that like to say this is only a political proceeding. No, this is a legal proceeding that we are conducting here because we do have a standard. It is given to us in the Constitution.

Now, I couldn't help but think of both of you as you were testifying, because I thought that—let me ask both of you. Dr. Battalino and Ms. Parsons, was one of the reasons that you testified falsely because you thought it would give you an advantage in the civil case in which you were involved in, and do you believe that the courts would work well if witnesses were allowed to testify falsely without any punishment?

The other question I have for you would be, I also found it quite interesting, as my colleague Mr. Goodlatte went through a series of alleged perjuries the President may have committed, doctor, you were sent to prison because you said no to a specific question that said, "Did anything of a sexual nature take place in your office on June 27, 1991?" And you answered "no" and you went to prison.

Ms. BATTALINO. Yes.

Mr. BUYER. On one "no"?

Ms. BATTALINO. One "no".

Mr. BUYER. Mr. Goodlatte gave a whole series of lists whereby the President sought to obstruct justice in a civil proceeding where he stood to lose money out of his own wallet. So I am interested in your answer to that.

The other thing I find quite interesting, Dr. Battalino, when you were under a wire, your quote was, when this gentleman revealed to authorities that you had had sex in your office, you responded, quote, "No, that is not what I told you to do."

So my question is, what did you tell him to do? And if that doesn't sound like a cover story, did you have a cover story? Because what I also find quite interesting, in all of my years of criminal prosecution and defense, I have never heard defendants ever say to each other, "Okay, I tell you what, I want you to lie." They don't say that. They say, "Here is the story," and then you have to prove by circumstantial evidence about the obstruction, i.e., cover story.

So please answer the series of questions.

Ms. BATTALINO. May I start with the last question?

Mr. BUYER. Yes.

Ms. BATTALINO. To tell you the truth, I have never heard the transcripts in full, nor have I—I mean I haven't heard the recordings, nor have I read the transcripts. So I am at a disadvantage in terms of exactly what I said and what the intent of what I said was about.

As I recall, the discussion that you are relating to had to do with telling my superiors at the VA hospital whether or not we did, indeed, have a sexual encounter on the premises. As far as a cover story goes, I think certainly that on some level there was an intent to influence the civil case by the response that I gave. I think it was a confused, unclear concept and perception that I had, but I would not doubt that there was some intent to influence the civil proceedings.

Mr. HYDE. The gentleman's time has expired.

Mr. BUYER. Mr. Chairman, would you permit the witnesses to answer, Ms. Parsons?

Mr. HYDE. Certainly.

Ms. PARSONS. I may have gotten caught in one lie, but there was a definite pattern.

Mr. BUYER. Was one of the reasons you gave false testimony because you thought it would give you an advantage in your civil case?

Ms. PARSONS. Because—I created the defense because I felt that most of the things that were surrounding me could not be understood by the general public or the people that were involved. And it is a ridiculous reason, but my strategy was very—the only thing I can say is, it is called incorrect thinking.

Ms. BATTALINO. May I respond?

Mr. BUYER. Yes, ma'am.

Ms. BATTALINO. In my case also, I think that there was an element whereby I was not so much attempting to influence the results of the civil case, but that in my mind there was—that that case—and in a sense maybe I can empathize with one of the explanations that I have heard Mr. Clinton give, and that is because I did not think that that lawsuit was a legitimate or an honest civil case—that that caused me in my mind to justify giving that inaccurate testimony, and there is no excuse for that.

Mr. BUYER. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman's time has expired.

The gentlelady from California, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman.

I would like to declare myself in relationship to whether or not I believe the President perjured himself, because of statement that someone attempted to clarify. I am not convinced that the President has perjured himself.

Having said that, I would like to raise a question I guess to one of the lawyers on this side of the aisle: Are all cases of perjury prosecuted? Mr. Nadler? Can you help me on that question?

Mr. NADLER. No. Prosecutorial discretion is exercised. Some are prosecuted and some aren't.

Ms. WATERS. So there could be extenuating circumstances: Intent, materiality, any of those things could possibly cause a prosecutor not to pursue prosecuting someone who may have perjured themselves?

Mr. NADLER. That is true. The prosecutor would have to weigh two things: How strong a case he thinks he has in terms of his ability to prove it, and how important he thinks it is in terms of his other cases.

Ms. WATERS. How many cases do you think that are out there that are not prosecuted? Is this the exception rather than the rule? Do we have many cases of perjury that are? Thank you. I didn't think so, and I don't think any time has been spent trying to find out whether or not that is the case.

Mr. Chairman and my Ranking Member, ever since the Judiciary Committee dumped the Independent Counsel's salacious referral into the public domain, I warned this body that Americans were becoming increasingly more suspicious of their government and our ability to be fair and sensible. The public has told us time and time again that Americans want fairness and they want us to get to the people's business.

In order to attend this hearing, I was forced to cancel at the last minute a very important forum on women and AIDS that was to be held in my district today as part of World AIDS Day. World

AIDS Day is held every December 1st to bring attention to the global AIDS crisis. As you may know, the HIV/AIDS epidemic has reached crisis proportions, both here and abroad, with half of all new infections worldwide occurring among young people age 15 to 24, and with 34 million people infected in sub-Saharan Africa alone. Here in the United States, the HIV/AIDS crisis continues to ravage our citizens, and it is devastating in the African-American community.

By raising the critical issue of HIV/AIDS, I do not mean to abdicate my constitutional duty. Far from it. As Chair of the Congressional Black Caucus, I have argued that Members of Congress must carry out their duty to uphold the Constitution and ensure fair and judicious process. Is lying under oath a serious matter? Yes. Should perjury be tolerated? No. We did not need this panel of 11 witnesses to explain the obvious.

The larger question that looms is whether impeachment is a proper tool to address the President's response to questions about his private consensual sexual affair. I must admit, I am not convinced that the President's answers regarding his relationship with Monica Lewinsky are "great and dangerous offenses," "attempts to subvert the Constitution," or "the most extensive injustice," as described by George Mason, the man who proposed the high crimes and misdemeanors language adopted by the framers of the Constitution.

By adopting a selective impeachment process, Republicans on this committee have elevated President Clinton's responses about whatever affair he may have had with Ms. Lewinsky to high crimes and misdemeanors. In comparison, the lies that were told by Presidents Reagan and Bush propagated regarding the illegal sale of arms during the Iran-Contra diversions do not in their mind constitute great and dangerous offenses to the country and the Constitution.

Let's take a look at what we have here. In his deposition, the President denied having sexual relations with Monica Lewinsky and he denies touching specific parts of her body. Although Ms. Lewinsky said the President did touch certain parts of her body, she too stated she did not have sexual relations with the President.

In contrast, President Reagan in his January 26, 1987 interview with Independent Counsel Lawrence Walsh, stated he approved the shipment of arms to Iran. Three years later President Reagan said he had no recollection of whether he approved or had discussions about arms sales. President Bush, who initially acknowledged he was regularly informed of the Iran-Contra activities, later stated he was out of the loop of the illegal Contra arms sales.

The same Members of Congress who defended the lies and illegal actions of Presidents Reagan and Bush now want President Clinton's head for what they consider lying about his private sexual affair. This double standard would be laughable if it were not a serious constitutional abuse. Where were the cries for impeachment when Presidents Reagan and Bush repeatedly lied to the office of independent counsel, Congress and the American people?

Mr. HYDE. The gentlelady's time has expired.

Ms. WATERS. May I have 30 more seconds?

Mr. HYDE. You surely may.

Ms. WATERS. Where were the charges of perjury and obstruction of justice when President Bush refused to submit to a second interview with Independent Counsel Lawrence Walsh to ascertain his knowledge of the diversion of arms sales proceeds to the Contras? When I compare the Iran-Contra activities and the lives lost, an evasive response about a private sexual affair pales in comparison. The American people are not stupid. They understand intuitively that the framers of the Constitution reserved high crimes and misdemeanors for the abuses practiced by Presidents Reagan and Bush and not for President Clinton's misleading statements about an embarrassing affair.

I will conclude at this point, Mr. Chairman.

Mr. HYDE. The gentleman from Virginia.

Mr. GOODLATTE. I thank you, Mr. Chairman. I would ask that a New York Times article, dated November 17, 1998, outlining prosecutions for perjury and indicating that in the last 5 years there have been nearly 500 Federal court prosecutions for perjury and in the State of California alone in 1997, there were more than 4,300 prosecutions for perjury, and I would ask this article be made a part of the record.

Mr. HYDE. Without objection, so ordered.

[The information follows:]

[From The New York Times, Nov. 17, 1998]

IN TRUTH, EVEN LITTLE LIES ARE SOMETIMES PROSECUTED

(By William Glaberson)

A Texas judge was convicted of perjury for declaring that he had used political contributions to buy flowers for his staff when, in fact, the flowers went to his wife.

A Florida postal supervisor is in prison for denying in a civil deposition that she had a sexual relationship with a subordinate.

An Ohio youth who had been arrested for under-age drinking testified that he had never been read his rights by the police. He was convicted of perjury for lying and sent to jail for 60 days.

Defenders of President Clinton have argued that his accusers are overzealous in saying he should be impeached or subject to criminal charges on the grounds that he committed perjury when he denied in a civil deposition that he had a sexual relationship with Monica S. Lewinsky.

But a review of more than 100 perjury cases in state and Federal courts and statistics on the number of perjury prosecutions brought around the country show that people are prosecuted in America for what might be called small lies more regularly than the Clinton defenders have suggested:

THE RISKS OF LYING

	Federal Prosecutions	
	Perjury Prosecutions	Total Major Prosecutions
1997	87	49,655
1996	99	47,146
1995	85	45,053
1994	93	44,678
1993	111	45,902
	California Prosecutions	
	Perjury Prosecutions	Total Felony Prosecutions
1997	4,318	326,768

	California Prosecutions	
	Perjury Prosecutions	Total Felony Prosecutions
1996	3,572	328,168
1995	3,302	345,125
1994	2,520	342,321
1993	1,968	345,469

Sources: Administrative Office of the U.S. Courts; California Department of Justice.

With the House Judiciary Committee's hearings into the possible impeachment of the President set to begin this week, the President's defenders are expected to return to their theme. His lawyer, David Kendall, has said that "no prosecutor in the United States would bring a perjury prosecution on the basis" of the kinds of questions Mr. Clinton was asked about his sexual harassment lawsuit.

But interviews with lawyers, legal experts and a woman who is serving a sentence for lying about sex in a civil case show that, far from being shrugged off, the threat of prosecution for perjury, even in civil cases, is a crucial deterrent in the legal system.

"Symbolically, the sword of Damocles hangs over every perjurer's head and no one can know whether they're the perjurer that's going to be prosecuted," said Jeffrey Abramson, a former prosecutor and an expert on jury trials who is a professor of legal studies and politics at Brandeis University.

One statistic on perjury prosecutions has been widely circulated since the President's supporters began arguing that perjury was little more than a technicality seized upon by the President's enemies: of 49,655 cases filed by Federal prosecutors last year, only 87 were for perjury.

State courts, where statistics are harder to come by, are another matter. Data supplied by court officials in two states, California and New York, suggest that perjury prosecutions are not as rare as some have suggested. In California alone last year, there were 4,318 felony perjury cases. In New York there were 395 perjury cases last year. And even in the Federal system, prison officials said in October that 115 people were serving sentences for perjury in Federal prisons alone.

The review of the cases offers some support for Mr. Clinton's defenders. Perjury charges are brought in civil cases far less frequently than in criminal cases. In addition, the law covering perjury is highly technical, with courts sometimes ruling that some obviously misleading statements like those Mr. Clinton acknowledges making may not constitute perjury under the law.

But the cases also show that, even in civil cases, judges are sometimes provoked by perjury more than by many of the evils they see everyday. In the Florida case of the postal supervisor in July, the judge, Lacey A. Collier, sentenced the supervisor, Diane Parker, to 13 months for falsely denying in a civil deposition that she had a sexual relationship with a male subordinate.

"One of the most troubling things in our society today," Judge Collier said, "is people who raise their hands, take an oath to tell the truth and then fail to do that. An analogy might be made to termites that get inside your house. Nobody sees it, nobody knows about it until the house collapses around you."

Some courts have gone out of their way to say that perjury in civil cases is as important as perjury in any other testimony.

In a 1988 civil suit in Georgia, for example, a founder of the Southern White Knights of the Ku Klux Klan, David Wayne Holland, was found liable for violating the rights of civil rights marchers.

Although perjury prosecutions make up a small percentage of total cases, Federal and state officials do pursue them.

In 1990, Mr. Holland was convicted of perjury for lying about his assets so the plaintiffs could not recover any of the \$450,000 they had won in the verdict. In the sentencing, a Federal judge in Georgia said that because Mr. Holland had lied in a civil proceeding, the sentence was to be less severe than it would have been had he lied in a criminal case. The judge sentenced Mr. Holland to home detention and community service.

But in 1994, a Federal appeals court criticized that ruling and sent the case back for a sterner sentence. "We categorically reject any suggestion, implicit or otherwise," the appeals court judges said, "that perjury is somehow less serious when made in a civil proceeding."

The review of perjury cases also shows that, although lies about sex are rarely the subject of perjury prosecutions, there are precedents that come quite close to the accusations against Mr. Clinton.

In 1984, Pam Parsons, the former women's basketball coach at the University of South Carolina, went to prison for 4 months after a perjury conviction for her testimony in a civil libel lawsuit she had filed against Sports Illustrated.

The magazine reported that she had had a lesbian relationship with at least one team member and recruited players "with sex in mind." Ms. Parsons and the player testified, denying, among other things, that they had frequented a lesbian bar. The jury in the libel case decided for the magazine. Then, the women were indicted for perjury. Both pleaded guilty.

In a current case, Barbara Battalino, a former Veterans Affairs psychiatrist at a medical center in Idaho, has become, perhaps, the best known admitted perjurer in the United States. She now acknowledges she performed oral sex in her Government office on a Vietnam veteran who was seeking psychiatric help in 1991.

She says the man, Ed Arthur, was never formally her patient. But she also admits that when he brought a civil suit for medical malpractice and sexual harassment, she lied when his lawyer asked her at a deposition whether "anything of a sexual nature" occurred in her office when she was alone with Mr. Arthur.

Mr. Arthur provided the prosecutors with tapes he had secretly made of her telling him to deny their affair. She was convicted of perjury. She is serving 6 months under home confinement and says she has had to give up her medical license because she was convicted of felony perjury charges.

In an interview after one network television interview and before another, Dr. Battalino, 53, said she was sorry she had told a lie, even though it was to try to keep an embarrassing sexual relationship private. But if Mr. Clinton escapes punishment, she said, she deserves a pardon.

"I think he's getting special treatment because he's the President. He has used his office to get his message across that what he did was no big deal. That wasn't good enough for me. I apologized to the judge that I lied to."

Some supporters of Mr. Clinton have suggested that the independent counsel, Kenneth W. Starr, was using the possibility of a perjury charge as a way to damage Mr. Clinton because Mr. Starr opposed his politics. They have said that was an abuse of Mr. Starr's powers as a prosecutor, suggesting that if Mr. Clinton were a private person he would never be charged with perjury for lying about private sexual matters.

But whether it is an abuse of power or not, other prosecutors in other high-profile cases have sometimes pushed for perjury charges—to send a signal to the public that lying will be punished. In fact, there is some evidence that the higher the profile of the case, the likelier the perjury charge.

In a Kansas murder case that attracted wide local publicity, the Geary County Attorney, Chris E. Biggs, won a perjury conviction of a local minister who prosecutors said had played a role in the killing. The prosecutors charged the minister had lied in a related civil case about whether he had had a sexual relationship with one of the people charged with him in the killing.

"It is important," Mr. Biggs said in an interview, "to send a message because the whole system depends on people telling the truth under oath."

Similarly, in Kentucky, a Federal appeals court last month affirmed the perjury conviction of Robert DeZarn, who was the Adjutant General of the Kentucky National Guard. He had been charged with perjury for denying in an investigation that he had engaged in improper political fund-raising from subordinates. At the time of the perjury charge, the fund-raising investigation was the subject of extensive news reports in Kentucky.

For many years, some scholars and many practicing lawyers have suggested that lying under oath was epidemic in the courts. But some legal experts say they are even more troubled by what they say is a highly technical approach the courts often take in defining what perjury is. In a 1973 case, *Bronston v. United States*, the U.S. Supreme Court laid down a rule for perjury cases that is still the governing law for courts across the country.

Some of Mr. Clinton's critics have said the fine distinctions set forth in the *Bronston* case are at the heart of Mr. Clinton's assertion that he did not commit perjury when he denied that he had "sexual relations" as that term was defined in Ms. Jones's sexual harassment lawsuit.

The man at the center of the 1973 case, Samuel Bronston, a movie producer, filed for bankruptcy and was asked in testimony in his bankruptcy case whether he had ever had Swiss bank accounts.

Mr. Bronston's answer was, "The company had an account there for about 6 months, in Zurich." In truth, he once had \$180,000 in an account in Geneva.

Mr. Bronston was later found guilty of perjury. The Supreme Court reversed the conviction. The Court said that even if Mr. Bronston's answers "were shrewdly cal-

culated to evade," it was the lawyer's responsibility to bring the witness "back to the mark, to flush out the whole truth."

Some critics of the ruling say it added momentum to the rampant telling of half-truths in the courts. Robert Blecker, a professor at New York Law School who has written about perjury law, said that judges nationally have concluded that the Supreme Court Justices were permitting what most people would consider lying under oath. "They sent a signal," Mr. Blecker said, "that you can calculatingly mislead by a statement that is carefully crafted to say one thing when you are really saying something else."

Mr. HYDE. The gentleman from Tennessee, Mr. Bryant.

Mr. BRYANT. Thank you, Mr. Chairman. And I might add to that. I think the gentlelady from California asked a very valid question in terms of are all perjury offenses prosecuted? Certainly that is not the case, and in most instances I suspect it is because they are not detected. But I would be greatly surprised if any of the distinguished members of the judiciary who will testify, as well as our former Attorney General and law professors from distinguished law schools, would say that it is not unimportant to prosecute people who commit perjury in a court. Truthful testimony underpins our judicial system; we must keep that judicial system strong. We don't want to go back to the point that whoever has the most guns wins the case. It is important that we have honest, truthful testimony, complete testimony. When someone raises their hands to tell the truth, they also say to tell the whole truth and nothing but the truth and not to hedge around.

One of my colleagues earlier had mentioned from the other side that the President has admitted to misleading the American people. I have a difficult time, when I listen to that oath, squaring how someone can say I misled the American people, but I told the truth when I said, I swear to tell the truth, the whole truth and nothing but the truth. How can you mislead somebody when you take that oath, without committing perjury?

And perhaps someone on the second panel who is legally trained can educate me on that. But it seems to me that if you mislead someone, you commit something less than telling the truth, the whole truth and nothing but the truth, so help you God.

I did want to point out to the gentlelady from California, as my colleague from Virginia did, that in California, in her home State, in 1993 there were 1,900 people, these were estimates, 1,968 people actually prosecuted for perjury. It has gone up every year; 2,500 in 1994, 3,300 in 1995, 3,500 in 1996, and 4,300 in 1997. Unfortunately, what this reflects is a societal pattern of increased lying. You hear about it in kids that are cheating on tests at school. Those numbers are going up. We are becoming, I guess, more tolerant, and that is very important in Washington these days, that we become tolerant. Unfortunately, we are becoming tolerant of lying in this country, as seen from these prosecutions in the State of California increasing.

So what do we do as a Congress when we find that our President has allegations against him, not just one time, but over a period of several months of lying under oath? Can we ignore that and say well, everybody does that. Well, maybe they do. But not everybody gets caught. And we have the chief law enforcement officer of this country, the man who appoints the Attorney General, the man who

appoints the U.S. Attorneys who prosecute all the Federal laws out there in all the Federal courts, this person is alleged to have lied.

Now, Ms. Battalino, I certainly—your testimony struck me when you said that you at a point crossed the line, you made a conscious choice. And I think we heard that in Mr. Starr's testimony, that the President had several occasions when he made a conscious decision, an educated decision, he weighed the pluses and minuses. And I mentioned to Mr. Starr what struck me was when the President talked to Dick Morris and said, "I'm in a quandary, what do I do here?" And they decided to take a poll on what to do, whether to tell the truth or not to tell the truth, what would sell and what wouldn't sell. Mr. Morris took an overnight poll and came back and said, "Well, they'll forgive you for adultery but not for perjury." At that point it looks like he made a choice and, according to Mr. Morris, made the statement that "We'll just have to win."

It was at that point, from that point forward, that the President got other people involved. And, therefore, it may have been just simply lies within the family, maybe it was grounds for a divorce. In all honesty, I don't like what he did, but I don't think he had violated any laws with Ms. Lewinsky, but up to that point it may have been grounds for a divorce. But once he made the decision, that choice, after talking with Dick Morris to move forward, he became involved in a legal process and had other people in his administration get involved, from filing affidavits to telling stories that they would repeat in grand juries.

I am concerned not so much about whether we are lowering the expectation, the level for impeachment—because we hear that a lot—I am more concerned with the Lindsey Graham test: Will we be able to look back in 30 years and say that we did the right thing, or are we going to look back and say did we lower the standards for the presidency? Are we willing to say we are going to accept perjury and these other things, if proven true, by the chief law enforcement officer, Commander in Chief of this country who sends our soldiers off? Are we going to question that in 30 years? Or are we going to do the right thing?

I hope, as a result of these hearings and your gracious testimony today, that we will have all the information we need to make that conscious choice for the American people.

I yield back the balance of my time.

Mr. HYDE. The gentleman's time has expired. The gentleman from Massachusetts, Mr. Delahunt.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I want to welcome you to this hearing. I along with everyone else appreciate the courage that you have displayed here this morning. I wasn't going to pose any questions, but I feel that I must; otherwise I might be labeled as an extreme partisan. I thought that was the word that I heard from one of my colleagues on the other side.

So just let me ask one question and then I would like to make some observations. But has either one of you, and I presume you haven't, have an opportunity to review the grand jury testimony of Mr. Clinton, of any of the significant witnesses, such as Ms. Lewinsky, prior to coming here this morning?

Ms. BATTALINO. Could you repeat that?

Mr. DELAHUNT. Yes. Did you have a chance to review or read the grand jury testimony or any of the documents that were referred to the committee by Mr. Starr?

Ms. BATTALINO. Just those that were open to public knowledge.

Mr. DELAHUNT. Well, let me ask you this. Did you have a chance to sit down and actually read the grand jury testimony of Mr. Clinton, or Ms. Lewinsky? Have you?

Ms. BATTALINO. I have read excerpts.

Mr. DELAHUNT. You have read excerpts. And you, Ms. Parsons?

Ms. PARSONS. I have not. I did not want to be biased.

Mr. DELAHUNT. Thank you. You know, much has been stated this morning about the rule of law. I think every member of this committee is concerned about the rule of law, whether we be Republican or whether we be Democrats. But I think it is really important also to understand that you were prosecuted under the criminal code of the United States. Every American citizen—and I think it is important that the American people understand this—every American citizen, including a President, whether that President be President Clinton or, in the case of the Watergate hearings some 24 years ago, President Nixon, is subject to prosecution. And I think it has been made rather clear in the record that any allegations that may be proven to be true involving perjury or obstruction of justice pose no problems in terms of criminal prosecution and statute of limitation issues.

So I think it is important to remind ourselves that upon the expiration of any President's term, the same process that you both experienced applies to that President, again whether it be President Clinton or President Nixon. I don't remember President Nixon, when President Ford pardoned him for any potential criminal prosecution saying, well, I don't need that because I am above the rule of law. My memory is he accepted that pardon readily and, I am sure, welcomed it. So when we talk about the rule of law, we are talking about the criminal code, and every single President of the United States is subject to that.

However, let us understand very clearly that presidential impeachment applies to only one American citizen, the President of the United States. So, of course there are differences.

Ms. BATTALINO. May I make a statement?

Mr. DELAHUNT. No, I don't have enough time, but I would be more than happy to discuss it with you afterward, Dr. Battalino.

I think it is important to remember that. And I guess what I am hearing today is two varying perspectives of what we ought to be about as a committee. I keep hearing, I think it was my friend from Virginia, Mr. Goodlatte, who talked about who rebutted evidence by the President, as if it was the President of the United States who had a duty to rebut evidence. My memory, and I see my time is running out, is that one of the fundamental concepts included in due process, which pervades the entire Constitution including Article 2, is the presumption of innocence, not a presumption of guilt.

I yield back.

Mr. HYDE. I am pleased to yield the gentleman another minute if he will let Dr. Battalino answer the question you posed to her.

Mr. DELAHUNT. No, because the gentleman to my left is anxious to get on and I know—but I will be happy to talk to you, Dr.

Battalino. And I really want to thank the Chair for indulging me as he always does. Thank you.

Mr. HYDE. You are properly grateful.

Dr. Battalino, you had an answer that you were not permitted to give. Would you give it now, please?

Ms. BATTALINO. I would be happy to. Thank you, sir. The point I wished to make is that I certainly would have preferred to have the ability to complete my profession before I was prosecuted, also. I didn't have that opportunity.

Mr. HYDE. Thank you. The gentleman from Florida, Mr. Wexler. I am sorry, Mr. Chabot. Forgive me.

Mr. CHABOT. Thank you. Dr. Battalino, the distinguished gentlelady from Texas asked you earlier about if your motivation for lying was at least partially to avoid the embarrassment that might come out as a result of all these things. And I think you indicated yes, that was part of the motivation.

Ms. BATTALINO. Yes.

Mr. CHABOT. Despite that, did the fact that you lied to hide an embarrassment in any way avoid any of the consequences that you had to go through as a result of the perjury?

Ms. BATTALINO. No, it didn't. And as I mentioned in my statement, I regret that I did not tell the truth sooner and apologize sooner, because when I did, when I had the ability to do that, the internal strength and grace to do that, it made such a difference in my life. It gave me a sense of relief, a sense of accommodation to the wrong that I had done.

Mr. CHABOT. So despite the fact that obviously anybody in this situation would want to avoid the embarrassment, the fact that you perjured yourself created a very heavy price that you personally had to pay?

Ms. BATTALINO. Absolutely.

Mr. CHABOT. You were no longer able to practice as a doctor, you lost your law license, and the criminal problems that you have had as a result of this, are obviously a very heavy price that you have paid. And I think, as we have all said, obviously nobody condones the activities, but it took a lot of courage on both of your parts to be here this morning and testify before this committee. I think it is also important for all of us to remember that the two of you here today are representative not just of yourselves but 113 other Americans who right now are suffering criminal consequences in the Federal criminal justice system because they committed perjury; 113 people either behind bars or under some sort of home confinement or whatever, but they have been convicted. That is just the Federal courts. We have also got 50 States out there, and there are thousands and thousands of other people who have committed perjury and that have suffered severe consequences as a result of that.

Would either one of you like to comment on what sort of message it sends to those people who are either behind bars or are on probation or whatever, who have been convicted of perjury? If this President has committed perjury and ultimately gets away with it, what message does it send to those people?

Ms. BATTALINO. I am more concerned about the message that it gives on a broader level, not just those of us that have been prosecuted. I would hope that all of us that have been prosecuted, and

that it is a legitimate prosecution, that we would all be able and willing to admit that we were wrong and we did the wrong thing and not make any attempt to excuse the wrong that we did. So my concern is at a much broader level to the young people, the citizens of the United States. I think it is wonderful that these proceedings are allowing the public to understand that there have been prosecutions, that perjury is a serious breach in our law, in our view of law as a society, as a Nation. So I would hope that at a broader level, this would have more of a significance and a reality for my fellow American citizens.

Mr. CHABOT. Thank you. Let me just comment, also. It was also brought up on the other side by one of the distinguished Members that the President is accused of lying relative to the dates of when he first began this inappropriate relationship, as to whether it was November of 1995 or whether it was February of 1996. And I think it is important to note that one of the reasons that apparently the President did lie about that is because at the earlier date, Ms. Lewinsky was still an intern. And I think everybody understands or should understand that interns are absolutely, unequivocally off-limits, and everybody understands that. So at that later date, she was no longer an intern. I think everybody understands or should understand that that is apparently the reason that the lie about the dates took place. And the other thing that I think is important is there are a whole lot of other lies which are much more significant: the lie about whether or not a relationship actually took place; whether they were alone together; and whether or not—what was this President's involvement in this job search to essentially make this witness keep her mouth shut. There is a whole range of issues that suggests that lies took place, not just that one particular thing about the date.

At this point I think I will yield back my time. Thank you.

Mr. HYDE. I thank the gentleman. The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman. I am afraid that this committee has become the theater of the absurd. I admire the personal courage of the women before us today, I truly do. But it seems that their personal courage is being misused by some for the partisan goal of impeaching the President.

No one, no one, is suggesting that perjury is anything but wrong. No one is suggesting that lying to the American public is anything but wrong. The only question before this Judiciary Committee is whether the President's actions rise to the level of an impeachable offense. If not, what consequences should the President face?

Some suggest if we do not impeach, there are no consequences for the President. In that regard, Mr. Chairman, I believe it is helpful and timely to read your eloquent and moving words to the House of Representatives on July 20, 1983, when the House took your lead and opted to censure a Congressman who had a sexual relationship with a 17-year-old page, not a consenting adult.

These are Chairman Hyde's wise words: We sit here today not as finders of fact. The facts are stipulated. We sit here not to characterize the crime, the breach, the transgression, because we all know the transgression, which is admitted and it is stipulated as reprehensible. We sit here to find a punishment that fits the

breach. And so in searching our souls for the appropriate punishment, I ask the Members to consider the situation in its totality, in its entire context.

I suggest to the Members that this man would rather have lost an arm at the shoulder than have to tell his wife, than have to grieve his wife as he did with the media. I suggest that all life is about is to earn the esteem of our fellow men. That is what we are here for. That is why we run for election. That is lost to this man. He is embarrassed. He is humiliated. He is displaced and it endures. It is not over. It will never be over. It will not be over as long as he lives. And it will remain after he lives. It will be with him. And it will be with his family as long as they live.

Mr. Chairman, I suggest to the Members that compassion and justice are not antithetical. They are complementary. The Judeo-Christian tradition says hate the sin and love the sinner. We are on record as hating the sin, some more ostentatiously than others. I think it is time to love the sinner.

Mr. Chairman, your wise words carry today, in 1983, and I plead with you now to once again lead this Congress to censure and end this nightmare for the good of our Nation. Thank you, Mr. Chairman.

Mr. HYDE. I thank the gentleman for quoting me so accurately. I regret to say that we didn't carry the day, but we made a good effort.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman. I would like to ask both of the witnesses if the following is the oath that you took in the court proceedings that then gave rise to the charges against you. Quote: "Do you solemnly swear that the testimony you are about to give in this matter will be the truth, the whole truth and nothing but the truth, so help you God," closed quote?

Ms. PARSONS. Yes.

Ms. BATTALINO. Yes.

Mr. BARR. I would like to quote this again for the record. This is the President. "Do you solemnly swear that the testimony you are about to give in this matter will be the truth, the whole truth and nothing but the truth, so help you God?"

"I do."

I yield back the balance of my time.

Mr. HYDE. I thank the gentleman. The distinguished gentleman from New Jersey, Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman. First I want to thank both of these women for testifying today. You have displayed enormous courage in coming here and telling your stories so eloquently. You have taken quite a journey. You have recited your journeys in a compelling way, and we have all been deeply touched.

I do want to address some remarks, though, to my colleagues on this committee. At least from this one Democrat, and I think I speak for most of us, we acknowledge that perjury is a very serious offense. And, when proven, it is punishable under the criminal law. If Mr. Starr or any other prosecutor feels that President Clinton committed perjury, the prosecutor can bring a criminal charge against the President and have him tried criminally for perjury. Whether that is during his presidency or after his presidency is a

matter of constitutional law, but he can be brought up on criminal charges for perjury. With regards to perjury—that is as it should be. He should not be above the law. But with regards to whether perjury is a grounds for impeachment, it may well be.

But first this committee has to determine whether the President committed perjury. And then this committee must determine whether perjury about the facts that are proven, if they are proven, rises to the level of an impeachable offense, treason, bribery, or other high crimes and misdemeanors, or does it require a lesser sanction?

I simply would conclude my remarks by saying that so far in our 3 months' worth of work, this committee has not resolved either of those two questions.

I yield back, Mr. Chairman.

Mr. HYDE. I thank the gentleman. The gentleman from Tennessee, Mr. Jenkins.

Mr. JENKINS. Thank you, Mr. Chairman. The questions I had have been asked and answered, and I would like to reserve my time in this matter.

Mr. HYDE. I thank the gentleman. The gentleman from Wisconsin, Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman. And I want to thank both witnesses for being here today. I think it is part of the healing process for you to come before us today to share your experiences. Just so I am sure, Ms. Parsons, in your case you were actually the plaintiff in that case; is that correct? You were the one who initiated the case?

Ms. PARSONS. Yes.

Mr. BARRETT. And, Doctor, you were the defendant in a claim of malpractice; is that correct?

Ms. BATTALINO. Malpractice and sexual harassment. However, I was dismissed of the charge early on, before the final determination and the final dismissal.

Mr. BARRETT. The actual perjury occurred when you went to the government to ask the government to pay your expenses or to make sure that you could not be held personally liable; is that correct?

Ms. BATTALINO. It was at one of the certification hearings.

Mr. BARRETT. Under the Federal Tort Claims Act.

Ms. BATTALINO. Yes, that I misrepresented the truth.

Mr. BARRETT. And you had initiated that, you had gone to the government?

Ms. BATTALINO. It was an appeal, yes.

Mr. BARRETT. Thanks. I just wanted to make sure that I understood that.

Mr. SCOTT. I didn't understand. Could you ask the question again? I didn't quite understand the answer.

Mr. BARRETT. The question was, for the doctor, under the Federal Tort Claim Act, because she was a Federal employee, the government would in certain circumstances cover her expenses and hold her immune from personal liability. I understand that you had requested, you had taken the step to have that happen?

Ms. BATTALINO. That is correct. They had already certified me for the June 27, 1991 date. We were appealing to have that coverage

extended through the whole claim of sexual harassment, which was dismissed.

Mr. BARRETT. I just want to make sure that I understood that. I do think that this is an important hearing because it does show that healing is part of the process. Unfortunately, as you can probably glean from the proceedings today, although this is far tamer than we have seen in the past, this committee has not begun the healing process and Congress has not begun the healing process, and I think that that is something that the American people desperately want.

Ms. BATTALINO. Yes.

Mr. BARRETT. I have talked to probably thousands of people now in my district and from around the country and there are people who hate the President and hate what he did. There are people who support the President. But the common thread that I hear over and over again is that the American people want this chapter of history behind us. And I don't know that we have come to grips with that.

When I hear that later today we may be expanding this probe into matters that the Government Reform and Oversight Committee has already investigated and we are going to continue that, I think that that shows you that we are not there yet. I am optimistic. The Chairman did promise me that we would complete this by early January when my wife was expecting. Mr. Chairman, I want you to know that we are still kicking around the names Henry for a boy and Henrietta for a girl, depending on whether you keep to that promise. But I think we can do it. I think we have to do that. We have to get beyond this. I think that we can do that. I am certain that the new Speaker, Bob Livingston, does not want to have the first vote that is taken under his leadership as Speaker to be whether this is going to continue.

So the question is how to resolve this and the question is how do we do it when the vast percentage of American people think that what the President did was wrong. The President has acknowledged it, just as you have acknowledged it, that what you did is wrong. But there are misgivings with the political process and the part that the political process plays in this, because we are trying to determine for the first time in this country's history whether we are going to impeach and remove from office a President of the United States.

Obviously we have had an impeachment of a President, of President Johnson, but we have never had a removal. So there is gravity that is attached to this issue that I don't think has been reflected in these hearings, and I think that that is unfortunate.

I again remain hopeful that we can do that, but I haven't seen great signs of evidence. I think it is also important to note, as several others have, that no person should be above the law. We hear that over and over again, and I agree with that. What we don't hear as often is that President Clinton, once he leaves office, can be charged with the same offenses that you were charged with, and if he takes it to trial or he enters into an agreement, it would be resolved. But President Clinton is not above the law and should not be above the law. If he has done something criminally wrong and

it is proven in court after he leaves office, then he has a debt to pay to society.

But it is my hope, and I think the hope of most American people, that we can resolve this issue and get back to the issues that the people in America care about.

I yield back my time.

Ms. JACKSON LEE. Will the gentleman yield?

Mr. BARRETT. I would like to yield to the witness, quickly.

Ms. PARSONS. I resigned in the middle of a season. We were ranked second in the Nation, 7-0, kind of like the economy, doing very well. That team went out of the top 20, a number of them transferred, the program has never been the same. When you remove the leader, sometimes you have things that are going to happen that you may not want.

You made a very good point. Timing is an issue in any resignation or any proceedings related to the leader. And I appreciate that, because I sense that one thing we don't need right now is to not have a leader in a world where leadership matters.

Mr. BARRETT. If I could have 30 seconds, Ms. Jackson Lee asked me to yield to her.

Ms. JACKSON LEE. Mr. Barrett, I simply want to add to a comment that you made that it is time to heal this Nation. As you have talked to so many of your constituents, I have heard from so many people acknowledging what we have all acknowledged, frankly: What the President did was absolutely wrong.

But how can we constitutionally move to a point of healing? And frankly I think we have the tools to do so. I hope that we will consider rebuking, reprimand or censure, and I hope that we will try to heal the Nation. These ladies represent healing.

Mr. HYDE. The gentleman's time has expired.

Ms. JACKSON LEE. I thank Mr. Barrett very much.

Mr. HYDE. The gentleman from Arkansas, Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman. I want to express my appreciation for the spirit of the comments of the gentleman from Wisconsin. He did make one reference, and Mr. Rothman from New Jersey did as well, that the President, like everyone else, can be held accountable in a criminal fashion for prosecution during his tenure or after he leaves office. Mr. Dershowitz is going to testify later, and I think he has indicated that such prosecution probably would not happen. I too think it is very doubtful. I think in theory it is within the realm of possibility, but in a practical sense, I doubt it will happen. And so I have to come back to the responsibility of this committee to deal with the consequences of any actions we find of the President.

I want to come back to the witnesses and thank both of you for being here. Each of your testimonies illustrates in very human terms that there are consequences of our actions and decisions in life. Teenagers learn this and we continually learn it through adulthood. But there will also be consequences of the decisions of this committee. It has been pointed out before that our decision will have an impact on the institution of the presidency, and will likely have an impact on the future conduct of elected officials, whatever we decide. But I think your testimony points out other considerations, for example that there is a principle of equal justice

and that our decision very likely will impact upon that principle. That principle of equal justice ensures that whether a doctor, a lawyer or a basketball coach, we are all expected to obey the requirements of the law, and if not, there should be equal treatment under the law. I think your testimony addressed that point, and even though it might not certainly resolve all the decisions that we make, it puts it in perspective and helps us in this process.

Our debate on the President is a little bit different because we are talking about impeachment, a constitutional remedy. I understand that it is different. But still your testimony helps balance the impact of the consequences of what we will do and the decision that we will make.

There has been talk that perjury is not always pursued, and I think that is true, but I also think it is so critically important. I remember on a couple of occasions being in the courtroom with a Federal judge, and the Federal judge hears the testimony of a witness, and the judge knows that the witness is lying, and the judge directs the U.S. Attorney to open a case and either to pursue contempt proceedings against that person or to pursue a criminal investigation for perjury. And so I have not seen any Federal judges that treat perjury lightly, nor should they.

There have been cases cited from different States, but in Arkansas, we have people in prison, as I speak, for perjury. Two defendants in 1997, on average, got 62 months in jail for perjury. Not all of them received prison time. Some were fined. Some were given probation. There are also cases in my State that deal with the issue of perjury at the State level and not just the Federal level.

And so I think it is not something we just dismiss. It is not something we say, "Everyone does it." And whatever we decide in this committee is going to have consequences. Our responsibility, my responsibility, is to determine the facts and apply the law and the Constitution. That is the same thing any jury has to do in any courtroom. We can call witnesses, yes, we can do that, but we are trying to balance streamlining these procedures and getting it done with hearing the facts.

I have spent a lot of time, I know other Members of the committee have as well, reviewing the grand jury transcripts and reviewing the evidence before us, and we can make these decisions but we have to concentrate upon the facts and apply the Constitution. There is room for sincere debate here. I am interested in the debate that is going to be forthcoming in this committee and I hope that everyone will withhold judgment until we hear the debate, and we hear each other's points of view.

Finally, I do want to ask a question of the witnesses today. Each of you have been convicted of lying under oath and I think each of you has expressed remorse or regret about that. My question to you is: When you lied under oath, how did you justify that, in your own mind at that time? Dr. Battalino.

Ms. BATTALINO. I think, as I have mentioned earlier, the main justification that I pursued was that the civil lawsuit was not well grounded, was not accurately grounded, and that in order to save embarrassment for myself and my profession, that I was justified in misleading and misrepresenting the complete truth.

Mr. HUTCHINSON. Your justification was that the civil suit was not well grounded. In hindsight, after you have been punished for that perjury, what is your view of that?

Ms. BATTALINO. Oh, that was very poor judgment on my part. I would like to state that the consequences of a misjudgment should be significant. It shouldn't be something that is dismissed lightly and all that is required is to say, "Well, I'm sorry, I made a mistake, I didn't tell the full truth."

Mr. HYDE. The gentleman's time has expired. The gentleman from Massachusetts, Mr. Meehan, do you desire time?

Mr. MEEHAN. Thank you, Mr. Chairman, just briefly. I was up in my office watching the testimony of both of you, and I give you both credit for coming before the committee and telling your story, which I am sure can be difficult to do. I am curious, because oftentimes this has been a pretty politically charged atmosphere and you may have noticed the debate over the period of the last few months has been pretty political, and a lot of times those of us on the Minority side don't get a chance to find out who is going to be called as a witness until the press tells us; or, like last night, I got a call late about who the subpoenas were going to be. So it is a pretty political atmosphere here.

I am just curious how you guys got to be contacted. Did somebody call you guys about testifying, or how did that work? Did you volunteer? Who contacted you? How did you end up coming before the committee?

Ms. BATTALINO. I was invited by one of the—my attorney got a call from one of Mr. Hyde's aides, asking whether or not I would be willing to come and be here as a witness.

Mr. MEEHAN. Ms. Parsons, how did that—was it the same way with you?

Ms. PARSONS. I got a call. But also, you know, I heard from the media. I didn't know for sure I would be here either. They were asking me before I knew. So I know how you feel.

Mr. MEEHAN. I am on the committee and I don't know.

Ms. PARSONS. It wasn't like it was some big thing. It was like, could you tell about perjury if you wanted to?

Mr. MEEHAN. Right. In either one of the cases, neither one of you were convicted or charged with treason or bribery or high crimes and misdemeanors, right?

Ms. PARSONS. It didn't get that far.

Ms. BATTALINO. We don't merit those.

Mr. MEEHAN. Mr. Chairman, no further questions.

Mr. HYDE. Thank you. The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

Ms. Parsons and Dr. Battalino, I suppose it is evident by now that there are a number of things happening before this committee throughout this matter and in our hearing today. Sometimes it seems that we talk at you instead of with you, or to each other and not with you at all. To the extent that may in fact or appearance lead you to conclude that your being here today is insignificant or incidental or unappreciated, I apologize for that. I want to express my gratitude for your courage in being here. There is nothing I can add to your testimony, so I will content myself with at least not

adding further to your discomfort, and instead I will yield my time to the gentleman from Virginia, Mr. Goodlatte.

Mr. GOODLATTE. I thank the gentleman for yielding. I just briefly want to respond to the gentleman from Massachusetts, Mr. Delahunt, regarding the presumption of innocence.

And I would say to him that I think everybody in this room believes and recognizes that everyone in this country, including the President of the United States, is entitled to a presumption of innocence. However, I would say to him that the committee has before it very substantial evidence of many instances of perjury, and it is that evidence upon which the committee will have to base its decision, and when that takes place what we are going to be confronted with is a situation where the President has the opportunity to come forward and offer rebuttal testimony. And so far, the President and his attorneys have chosen largely not to do that.

And so that is the concern that I have. If the President has that kind of evidence to rebut perjury, he should step forward and do so, because we do have substantial evidence before us, and we will have to evaluate the evidence that we have.

Mr. DELAHUNT. Will the gentleman yield?

Mr. GOODLATTE. Yes, I yield to the gentleman.

Mr. DELAHUNT. I want to thank you, because I think it is important to draw the contrast here and I respect the gentleman's position. But I think if we go back to the single precedent that occurred in this century, this committee heard direct evidence from individual witnesses. They were able to evaluate, they were able to assess credibility, and they were able to probe memories. There are many facts that are alleged—there are many facts that are alleged that have clearly different inferences that could be drawn, and I think we all understand that those on the committee who have had the opportunity to review the referral, I think it is important to note—

Mr. GOODLATTE. Reclaiming my time, I would say to the gentleman, first of all, that in the other case that the gentleman cites, the witnesses were all called by the President and they were heard in executive session depositions. We did not have an independent counsel statute at that time, the independent counsel has done that work, nor has the President requested that those witnesses be brought forward for him to cross-examine them.

And I would yield my time back to the gentleman from Indiana.

Mr. DELAHUNT. If I could ask the indulgence of the Chair.

Mr. HYDE. Well, this time belongs to Mr. Pease, who yielded to Mr. Goodlatte, who has yielded back, so now Mr. Pease has the time.

Mr. DELAHUNT. Mr. Pease, would you be kind enough to yield?

Mr. PEASE. I will yield to my colleague from Massachusetts for purposes of a response to the question.

Mr. DELAHUNT. I thank the gentleman. I think it is important that we note that in the committee report crafted by Mr. Schippers, counsel for the Majority, and I am quoting, "Monica Lewinsky's credibility may be subject to some skepticism. At an appropriate stage of the proceedings, that credibility will, of necessity, be assessed together with the credibility of all witnesses in light of all the other evidence."

I would suggest that simply accepting a report from Mr. Starr does not meet that particular standard. And I thought it was fascinating when Mr. Starr himself testified that he acknowledged that he had never been present at a grand jury proceeding, with the exception of the President's testimony; had never participated in any of the interviews conducted by the FBI agents; and, in fact, had never met Monica Lewinsky. I daresay that we are abdicating our responsibility if we simply accept the transmittal from the independent counsel, and I disagree with my friend from Virginia that that constitutes evidence.

I yield back.

Mr. CHABOT. Will the gentleman yield?

Mr. PEASE. I yield to the gentleman from Ohio.

Mr. CHABOT. Real quickly. We could call more and more and more witnesses. We are trying to get this wrapped up as expeditiously as possible. I think both sides want to do that. If we call more witnesses and drag this on into next year, then they are going to scream because they say we are on a fishing expedition, we have already got enough evidence. I think we are trying to do this properly. I think Chairman Hyde has led this committee in a very expeditious manner, in a very fair manner. I commend Chairman Hyde for doing that, and I yield my time back to the gentleman from Indiana.

Mr. PEASE. I yield back the balance of my time.

Mr. HYDE. I thank the gentleman. Mr. Cannon of Utah.

Mr. CANNON. Thank you Mr. Chairman. First of all, I would like to associate myself with the statement by Mr. Goodlatte who set forth the many times the President has apparently lied under oath. I would like to thank the witnesses for coming here today. They exemplify the importance of what we are investigating in this committee. In case my Democratic colleagues, the American public, and the media have not yet figured it out, let me say this investigation is about perjury and obstruction of justice. It is not about Monica Lewinsky. It is about perjury. This is not about Paula Jones. It is about perjury. This is not about Ken Starr. It is about perjury.

As these witnesses demonstrate and as the actions of the Clinton Justice Department have proven, perjury is a serious crime. As every American knows and as these witnesses have shown here today, perjury undermines the American system of justice. Perjury violates the rule of law. Perjury is subversion of government. Perjury is a cancer which must be removed for society to heal itself. Perjury is an impeachable offense. We owe it to the witnesses who are currently being punished for perjury to assure that no man is seen to be above the law or becomes an example to all Americans that they can violate the law. No matter how popular, no matter what the polls say, no matter how vilified the investigation has become, no man is above the law. If we establish that the President committed perjury, we are duty bound to act. Whether or not the President's supporters on this committee or elsewhere hypocritically choose to turn a blind eye to justice, we are bound to act to uphold the rule of law. Again I thank the witnesses for being here today, and I yield back the balance of my time.

Mr. HYDE. I thank the gentleman. Mr. Rogan from California.

Mr. ROGAN. Mr. Chairman, thank you. For the last 11 months our country, as well as the committee, has been treated to a litany of law professors, Members of Congress, attorneys, and talk-show guests explaining to us that perjury somehow is no longer important or doesn't have significance. And the purpose of this hearing, as I understood it, Mr. Chairman, is so we could shed some light on that preposterous concept.

During my days as a judge, had a lawyer ever appeared in my court and made such a suggestion, I would have been on the phone immediately with the State Bar to inquire as to the status of his or her law license. Having said that, Dr. Battalino, your case intrigues me.

I want to make sure I understand the factual circumstances. You lied about a one-time act of consensual sex with someone on Federal property; is that correct?

Ms. BATTALINO. Yes, absolutely correct.

Mr. ROGAN. This act of perjury was in a civil lawsuit, not in a criminal case?

Ms. BATTALINO. That's also correct.

Mr. ROGAN. And, in fact, the civil case eventually was dismissed?

Ms. BATTALINO. Correct.

Mr. ROGAN. Yet despite the dismissal, you were prosecuted by the Clinton Justice Department for this act of perjury; is that correct?

Ms. BATTALINO. That is correct.

Mr. ROGAN. I want to know, Dr. Battalino: During your ordeal, during your prosecution, did anybody from the White House, from the Clinton Justice Department, any Members of Congress, or academics from respected universities ever show up at your trial and suggest that you should be treated with leniency because "everybody lies about sex"?

Ms. BATTALINO. No, sir.

Mr. ROGAN. Did anybody ever come forward from the White House or from the Clinton Justice Department and urge leniency for you because your perjury was only in a civil case?

Ms. BATTALINO. No.

Mr. ROGAN. Did they argue for leniency because the civil case in which you committed perjury was ultimately dismissed?

Ms. BATTALINO. No.

Mr. ROGAN. Did anybody from the White House ever say that leniency should be granted to you because you otherwise did your job very well?

Ms. BATTALINO. No.

Mr. ROGAN. Did anybody ever come forward from Congress to suggest that you were the victim of an overzealous or sex-obsessed prosecutor?

Ms. BATTALINO. No.

Mr. ROGAN. Now, according to the New York Times, they report that you lied when your lawyer asked you at a deposition whether "anything of a sexual nature" occurred; is that correct?

Ms. BATTALINO. Yes, that is correct.

Mr. ROGAN. Did anybody from Congress or from the White House come forward to defend you, saying that that phrase was ambiguous or it all depended on what the word "anything" meant?

Ms. BATTALINO. No, sir. May I just—I am not sure it was my lawyer that asked the question, but that is the exact question that I was asked.

Mr. ROGAN. The question that was asked that caused your prosecution for perjury.

Ms. BATTALINO. That's correct.

Mr. ROGAN. No one ever argued that that phrase itself was ambiguous, did they?

Ms. BATTALINO. No.

Ms. WATERS. Will the gentleman yield?

Mr. ROGAN. Regrettably, my time is limited and I will not yield for that reason.

Now, Doctor, you lost two licenses. You lost a law license.

Ms. BATTALINO. Well, I have a law degree. I was not a member of any bar.

Mr. ROGAN. Your conviction precludes you from practicing law?

Ms. BATTALINO. That is correct, sir.

Mr. ROGAN. You also had a medical degree and license.

Ms. BATTALINO. That is correct.

Mr. ROGAN. You lost your medical license?

Ms. BATTALINO. Yes. I am no longer permitted to practice medicine either.

Mr. ROGAN. Did anybody from either the White House or from Congress come forward during your prosecution, or during your sentencing, and suggest that rather than you suffer the severe punishment of no longer being able to practice your profession, perhaps you should simply just receive some sort of rebuke or censure?

Ms. BATTALINO. No one came to my aid or defense, no.

Mr. ROGAN. Nobody from the Clinton Justice Department suggested that during your sentencing hearing?

Ms. BATTALINO. No.

Mr. ROGAN. Has anybody come forward from the White House to suggest to you that in light of circumstances, as we now see them unfolding, you should be pardoned for your offense?

Ms. BATTALINO. Nobody has come, no.

Mr. ROGAN. Are you going to ask for a pardon? Have you thought about that?

Ms. BATTALINO. That is a difficult question. Certainly I want to assume full responsibility for the fact—for the reality that I did commit a crime and that it was wrong to do and I deserve to pay consequences for it. However, if indeed, as you suggest, some of the reasoning that has come up in terms of some very specific points in my conviction, I certainly would hope that if indeed there is no reason for anything less than censure or more than censure to be expected, that certainly I would hope that the administration would consider leniency and pardon for me, yes.

Mr. ROGAN. If the Congress of the United States ultimately takes the position that lying under oath over such matters is not an offense worthy of punishing a public official otherwise sworn to uphold the law, and is not worthy of that person potentially having their job placed in jeopardy, would you feel that you were the victim of an unfair double standard?

Ms. BATTALINO. Yes, I would.

Mr. ROGAN. Mr. Chairman, I see my time has expired. I thank the Chairman.

Ms. WATERS. Mr. Chairman.

Mr. HYDE. The gentleman from South Carolina, Mr. Lindsey Graham.

Mr. GRAHAM. Thank you, Mr. Chairman. That was a very well done litany, explaining why it is a little calmer today. I think my friend from South Carolina mentioned this fact. The reason it is calmer today, we have real people who suffered real consequences for something that we are all wrestling with. I am going to put a little different spin on this. Both of you pled guilty; is that correct?

Ms. PARSONS. Yes.

Ms. BATTALINO. Yes.

Mr. GRAHAM. Are you glad that you did?

Ms. BATTALINO. Absolutely.

Ms. PARSONS. Absolutely.

Mr. GRAHAM. Did the court consider your guilty plea in a positive light? Do you think it helped the disposition of your case?

Ms. BATTALINO. I think in my case, Judge Lodge did express concern that I had suffered significant consequences, but nonetheless felt that because of the Federal guidelines that he was mandated to give me some serious consequences.

Mr. GRAHAM. But it is my understanding that if one pleads guilty, that is something the judge can consider in a positive light.

Ms. BATTALINO. That is correct.

Mr. GRAHAM. Is that true, Ms. Parsons?

Ms. PARSONS. I believe that is very true.

Mr. GRAHAM. Mr. Chairman, there was a case mentioned where you came to bat for someone in Congress. Is it—isn't it true, from my understanding of that case, that the gentleman in question admitted every accusation against him?

Mr. HYDE. Yes.

Mr. GRAHAM. All I want to say is it is easier to go to bat for somebody when they recognize they are wrong. My friends on the other side, this has been a good day for the committee. This has been one of our better days. If you believe the President of the United States did not commit perjury, I can understand why you would not want to take this so far. Mr. Schumer and myself are at the opposite ends of the political spectrum, but I admire him greatly for saying that he believes the evidence suggests the President lied under oath, but having said that, he believes the underlying conduct is not something you would want to overturn a national election about. I don't know if an individual's case should be equated to overturning a national election. For you it is very important as your liberty. But I think we should have as our last resort impeachment, not our first resort, but there are other dispositions yet to come.

But let me tell you how I feel about the President. I feel he lied under oath. I feel he is dancing on the head of a pin, still. He is insulting my intelligence. Mr. Schumer wants to conclude he lied under oath but not go forward. I respect that, but I cannot live with that conclusion. I think the day we say the President of the United States obviously commits perjury before a Federal grand jury and is not subject to losing his job is the day we redefine the

presidency in terms of a law that will damn this country later on. That is unacceptable for me.

Mr. Schumer asked Mr. Livingston to help us. I am now asking the President of the United States to help us. Mr. President, if anybody on your behalf or you are watching this, I ask you now to consider coming before the American people and do what these two ladies have done, people convicted of crimes who have served jail time, who are now being talked about in terms almost of being American heroes. That is the goodness of this country, that if you will own up to your mistakes, people will go out of their way to forgive the sin. But if you, Mr. President, continue to deny what I think is the obvious, in my opinion you have forfeited the right to lead this country in the next century. If you will own up and do what these two ladies have done, I will go to bat for you.

I yield back the balance of my time.

Mr. HYDE. The gentlelady from California, Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman. I simply want to thank the witnesses for their testimony and say also, as my colleagues have said, it is very courageous for you to be here today. I think we have all learned some very, very valuable lessons. But I cannot add any further questions that haven't already been asked at this point, so I will yield the balance of my time to my colleague from Indiana.

Mr. BUYER. I thank the lady for yielding. Dr. Battalino, you weren't convicted of perjury, were you?

Ms. BATTALINO. No, one count of obstruction of justice.

Mr. BUYER. Obstruction of justice. Are you aware that the President is also being—stands accused of obstruction of justice in his civil case?

Ms. BATTALINO. Yes.

Mr. BUYER. Part of the allegations against the President then with regard to obstruction of justice, because I want to be clear, people have been referring to you as someone who committed perjury, therefore you are convicted of perjury but your conviction was for obstruction of justice.

Ms. BATTALINO. Yes, that is more accurate.

Mr. BUYER. So what we have is the President accused of perjury but he also stands accused of obstruction of justice, and it is because his obstruction occurred by his conduct and actions in a civil case, a civil rights case, i.e., *Jones v. Clinton*.

Ms. BATTALINO. Yes.

Mr. BUYER. As also part of the President's, I believe, engaged in a pattern of obstruction in the *Jones v. Clinton* case while it was pending, it was done in order to thwart those proceedings. Earlier you had testified to some of my questionings that you also engaged in this same pattern because you attempted to thwart the legal proceedings; is that true?

Ms. BATTALINO. Yes, that is correct.

Mr. BUYER. And no matter what the motivation was, even though you justified it in your mind as I listened to some of the questioning, you could find no justifiable excuse?

Ms. BATTALINO. No, there is no justifiable excuse. No honest legitimate justifiable excuse, no. My motives were of self-interest,

and I think that that is what is behind not telling the complete truth. It is generally for self-interest.

Mr. BUYER. A lot of people, not only some on this committee and in the press, they like to focus on a young lady by the name of Monica Lewinsky, but nobody likes to talk about Kathleen Willey. Kathleen Willey, who was an individual who was a volunteer at the White House, it has been alleged, who went to the President for a job and she alleged that there may have been a sexual assault even by the President upon her, and that she ended up getting a job. And then the real question is, well, was there sexual harassment or not sexual harassment and she got a job out of it? And there seems to be this pattern of rewarding the "Jane Doe's." And Kathleen Willey was also a witness in that *Jones v. Clinton* case, and so the committee has also been looking into other witnesses, and I am citing here an Associated Press piece of Monday, November 30. This Associated Press piece discussed that during a private session with impeachment investigators, a Democrat operative, Nathan Landow, invoked the fifth amendment over 70 times. This is an individual who has been accused of having—trying to develop a relationship with Kathleen Willey to prevent her from cooperating not only in the *Jones* case but coming forward about the allegations of sexual harassment, which also there is another witness out there against the President who for some reason people don't want to talk about, because they want to keep in front of people's minds, oh, this is a case about the President's affair with Monica Lewinsky.

No, this is a case about obstruction of justice and denying someone equal access to the courthouse door. Even the powerless and the poor and the needy gain access to the courthouse door, and it is never meant to be manipulated by the powerful.

So I want to thank both of you for coming and your testimony here today and I thank the gentlelady from California for yielding me this time. I yield back her time.

Ms. WATERS. Mr. Chairman.

Mr. HYDE. The gentlelady from California.

Ms. WATERS. I would like to ask for unanimous consent to raise a point of clarification. I have been sitting here trying to figure out what is the crime for having sex with someone in the workplace. And I guess there is something else going on here. The person was a patient; is that right?

Ms. BATTALINO. The person was a patient of the VA. He was not my particular patient.

Ms. WATERS. But he was a patient in the hospital. And the loss of your license had to do with professional standards?

Ms. BATTALINO. Incorrect. It had to do with the fact that I was convicted of a felony.

Ms. WATERS. Are you a psychiatrist?

Ms. BATTALINO. That is right.

Ms. WATERS. And it had nothing to do with the fact that there was sexual relations with a patient?

Ms. BATTALINO. No, it did not. I was dismissed from that charge. And the case itself, the whole sexual harassment accusation was dismissed.

Ms. WATERS. It was a sexual harassment case?

Ms. BATTALINO. Correct.

Mr. HYDE. The committee has finished questioning this panel; and before you both leave, I sincerely want you to know what a great contribution you have made to our understanding of a very tough issue. And we have not only read about it, now we have seen it and listened to it, and we understand it a lot better. Thank you for your bravery and your cooperation.

Ms. BATTALINO. Thank you.

Mr. HYDE. Now, the committee is going to recess subject to the call of the Chair, and the committee will stay here, because we are going to meet for the purposes of conducting business pursuant to the notice. Mr. Conyers—we are going to discuss some subpoenas, and we need authority from the committee to issue them. I will be more detailed in a moment.

Mr. DELAHUNT. Mr. Chairman, if you would indulge me, I would like to welcome two natives of the Commonwealth of Massachusetts.

Mr. HYDE. Surely.

Mr. DELAHUNT. I would like to welcome the former Attorney General of the Commonwealth of Massachusetts and the former Attorney General of the United States, Mr. Richardson, for whom I have great respect.

I also want to welcome a friend of mine from Cambridge, Massachusetts, who works over at Harvard University, Professor Dershowitz.

Mr. DERSHOWITZ. Nobody works at Harvard University.

Mr. HYDE. They study.

I am somewhat reluctant to start without a better complement. I hate to keep you waiting. You have already waited so long. Some of the Members will come straggling in, I daresay. So we will resume.

Again, your patience has been saintly. We thank you very much.

On our second panel we have nine witnesses who will give us a variety of perspectives on the consequences of perjury and related crimes. The panel consists of Federal judges, a former Attorney General, retired military officers, legal scholars, and this morning we had the other panel of people who have actually been convicted of these crimes.

Let me note at the outset that all of these witnesses are appearing in their personal capacities and none of their statements should be construed as expressing the views of any organizations with which they might be associated.

Our first witness is the Honorable Gerald B. Tjoflat, a U.S. Circuit Judge on the U.S. Court of Appeals for the Eleventh Circuit.

Judge Tjoflat is a graduate of the University of Cincinnati and Duke University School of Law. His law school tenure was interrupted by 2 years' service as a special agent in the U.S. Army Counterintelligence Corps.

After law school, Judge Tjoflat practiced law in Jacksonville, Florida, for a number of years. He took the bench in 1968 as a Circuit Judge on Florida's Fourth Judicial Circuit. In 1970, he was appointed to the U.S. District Court for the Middle District of Florida. In 1975, he was appointed to the U.S. Court of Appeals for the Fifth Circuit; and when Congress split the Fifth Circuit, he went

to the newly created Eleventh Circuit. He served as Chief Judge for the Eleventh Circuit from 1989 until 1996.

In addition to his court duties, he is active in local and national community service, educational, and professional development organizations. He received the 1996 Fordham-Stein Prize, a national prize that recognizes positive contributions of the legal profession to American society.

Next to Judge Tjoflat is the Honorable Charles Wiggins, a man who served on this committee for many years. He is now a Senior U.S. Circuit Judge on the U.S. Court of Appeals for the Ninth Circuit. Judge Wiggins is a former colleague and a dear friend. We are particularly pleased to have him here today. He graduated from college and law school at the University of Southern California and served two tours as an infantry officer in the U.S. Army.

He began his law practice in El Monte, California, in 1957, where he also served in a variety of local elected offices. In 1966, he was elected to the U.S. House of Representatives, where he served with distinction on this committee during the impeachment inquiry of President Nixon, and he played a very vital role in that hearing.

Judge Wiggins left Congress in 1978, returned to private practice until 1984 when he was appointed to the Ninth Circuit, and he has served on that court since that time.

Is Mr. Conyers here?

We will skip you, Judge Higginbotham, only because Mr. Conyers wants the honor of introducing you. It is not out of disrespect.

Our next witness is the Honorable Elliot Richardson.

Mr. Richardson is a graduate of Harvard College and Harvard Law School. After law school, he clerked for Judge Learned Hand of the Second Circuit and Supreme Court Justice Felix Frankfurter.

Throughout his distinguished career, he has served in numerous public positions, including Secretary of Health, Education and Welfare; Secretary of Defense; Attorney General of the United States; Secretary of Commerce; and Ambassador to the Court of St. James. That is a resume.

In 1992, he retired as a senior partner in the Washington office of the law firm Milbank, Tweed, Hadley & McCloy. In January of this year, President Clinton awarded him the Presidential Medal of Freedom.

Now I will yield to John Conyers for purposes of introducing Judge Higginbotham.

Mr. CONYERS. Thank you, Mr. Chairman.

A. Leon Higginbotham, Jr., started out as a President Kennedy appointee to the FTC. He had finished Antioch, Yale Law School, Harvard, University of Michigan, New York University, University of Pennsylvania. I counted them. He has 62 honorary degrees from universities.

He has written extensively, particularly about race relations in America and how the justice process has impacted it. He is currently writing his biography and other writings. He has been so helpful in the civil rights movement across the years.

He is presently Professor of Jurisprudence at Harvard and the John F. Kennedy School of Government, of counsel to Paul, Weiss,

Rifkind, Wharton & Garrison in their New York and Washington offices, and a former Circuit Judge and Chief Judge of the U.S. Court of Appeals for the Third Circuit.

We are delighted that you, as well as all of the distinguished members here, could stay with us for this lengthy period today.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Conyers.

Our next witness is Admiral Bud Edney, who retired from the U.S. Navy in 1992 after 39 years of service. He is a graduate of the U.S. Naval Academy and has a Master of Public Administration degree from Harvard University.

A naval aviator, he has logged over 5,600 carrier flight hours and flown 350 combat missions. During his career, his assignments included command of a carrier air wing, command of the aircraft carrier U.S.S. Constellation, and command of a carrier battle group. He also served as commander of all U.S. forces in the Atlantic and Commandant of Midshipmen at the U.S. Naval Academy.

He concluded his career as Supreme Allied Commander of NATO forces in the Atlantic and Commander in Chief of the U.S. Atlantic Command, following his service as Vice Chief of Naval Operations and Chief of Naval Personnel.

Since his retirement, he has served as a member of the Defense Department's Roles and Mission Commission, as a senior fellow at the Center for Naval Analysis, as a director of the Retired Officers Association, and a director of Newport News Shipbuilding. He presently teaches ethics at the Naval Academy, holding the Distinguished Leadership Chair.

Our next witness is Lieutenant General Thomas Carney, who retired from the U.S. Army in 1994 after 35 years of service. He is a graduate of the U.S. Military Academy and has a master's degree in operations research and systems analysis from the Naval Postgraduate School.

Just before his retirement, he served as the Army's Deputy Chief of Staff for Personnel. In that position he was responsible for developing all plans, policies, and programs for the management of the Army's military and civilian personnel. Prior to holding that position, he commanded the Army's Recruiting Command, where he was responsible for the Army's efforts to recruit new soldiers.

General Carney has also held a number of combat commands, including serving as Commander of the Fifth Infantry Division and Assistant Commander of the 82nd Airborne Division.

An airborne qualified Ranger, he served two tours of duty in Vietnam, was awarded two Distinguished Service Medals, three Legions of Merit, three Bronze Stars, the Combat Infantryman's Badge for coming under fire in combat, and a Combat Jump Star for making a parachute jump into combat.

Since his retirement, General Carney has served as an independent management consultant to the Shell Oil Company, the Delaware Port Authority, the Deloitte & Touche accounting firm, and the National Academy of Public Administration.

Most recently, he served as the Deputy Librarian of Congress, where he acted as chief executive officer of the world's largest library.

Our next witness is professor Alan Dershowitz, the Felix Frankfurter Professor of Law at Harvard Law School.

Professor Dershowitz is a graduate of Brooklyn College and Yale Law School. After law school, he clerked for Chief Judge David Bazelon of the D.C. Circuit and Supreme Court Justice Arthur Goldberg. Since that time, he has taught at Harvard Law School.

He has authored dozens of books and articles on various subjects, and he has represented numerous high-profile clients, including O.J. Simpson, Mike Tyson, and Claus von Bulow.

Our next witness is Professor Stephen Saltzburg, the Howrey Professor of Trial Advocacy, Litigation and Professional Responsibility at George Washington University Law School.

Professor Saltzburg is a graduate of Dickinson College and the University of Pennsylvania Law School. After law school, he clerked for Judge Stanley Weigel of the U.S. District Court for the Northern District of California and Supreme Court Justice Thurgood Marshall. He taught at the University of Virginia Law School for many years before moving to George Washington in 1993.

He has also served as Deputy Assistant Attorney General for the Criminal Division and an Associate Independent Counsel. He has published numerous articles in the field of criminal law.

Our next witness is Professor Jeffrey Rosen, an Associate Professor of Law at George Washington University Law School.

Professor Rosen is a graduate of Harvard College and Yale Law School. After law school, he clerked for Chief Judge Abner Mikva of the D.C. Circuit.

In addition to his teaching duties, Professor Rosen is the Legal Affairs Editor of the New Republic and a staff writer for the New Yorker. He has authored numerous published articles.

We will begin with Judge Tjoflat.

It would be helpful if you could hold your remarks in chief to about 5 minutes. We will have the light on. If you go over, I certainly am not going to cut you off. But we have a big panel, and we have an inquiring membership up here.

Judge Tjoflat.

STATEMENT OF HON. GERALD B. TJOFLAT, U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, JACKSONVILLE, FL

Judge TJOFLAT. Thank you, Mr. Chairman.

As you indicated before you began the introductions, none of us here appears in behalf of any group, so I don't appear in behalf of the judicial branch or the judges of the Eleventh Circuit. I appear alone.

The views I express on the subject of the consequences of perjury and related crimes are my own views, though I think they are shared in general, as my own opinion, by most judges and probably by most of the Members of this committee. I am not here to suggest what the committee should do however.

Mr. HYDE. Your Honor, Mr. Conyers.

Mr. CONYERS. Mr. Chairman, with all due fairness to our sitting judges here, I want to explain to you that we have the cannons, we have the advice from the experts, and the fact that you are indi-

cating your own individual views are not exculpatory at all. And so, if you want, I will send down to you the ABA Code of Judicial Conduct, Cannon 3(b)9. That doesn't talk about your views.

We know you are not representing anybody but yourself. But, as a sitting judge, you are still under the Code of Judicial Conduct which precludes sitting judges from commenting on pending matters. Aware?

Judge TJOFLAT. I am fully aware. It is not my intent to comment on the merits of the matter before this panel.

Mr. CONYERS. I just wanted to bring this to your attention, sir.

Judge TJOFLAT. I am fully familiar with the cannons, and I appreciate your citing them.

The system of justice depends on three things in order to function as its framers intended. The first thing is an impartial judiciary. It is absolutely imperative that whoever is on the bench in a matter be impartial. The second thing that is indispensable to the administration of justice is a bar of lawyers who are committed to adhering to the code of ethics at all times, in all matters. And the third thing that is indispensable to the administration of justice is the oath taken by witnesses.

Those three things together under our system produce justice. It is like a three-legged stool in a way. If one of the legs or two of the legs break, then the stool collapses.

To the extent that this situation permeates the system, either because the oath is not obeyed or because lawyers do not adhere to the cannons of ethics or because judges don't carry out their oaths of office, disrespect for the rule of law is bred and the people mistrust the system. And when they do that, they resort to other means of resolving their disputes.

Now, today's hearing focuses on the third element, and that is the oath. In particular, what effect perjury has on the system of justice.

One way to illustrate what perjury can do to the administration of justice is to imagine a pool of water, a pond, and you drop a pebble into the pond, and the pebble is perjury, let us say, and it creates a ripple effect. The extent of the ripple effect depends on the extent to which the perjury is material, is important to the matter under inquiry, to the truth-seeking process.

Now, what happens with the ripple effect is that perjury of that sort implicates the judicial system and the parajudicial system, we will call it. It may require—for example, if it occurs in a case that is on trial, it may require a continuance of the case. It may require a mistrial. It may require more discovery.

In a criminal case, it could likewise produce the same effect, a mistrial, require a continuance.

If it is a pretrial proceeding of some sort, other machinery of the courts may have to be brought into play, because the natural tendency is to counteract perjury with other evidence in order to shed light on the truth. And when that occurs, the courts are taxed in the sense that they cannot be made available to other litigants who are standing in the pipeline ready to be served. The courts have to expand themselves and their processes to accommodate the perjury, and that is called obstruction of justice. The perjury in that circumstance impedes the due administration of justice. It causes,

as I say, delay and expenditure of judicial resources, and it precludes a summary disposition many times of cases.

With that, Mr. Chairman, I will conclude my opening remarks. I am sure there will be questions later.

Mr. HYDE. Very well. Judge Wiggins.

STATEMENT OF HON. CHARLES E. WIGGINS, SENIOR U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, LAS VEGAS, NV

Judge WIGGINS. Thank you. Thank you, Mr. Chairman.

I want to make it clear that I am appearing as an individual at the request of Chairman Hyde, that I am appearing today as an individual and not as a member of the Ninth Circuit. I am appearing here at the request of Henry Hyde, your chairman, and I am honored to be here in his company today.

I have a problem. I am just about blind, and I can't read my remarks, but I have prepared remarks, and I have submitted them. If you have questions of me, I will be sure that they are written down, and I will respond after I get back to my magnifying machine that permits me to read.

Well, the question asked by Chairman Hyde was whether I would state my views concerning the impeachability of perjury and obstruction of justice, and that is an easy question to answer. Of course, they are. They are impeachable. And I don't think there should be any debate on that subject.

The debate should occur ultimately before the House of Representatives, ultimately, on whether or not the President should be impeached. There is no question he is vulnerable. I think that that indicates to the committee what its responsibility is.

Is there probable cause to believe that President Clinton has committed impeachable offenses, namely perjury and obstruction of justice? We can question the legitimacy of the testimony, but I think there is little doubt, little doubt, that the President is vulnerable, could be impeached.

But that doesn't preclude a second judgment by you as a Member of the House to vote in the public interest on the question of whether the President should be impeached. That question troubles me greatly. I believe that the committee is within its responsibility to report articles of impeachment to the House, as a matter of law and as a factual matter, too. I confess that there are factual issues, too. I resolve those questions in favor of the committee voting to impeach the President but that doesn't preclude my second-guess.

As a full Member of the House when you are called upon, as I think you will be, called upon to vote as a Member of the House of Representatives, your standards should be the public interest. I confess to you that I would recommend that you not vote to impeach the President. I am not a fan of impeachment, as you know. But I find it troubling that this matter has grown to the consequence that it now occupies on the public screen.

When the President has lied—I think he has lied, but the issue is whether the President should be impeached, and you are ultimately going to be called upon to cast your vote in that regard. I would urge that you not vote to impeach the President.

I want to send some sort of clue to you on my own research concerning the impeachability of offenses. I find it very troubling that the Judiciary Committee seems to be willing to impeach a President for such vague concepts as abuse of power. I find that there is not any necessity that the President know that his acts were impeachable, that he was abusing power at the time he did them. That is true with respect to the Nixon—President Nixon impeachment experience, and it is true today.

There is some talk about impeaching the President for abuse of power. I think that is too vague. The President is entitled to notice, some notice, that he is performing acts that are wrong and that he did those acts notwithstanding that notice.

I think that the text of my remarks speak for themselves, and I will stop at this time, Mr. Chairman.

Mr. HYDE. Thank you, Judge Wiggins.

[The prepared statement of Judge Wiggins follows:]

PREPARED STATEMENT OF HON. CHARLES E. WIGGINS, U.S. CIRCUIT JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, LAS VEGAS, NV

I

My name is Charles E. Wiggins. I am a senior judge on the U.S. Court of Appeals for the Ninth Circuit. My chambers and residence are in the city of Las Vegas, Nevada. I am appearing here this morning at the request of Chairman Henry Hyde.

Before I begin, I wish to emphasize that I am appearing this morning as an individual offering my personal views. I do not presume to speak for the Ninth Circuit.

Also, I wish to advise the Committee that I am suffering from diabetes and that it has affected my vision. I am unable to read my remarks. However, I have prepared formal remarks for submission to the Committee. I will be testifying from my memory of what is a part of my formal submission to the Committee.

Two members of the present Committee may recall that I served as a member of this Committee during the investigation of Richard Nixon, some 25 years ago. It may be because of my previous experience that I have been invited as a witness today.

First, I would like to define the scope of my intended remarks. I will respond, of course, to the questions asked me by the Committee but I should like to avoid the question that may be on the forefront of your minds: whether President Clinton should be impeached.

As I see it, the responsibility for considering whether or not the President should be impeached is the sole responsibility of the House of Representatives. It will, possibly, indict the President for what it believes to be high crimes and misdemeanors. The responsibility of this Committee, as I see it, is much narrower. The Judiciary Committee is charged by the House of Representatives of conducting an investigation of the facts to ascertain whether or not there is probable cause to believe that the President has committed a high crime or misdemeanor. The affirmative response to that question is a necessary precondition to a second vote by the full House of Representatives as to whether or not the President should be impeached. I would like to confine my preliminary remarks this morning to the first question: whether there is probable cause to believe that the President has committed acts which are fairly characterized as high crimes or misdemeanors.

Many of you, I suspect, are willing to leap immediately to the second question of whether or not the President should be impeached. I urge that you restrain yourselves for now and confine your present interest to the first question.

II

The facts concerning the President's misconduct are fairly simply stated. The President was sued in a civil proceeding for sexual harassment by Paula Jones. During the pretrial discovery, the court authorized plaintiff's counsel to examine the President concerning his involvement with other employees. Plaintiff's counsel wanted to conduct the authorized discovery with respect to Monica Lewinsky. Miss Lewinsky thereafter had a conversation with the President in which the President advised her to prepare an affidavit and to deny that she had sexual relations with him. Although the President has acknowledged that he had an improper personal

relationship with Miss Lewinsky, he requested that Miss Lewinsky file a false affidavit in the Jones lawsuit.

Thereafter, the President was called as a witness before the grand jury and he repeated his story that he did not have a sexual relationship with Monica Lewinsky. Subsequently, the President acknowledged that his story was false or misleading and that he in fact had such a relationship with Miss Lewinsky.

I don't believe that any supporter of the President in these proceedings would maintain that the President is innocent of misleading the plaintiff's counsel in the deposition proceeding or before the grand jury. In short, the President lied in his testimony before both proceedings.

The question, then, is what is the House of Representatives to do about these lies. Specifically, you have inquired of me whether or not I believe the crimes of perjury and obstruction of justice give to the Congress the right to try the public official for impeachable offenses. It is clear that both perjury and obstruction of justice are significant crimes. Both are felonies. A review of the impeachment precedents indicate that at least one federal judge has been impeached by the House of Representatives because he committed the crimes of perjury and obstruction of justice. The absence of any contrary precedents is important to me. There is simply no law prohibiting the impeachment of the President for having committed the felony crimes of perjury and obstruction of justice. That power to impeach the President does not indicate that the President should be impeached; it merely refers to the right of impeachment in the House of Representatives.

I have heard said that in the context of the crimes attributed to President Clinton, the claim is made that they are so routine as to properly be overlooked. I have no doubt that many Americans have lied about their sexual escapades to their wives, but I am not so convinced that the right to lie should be recognized before governmental bodies charged with finding the truth. The grand jury was just such a proceeding. The President evidently lied when he had been sworn to tell the truth in proceedings before the grand jury. I don't believe that we can ever condone a deliberate lie made when given under oath to tell the truth. We should not condone the telling of a lie, but the issue here is whether we should remove the President from office for telling a lie.

III

Given the facts in this case, what is the Congress to do about it?

I would recommend that the House Judiciary Committee confine its attention to whether or not probable cause exists that the President has committed an impeachable offense. I don't have any hesitancy in finding that preliminary fact to be true and I don't think that many members of this Committee would disagree with that assessment. When the issue comes to a vote before the Committee, I would recommend that the members of this Committee cast their votes consistent with the law that the President is found to have committed a high crime or misdemeanor. Thereafter the issue would go before the House and I don't know whether a member of the House would be bound by the preliminary findings if he had a conviction that the public interest would be served by not impeaching the President. I tentatively would suggest that a member should cast his or her ballot on what the member perceives to be the public interest under the circumstances. But that does not mean that this Committee should shirk its responsibility to find that the President has committed an impeachable offense.

IV

I wish to comment briefly on the frequently stated notion that perjury is tolerated when the underlying offense is sexual misconduct. Nothing could be further from the truth. The substantive offense is perjury, a felony. Whether the underlying offense is a crime or not is immaterial. A defendant is not permitted to lie under oath with respect to sexual peccadillos. That is the law in the Ninth Circuit and is the law everywhere in the country.

But the further question before the Congress as a whole is whether the President must be removed from office for lying about such misconduct.

V

The essential prerequisite of an impeachable offense is that it be fairly characterized as misconduct involving treason, bribery or other high crimes and misdemeanors. There is considerable controversy in applying those words. I suppose it will always be thus. However, let me offer some guidelines to a finding of an impeachable offense.

First, I need not comment upon the crimes of treason or bribery. They are not involved in this case. The answer to the question of whether perjury or obstruction of justice is a high crime or misdemeanor is a relatively simple one. Of course it is. Many persons have been incarcerated for committing perjury in the context of relatively minor sexual offenses and obstruction of justice has been a commonly employed offense in such cases as well. Many men and women have been charged and sentenced on such offenses. We should simply acknowledge that perjury is a high crime and obstruction of justice is as well. If we do acknowledge it to be so, then President Clinton is not impeached as a result of such finding but he is vulnerable to impeachment. He may be impeached by the House of Representatives if it deems the offense to be sufficiently egregious.

As I view the impeachment process, the House Judiciary Committee is not only charged with determining whether probable cause exists or to find that the President has committed an impeachable offense. If you, as a committee, conclude that perjury and obstruction of justice are impeachable offenses, you may then proceed to the next question as to whether probable cause exists to find that the President has committed these acts. If you find that probable cause in fact exists, and the offenses are impeachable, I think you have a responsibility to conclude that the President should be impeached by the full House of Representatives. I do not presume to tell members of this committee how they should vote if called upon to vote as a member of the full House.

When the issue is presented to the full House of Representatives, I do not believe that the full House is limited to a narrow legal conclusion but can judge the matter in a broader sense. It may view the question of whether the President is not only vulnerable, but whether he in fact should be impeached.

Let me give you a few bench marks or guidelines that I find to be significant in deciding whether misconduct is an impeachable offense. First, we should recognize that the target of impeachment is an individual, in this case the President of the United States, and as such the misconduct attributed to him should not be the misconduct of an administration but personal misconduct of the part of the President. There is no question in this case that the misconduct was committed by President Clinton personally. But that was not always the case in the situation involving President Nixon. He and his administration were accused of a broad range of offenses that did not involve presidential misconduct personally.

Second, the President, if he is target of impeachment, must be given some reasonable notice that the misconduct alleged to him was wrong. Our constitution mandates such a finding as a part of due process and the President is entitled to that. I caution against charging the President with such vague offenses as abusing power. Although there is some controversy about this, the abuse of power is always judged after the fact. There is no necessary finding that the President knew that he was abusing his power. I find that to be a dangerous precedent and one that should not be emulated by future Congresses.

Third, after having considered the issue at some length, I have come to the conclusion that the misconduct alleged to the officer subject to impeachment should be a crime. A person is subject to knowledge of the law and to knowledge that his conduct is criminal if in fact it is so. Not all offenses, even if crimes, should result in the removal of the President from his office, but having committed those crimes, the President is vulnerable and should be charged if probable cause exists that the President has committed the offenses alleged.

As I see it, then, the responsibility of this Committee is narrow. It need not concern itself about whether an impeachable offense has been committed. Of course they have. The question before this Committee is whether to acknowledge that fact and report a possible bill of impeachment to the full House. Once the matter is pending before the full House, the question is a fundamentally different one. The question then is whether the President should be impeached for the misconduct found to exist by the House Judiciary Committee.

I don't mind confessing that if I had a vote on this Committee, I would vote to impeach the President. But before the full House of Representatives, I certainly am not sure. I am presently of the opinion that the misconduct admittedly occurring by the President is not of the gravity to remove him from office.

If the President is not subject to impeachment before the full House, what then should the Congress do about the President's admitted misconduct? That is a very difficult question. Certainly the President should not be permitted to walk away from his misdeeds without punishment. The options should rest with the House and the Senate as to whether or not the President should be sanctioned. I think that he should be.

I believe that the President's reputation is important to him and I believe that money is important to him as well. If the President is criticized by a formal vote

of the House and Senate, that may be enough but I would recommend that both parties explore the possibility an economic sanction against the President as well—something on the order of a million dollars.

VI

Let me summarize what I have intended to say in the body of my remarks. First, there is substantial disagreement in the Judiciary Committee but that should be resolved by a vote. The vote should occur at the earliest possible date. The question to be voted upon is whether probable cause exists to find that the President of the United States committed impeachable offenses, namely perjury and obstruction of justice. I personally conclude that the President is properly indicted by the Judiciary Committee for having committed those offenses. If the Committee so concludes, it should pass promptly a Bill of Impeachment to the full House of Representatives. If, on the other hand, the Committee does not so conclude, the matter is over at that point.

Second, the matter should be brought promptly to a vote by the full House. The question before the full House is not whether probable cause exists, but whether the President should be impeached. I conclude that the President should not be impeached and would so vote in the full House.

If, on the other hand, a majority in the House concludes that the President is subject to impeachment and should be impeached, the issue should go to the Senate for their consideration. Both votes before the House should occur this year and should not entail substantial acrimonious debate.

The Senate can consider the matter at its leisure next year. But I would hope that it resolves the issue of whether the President is guilty of impeachable offenses promptly.

I would hope that the Senate in consultation with the Congress would consider an appropriate sanction to be levied against the President.

Mr. HYDE. Judge Higginbotham.

STATEMENT OF HON. A. LEON HIGGINBOTHAM, JR., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, WASHINGTON, DC

Mr. HIGGINBOTHAM. Mr. Chairman, when I was 35 years old, about at the age of Congresswoman Waters, I became a U.S. District Judge. I had that coveted honor for 29 years. I retired about 5 years ago, so that I am talking solely as an individual. But I have enough absolute confidence to say to you that I do not speak only for myself. My wife read this speech, and she concurs.

I have in my first two books spent hundreds of hours going over Farrand and Elliot, who were the two prior major scholars who give us the whole American legal history; and maybe I should start by quoting them. But as I listened today and as I have heard you before, I don't think what this illustrious body needs are quotes from Madison or Mason or Benjamin Franklin but quotes from a person known as Luther Standing Bear, a member of the Lakota tribe who said, "Thought comes before speech."

The more I have reflected on it, it seems to me that that is the critical issue: Do we have the capacity, when dealing with one of the most important constitutional issues which this committee will ever have, to pause and to give thought before you speak and before you vote.

I have filed a very detailed statement, with all of the things which academicians do, with the footnotes which will satisfy those who want footnotes. And as I listened to the debate this morning, I heard a spectrum of profoundly conflicting views. Some argued very convincingly that there is a scintilla, or maybe more than a scintilla, of evidence to justify a perjury prosecution. And others, I thought with extraordinary good sense, question whether this case

had the probative weight to make the critical judgment that is necessary.

And I came to the conclusion that I could not put your thoughts together, and therefore, in my document, I used the words which every great appellate lawyer uses when you want to test the core, and the phrase is, "assuming arguendo," is there a cause of action? Assuming arguendo that all of the adverse evidence that has been alleged by my adversary, is there a prima facie case?

And I will assume for the purposes of analytical discussion that some reasonable people could find a prima facie case. But if you are going to understand my good friend Luther Standing Bear, that is not the end of the thought, but only the beginning, and the thought issue has to be if there is a prima facie case of perjury, does that establish a basis for the unique punishment inherent in impeachment.

Now, Justice Frankfurter, and I don't have to tell my good friend Elliott Richardson because he heard it so many times, would often say, if I can define the question, I can determine the answer. For me, the proper question is, even if there is perjury, is there a basis for impeachment? And in the document which I have submitted to you, quoting and relying on the historians who have appeared before you, Professor Holden of Virginia, Professor Sunstein and others, I don't believe that this case reaches the narrow category of egregious or large-scale abuses of authority that comes from the exercise of distinctly Presidential power. That does not mean that there is any precedent to justify the President's sexual conduct, but we are not talking about grand theater, we are talking about a profound constitutional inquiry which few generations of Congressmen have ever had to make. And it is that foundation from which I would like to address my comments to you.

And when you have been teaching in law school, the one thing you always try to test the students on is a hypothetical. You are much too smart to be students, and I am much too old to not be a professor. Let me give you what, if I were teaching my class at Harvard, would be the hypothetical I would present to them.

I would say, suppose that on January 17, 1998, and on August 17, 1998, which are the two dates in which President Clinton testified, that he appeared before a grand jury and that his testimony was that when he was driving his automobile in a 50-mile-per-hour speed zone, that he said he was going 49. But the record demonstrates beyond a reasonable doubt that he was going 55, and it would demonstrate that he knew that he was going 55, and therefore, you have perjury material to that inquiry. Could the President of the United States under those circumstances be removed from office because he gave a false statement about the speed of his car in a grand jury inquiry?

Those of you who use the word perjury in the abstract, as if it is a "per se" formula which covers everything, then it would be impeachable. I submit to you that perjury has gradations, and I spent a lot of time in my paper suggesting to you that there are gradations of perjury. Some are serious, and some are less. And though I do not applaud the President for what he did, for impeachment purposes there is not much difference between someone who testified falsely on a speeding incident than someone who testified

falsely about his relationship in a sexual matter voluntarily with a private person. So therefore, that is one point I think you have to clarify: Are you going to follow a per se perjury rule, or will you look at gradations? We look at gradations of perjury even under the sentencing rules, and I cite them here to you.

Now, let me press the doctrine a little more. The two ladies who testified today, Pam Parsons and Barbara Battalino, I respect them as decent human beings who, like all of us, or maybe like me, have frailties; who may not have had the level of perfection which some of you have. So they have frailties, and they were sentenced. But what is the relevance? What is the probative relevance of what they did compared to impeaching a President, one who got more than 49 percent of the votes of the citizens of this Nation? When Ms. Parsons and Dr. Battalino were sentenced, the President was not removed. But in the *Jones* case, there was a powerful concurring opinion by Justice Breyer, and in that concurring opinion, he said the President is the most indispensable person in the government. You cannot equate the Presidency of the United States with the basketball coach from South Carolina, and that takes not a thing from her excellence and the human empathy which we must have for her.

And there are other concerns I had when I heard the word “double standards.” And if you were a student in my class, I would have started a real Socratic inquiry. What do you mean about double standards? Under the statute, under the statute the President of the United States can be treated just like they were. The only difference is a time delay until January 20, 2001. It is not that he has immunity, it is a question of delay, and the Founding Fathers when creating this Constitution were concerned about the complexity of government that they had a whole series of rules—

Mr. COBLE. Mr. Chairman, Judge, pardon me for interrupting you, but I know the light has been on for about 10 to 12 minutes.

Judge HIGGINBOTHAM. I apologize.

Mr. HYDE. I was going to ask the judge if he could bring his remarks to a close.

Mr. COBLE. No discourtesy to you, I was just thinking about the other folks on the panel.

Judge HIGGINBOTHAM. An eminently fair comment. So let me look at Congress.

Mr. FRANK. That is a terrible way to repay fairness, Judge.

Mr. COBLE. Mr. Chairman, at least I tried.

Judge HIGGINBOTHAM. If you are talking about double standard, look at *Dombrowsky v. Eastland*, which stands for the proposition that Members of the U.S. Congress can go on the floor of the House and commit what in a private setting would be libel. They can say things, I know none of you do it, which are malicious, which are even fraudulent, and you have absolute immunity from any liability whatsoever, and that has been applied to judges in *Stump v. Sparkman* to prosecutors in *Imbler v. Pachtman* and to witnesses in *Briscoe v. LaHue*. So therefore, we don't have a single standard in the operation of our society; we do have some situations of special privilege.

And I thank you, Mr. Chairman, for your extraordinary indulgence of me.

Mr. HYDE. Thank you, Judge.
 [The prepared statement of Mr. Higginbotham follows:]

PREPARED STATEMENT OF HON. A. LEON HIGGINBOTHAM, JR.,¹ PAUL, WEISS,
 RIFKIND, WHARTON & GARRISON, WASHINGTON, DC

I. "THOUGHT COMES BEFORE SPEECH"

Mr. Chairman, it is a coveted and extremely challenging honor to speak to this distinguished Committee. Each member of this Committee is at a critical fork in the road of constitutional inquiry. I cannot think of any judgment that will, in the long run, have more profound significance to the future of our country and to our citizens than your decision as to whether, on the evidence before you, Articles of Impeachment should or should not be filed against the President of the United States. Although on several occasions Congress has declared war, this is only the third time that the Committee on the Judiciary has seriously considered whether Articles of Impeachment should be issued against an American President. By the very infrequency that such proceedings have been initiated, and the polarization such proceedings could cause, we are confronted with a situation that requires the Judiciary Committee to be ever mindful of the potentially harmful consequences of any process that may have only a minuscule rationality.

My approach to this momentous problem is what a leader of the Lakota tribe named Luther Standing Bear once said: "*Thought comes before speech.*"

II. NO VALID BASIS TO VOTE FOR ARTICLES OF IMPEACHMENT

You have received a plethora of comments by premier scholars on the issue as to whether, after a fair reading of Article II of the U.S. Constitution,² the facts on the present record warrant the filing of Articles of Impeachment. I agree generally with the comments of Professors Matthew Holden, Jr., Cass R. Sunstein, Arthur M. Schlesinger, and Father Robert F. Drinan, who have testified before you, and I do not believe that, on the present record, there is a valid basis to vote Articles of Impeachment.

III. THE CONSTITUTIONAL BASIS FOR IMPEACHMENT

I recognize that there is intensive debate as to whether the record establishes that actual perjury was committed by the President. For the purpose of my analysis before this Committee, I will assume, *arguendo*, that the record has a *prima facie* basis for statutory perjury. But, even with a "finding" of criminal liability for perjury, a more relevant question remains unresolved—that is whether *this* case of statutory perjury constitutes a basis for impeachment of the President. It is my understanding that the Committee—or at least a majority of the Committee—has categorized the topic for discussion today as "The Consequences of Perjury and Related Crimes." I submit that a discussion of perjury in the abstract is not adequate to form a wise judgment on the more complex issue as to whether the President of the United States should be impeached, pursuant to Article II.

From my view, Professor Sunstein framed the issue flawlessly when he wrote:

. . . with respect to the President, the principal goal of the impeachment clause is to allow impeachment for a *narrow category of egregious or large-scale abuses of authority that come from the exercise of distinctly presidential powers*. On this view, a criminal violation is neither a necessary nor a sufficient condition for impeaching the President. What is generally necessary is *an egregious abuse of power that the President has by virtue of being President*. . . . Impeachment is generally foreign to our traditions and prohibited by the Constitution. Outside of [a special] category of cases, the appropriate course for any crimes is not impeachment, but a prosecutorial judgment *after* the President has left office, whether indictment is appropriate.

* * * * *

¹Chief Judge Emeritus (Ret.), U.S. Court of Appeals; Public Service Professor of Jurisprudence, John F. Kennedy School of Government, Harvard University; Senior Counsel, Paul, Weiss, Rifkind, Wharton & Garrison; Commissioner, U.S. Commission on Civil Rights.

²"The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

There are grave systemic dangers in resorting to impeachment except in the most extreme cases. The prospect of impeachment can be highly destabilizing to government, and in an era in which the opposing party and the mass media are likely to be aligned in accusing political opponents of criminality, there is a continuing risk that impeachment proceedings will become routine rather than exceptional. This risk is all the more serious in light of the central modern role of the American President, both domestically and internationally.³

IV. WOULD ALL ACTS OF PERJURY CONSTITUTE A BASIS FOR IMPEACHMENT, REGARDLESS OF THE FACTUAL CONTEXT?

My discussion today will address three questions. The first question is the *sine qua non* issue for this Committee's consideration: whether *all* acts of perjury, regardless of the factual context, warrant a Congressional committee voting for an Article of Impeachment. In other words, is any incident of perjury, on any matter, on any subject, *per se*, in and of itself, a basis for impeachment of a President? The second question for consideration is: If some acts of perjury by a President can rise to the level of impeachable offenses and other acts of perjury do not, then, what is the limiting principle that differentiates the two types of perjury? The final question is: If the perjury of which the President has been charged is not impeachable under the Constitution, as I argue, then, what, if any, permissible responses remain for addressing the President's behavior?

The first question is whether *all* types of perjury by a President are *per se* impeachable offenses. Let us examine the concept of *per se* perjury by setting up a factually specific hypothetical. Suppose that in either January or August 1998⁴ President Clinton testified under oath, but in this hypothetical, he was not asked about sexual matters, but was questioned about his driving record. Let us assume that the President, at some point before giving his testimony, was cited for driving his car at a speed of 55 miles-per-hour in a 50-mile-per-hour speed zone. Suppose further that, when the President was questioned, again under oath, he falsely testified that he was only driving 49 miles-per-hour on the date in issue. Would that false statement about the speed of his car constitute a valid constitutional basis for this Committee to issue a proposed Article of Impeachment? I submit to you that it would be grossly improper to impeach a President under such a factual scenario, because perjury regarding a 55-mile-per-hour traffic offense does not rise to the level of "Treason, Bribery, or other high Crimes and Misdemeanors" about which the framers were concerned when they drafted Article II. Is perjury about a traffic offense different than perjury about a sexual matter involving consenting adults? I submit that as to impeachment purposes, there is not a significant substantive difference between the hypothetical traffic offense and the actual sexual incident in this matter. The alleged perjurious statements denying a sexual relationship between the President of the United States and another consenting adult do not rise to the level of constitutional egregiousness that triggers the impeachment clause of Article II.

V. ARE THERE GRADATIONS OF PERJURY?

If perjury is not *per se* impeachable, the purist might demand that we draw a bright line that clearly delineates between impeachable and non-impeachable perjury. However, as Justice Holmes said on two different occasions: "Neither are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types";⁵ and "I do not think we need trouble ourselves with the thought that my view depends upon differences of degree. The whole law does so as soon as it is civilized."⁶

As serious a crime as perjury is, there exists a spectrum of gravity with regard to false statements. As judges, we follow Congress' instructions—*your* instructions—to recognize this spectrum every time we sentence an individual for perjury under the U.S. Sentencing Guidelines (the "Guidelines"). Section 2J1.3 of the Guidelines mandates that we increase the base offense level, and therefore the sentence, of a

³Professor Sunstein testified before the House Committee on the Judiciary on November 9, 1998, and has written and presented a comprehensive essay as the Roberts Lecture at the University of Pennsylvania on November 10, 1998.

⁴The President testified in his deposition in the *Jones v. Clinton* case on January 17, 1998, and before the Grand Jury on August 17, 1998.

⁵*Irwin v. Gavit*, 268 U.S. 161, 168 (1924).

⁶*LeRoy Fibre Company v. Chicago, Milwaukee & St. Paul Railway*, 232 U.S. 340, 354 (1913) (Holmes, J., concurring).

defendant convicted of perjury by different degrees depending on the harm caused by the false statement.

Section (b)(1) requires us to increase the offense level by 8 if the offense “involved causing or threatening to cause physical injury to a person, or property damage, in order to suborn perjury.”

Section (b)(2) requires us to increase the offense level by 3 if the perjury “resulted in substantial interference with the administration of justice.”

Section (c)(1) provides that “if the offense involved perjury in respect to a criminal offense,” we must use the offense level for an accessory after the fact if that offense level would be higher.

At one end of the spectrum are examples of clearly impeachable perjury, such as providing false testimony that causes grave injury to the country. For example, if the President had committed treason by selling nuclear secrets to a foreign agent, it could cause grave injury to the country and it would be an impeachable offense—and it would also be an impeachable offense if he lied about his treason.

At the other end of the spectrum are examples of perjury that clearly do not merit impeachment under the high constitutional standard.⁷ I provided one such example earlier. If the President had lied about the commission of a traffic violation, I submit that his false testimony would not cause anywhere near sufficient injury to the nation to warrant impeachment.

To my mind, President Clinton’s alleged perjury regarding consensual sexual relations clearly falls on the end of the spectrum with my example of perjury regarding a traffic violation. Assuming his statements were false and material, they did not cause anywhere near the gravity of injury required by the Constitution for impeachment.

I cannot in the abstract articulate exactly where the line between impeachable and non-impeachable perjury *does* fall. Instead, I can only urge that you allow yourselves to be guided by a principle of restraint in interpreting an ambiguous area of constitutional inquiry, particularly where the failure to exercise such restraint could result in the nullification of the will of the majority of the electorate, not to mention the profound weakening of the institution of the presidency.

VI. THE ALLEGED DOUBLE STANDARD ISSUE

Judge Bowman stated in his Eighth Circuit opinion in *Jones v. Clinton*,⁸ that “[t]he President of the United States, like all other government officials, is subject to the same laws that apply to all other members of our society.” Some persons make the deceptive contention that there is a double standard at work, in that the President is being treated differently than “everyone else.” They assert that if the President is not impeached, he will not be held responsible for an act for which an ordinary citizen would be sanctioned.

It is my understanding that the Committee has invited two persons to testify who have been convicted of perjury in federal court. I presume that the inference that some seek to make is that President Clinton should be treated the same as they were, and that he should not get some “special privilege.” However, in reality, the President is not receiving any “special privilege.” The Justice Department may prosecute Mr. Clinton for perjury in 2001 or earlier,⁹ just as Ms. Barbara Battalino and Ms. Pam Parsons were prosecuted. President Clinton is subject to the *exact same* criminal penalties to which Ms. Battalino and Ms. Parsons were subject. Reliance on the duality “problem” as a basis to initiate an impeachment of the President is fallacious and unconstitutional. It reminds me of what Samuel Johnson once said: that we should avoid arguments that are “too foolish for buffoonery and too wild for madness.”¹⁰

Right now, the issue before the Committee is whether or not President Clinton should be *impeached*. The testimony provided by Ms. Battalino and Ms. Parsons is wholly irrelevant to this inquiry because this alleged differential treatment goes to the realities of maintaining a federal government on a stable and rational basis. Ms. Battalino and Ms. Parsons did not receive 379 electoral votes and 47,401,054 (49.3%) of the popular vote to put them in office as the President of the United

⁷ Professor Sunstein asserts that an originalist understanding of the Constitution mandates that impeachment be used only in those rare cases in which it can be proven that the President engaged in a large-scale abuse of presidential power. Put differently, to be impeached, the President must have abused a distinctly presidential power and that abuse must have been of such a scope and magnitude as to cause grave injury to the country.

⁸ 72 F.3d 1354, 1358 (8th Cir. 1996), *aff’d*, 520 U.S. 681 (1997).

⁹ It is an open question as to whether or not the President may be criminally prosecuted while in office.

¹⁰ See Lillian B. Miller, “The Dye is Now Cast,” at 163.

States. Their immediate prosecution would not raise the destabilizing impact that a prosecution of the President might. Their testimony has limited probative value as to the appropriateness of an *impeachment* inquiry against President Clinton. I urge the Committee to remain focused, and not to be swayed by the irrelevant testimony of Ms. Battalino and Ms. Parsons.

VII. THE "ABUSE OF POWER" ISSUE IN THE NIXON AND CLINTON PROCEEDINGS—ARE THEY THE SAME?

One of the "related crimes" about which I have been asked to testify is "abuse of power." As an initial matter, I observe that there is no federal crime of "abuse of power" or "misuse of power." The words do not appear in any criminal statute of which I am aware.

To the extent that the Office of the Independent Counsel ("OIC") relies upon similar language in Article II of the Articles of Impeachment filed against President Richard M. Nixon, the two matters concern starkly different behavior. The conduct of President Nixon consisted of a *continuous* and *systematic* attempt to deprive citizens, deemed by the President to be his political enemies, of their liberty, by bringing to bear the awesome power of various agencies of the federal government. The allegations against President Nixon evince an abuse of *distinctly Presidential powers* in an attempt to *oppress political enemies and other private citizens*.

- Using the Internal Revenue Service ("IRS") to engage in improper tax audits and investigations of political enemies.
- Attempting to obtain confidential information maintained by the IRS concerning political enemies.
- Using the Federal Bureau of Investigation ("FBI"), the Secret Service and other executive personnel to undertake improper electronic surveillance and other investigatory techniques with regard to political enemies, and permitting improper use of materials obtained thereby.
- Creating and maintaining a secret investigative unit within the Office of the President, which utilized the resources of the Central Intelligence Agency ("CIA"), engaged in covert and illegal activities, and attempted to prejudice the constitutional rights of an individual to a fair trial.
- Failing to act when subordinates impeded the investigation into the break-in of the headquarters of the Democratic National Committee.
- Interfering with executive branch agencies, including the FBI, CIA and Department of Justice.

The charges by the OIC against President Clinton are not comparable to those leveled against President Nixon. First, the charges against President Clinton are based on the weakest of evidence, as revealed by the phraseology used by the Independent Counsel in his testimony before this Committee. For example, each charge relating to the alleged abuse of power by the President is prefaced by the words "the evidence suggests."

Moreover, the allegations against President Clinton, even if true, do not reveal the kind of *systematic and repeated abuse of distinctly Presidential power, in derogation of the constitutional rights of citizens of the United States*, exemplified by the charges against President Nixon. Rather, they relate to the purely private matter of the *Jones v. Clinton* case, his relationship with Ms. Lewinsky and their sequelae.

VIII. THE OBSTRUCTION OF JUSTICE ISSUE

The obstruction of justice charge levied against President Nixon was based on actions that were far more serious than those which President Clinton allegedly committed. President Nixon was accused of obstructing the investigation of the unlawful entry into the headquarters of the Democratic National Committee in order to secure political intelligence. As part of this obstruction, President Nixon allegedly made false statements to investigators, withheld material evidence, counseled witnesses to give misleading statements, and condoned secret payments intended to influence the testimony of key witnesses.

President Clinton is being accused of obstruction of justice because he allegedly lied under oath about a private relationship between two consenting adults.¹¹ Quite simply, even if one assumes that the President lied about the relationship between him and Ms. Lewinsky, such a lie does not rise to the level of egregious conduct

¹¹According to Mr. Starr, the evidence also "suggests" that President Clinton reached an agreement with Ms. Lewinsky that each would make false statements under oath; that President Clinton improperly provided job assistance to Ms. Lewinsky; that President Clinton coached a potential witness (Ms. Betty Currie) with a false account of relevant events; and that President Clinton attempted to conceal gifts which had been subpoenaed from Ms. Lewinsky.

which is required to support an impeachment inquiry against a President. Mr. Starr alleges that President Clinton asserted legally baseless privileges to conceal relevant information from the grand jury. However, it is worth noting that Justices Ginsburg and Breyer both argued, in dissent, that the Supreme Court should have heard the issue of whether or not there is a Secret Service evidentiary privilege. Thus, that asserted privilege is clearly not baseless.¹²

IX. ARE THERE DIFFERENT CRITERIA IN PRESIDENTIAL AND JUDICIAL IMPEACHMENTS?

As a matter of constitutional law, there is a higher threshold the House must meet in order to impeach a President as compared to its constitutional authority to impeach a federal judge.

Looking at the text of the Constitution, one finds that judges are subject to the “good behavior” clause of Article III, Section 1, while the President, Vice President and other civil officers are not. While constitutional scholars disagree on whether this language lowers the threshold for the impeachment of judges, it certainly ought to give one pause before applying the same impeachment standards to the President that one would apply to a federal judge.

In addition, and more importantly, there are structural, functional and pragmatic differences between the presidential and judicial impeachment processes.

First, the President is one of only two civil officers of the United States *popularly elected* (for all intents and purposes) by a *national constituency*. Judges are appointed for life by the President and the Senate, and can claim the support of *no* constituency, national or local.

The President is subject to political checks and balances other than impeachment—the requirement of running for re-election after 4 years, the *constant* interaction between the legislative and executive branch (on legislation, appointments, legislative oversight, etc.), the President’s concern for his own party in the next Congressional and Presidential election, and so on. The *only* checks on a federal judge are one’s conscience and the threat of impeachment.

The President can be ousted from office by the people after his current term ends, or in the case of a second-term President such as President Clinton, is automatically disqualified to serve another term by virtue of the 22nd Amendment. Judges hold office for life. The need is far more pressing in these circumstances, therefore, to remove a judge who is dangerous, corrupt or a criminal than to remove a President with similar attributes. It would be especially damaging to the nation for a federal officer to draw a salary from the federal government *while in prison*, and then, what is worse, to countenance his or her *returning to office after prison*. Such concerns exist with regard to federal judges—indeed, both Judges Claiborne and Nixon were impeached after having been sentenced to prison—but not the President.

As Justice Breyer has said, and few can disagree, the President is the “sole indispensable [person] in government.”¹³ There are more than 1,100 federal judges. To remove a sitting President is to decapitate an equal and co-ordinate branch of government with one fell swoop.

The application of a different standard to the impeachment of the President than the impeachment of federal judges is also not without precedent in this body. The House Judiciary Committee in 1974 *declined* to file an Article of Impeachment against President Nixon based on the allegations that he filed false tax returns from 1969 through 1972. The Committee’s decision was based largely on its determination that an instance of private misconduct, even if criminal, did not amount to an impeachable offense, as opposed to *an extreme abuse of distinctly Presidential authority*. By contrast, the Committee filed Articles of Impeachment against Judges Claiborne, Nixon and Hastings alleging similar conduct. The “common law of impeachment” has thus forged a distinction between a President and federal judges for impeachment purposes.

X. YOUR VOTE AND AMERICA’S RENDEZVOUS WITH DESTINY

I do not believe that perjury is a trivial matter and, as I have noted in several opinions while serving on the U.S. Court of Appeals for the Third Circuit, perjury is a serious offense.¹⁴ But, I submit that the impeachment clause was not intended

¹² See *Rubin v. United States*, No. 98–93, 1998 WL 407152 (U.S., Nov. 9, 1998) (Ginsburg, J., dissenting from denial of certiorari); *id.* (Breyer, J., dissenting from denial of certiorari).

¹³ *Clinton v. Jones*, 520 U.S. 681, 713 (1997) (Breyer, J., concurring in the judgment).

¹⁴ See, e.g., *Fraternal Order of Police v. City of Philadelphia*, 859 F.2d 276 (3d Cir. 1988) (noting that “the fifth amendment does not protect a citizen against the consequences of committing perjury”); *Government of the Virgin Islands v. Martinez*, 831 F.2d 46 (3d Cir. 1987) (noting that

Continued

to give unlimited options to either an unrestrained committee of Congress or a super-aggressive Office of the Independent Counsel seeking to use the label of perjury to prosecute a President for what primarily was a dereliction of sexual morals, where the underlying sexual acts did not constitute a grave injury to the country.

I submit that your individual vote will have a profound impact on the entire history and future of the United States of America. I would remind you once again of the incisive words of Luther Standing Bear: "*Thought comes before speech.*" I pray that this Committee will, in a non-partisan way, rise to its highest potential of statesmanship by giving this issue its calm and insightful *thought* before speaking and casting a vote that will affect America's rendezvous with destiny.

I wish to acknowledge the valuable contributions of my colleagues Tiffany S. Bingham, Carol Derby, Michael J. Mannheimer, Joanne L. Monteavaro, Shaun M. Palmer, Joseph Sansone, Amy B. Vernick and Linda Y. Yueh.

Mr. HYDE. Mr. Richardson, Ambassador Richardson.

**STATEMENT OF HON. ELLIOT L. RICHARDSON, MILBANK,
TWEED, HADLEY & McCLOY, WASHINGTON, DC**

Mr. RICHARDSON. Mr. Chairman and members of the committee, thank you for giving me this opportunity to share with you my perspective on the responsibilities thrust upon you by President Clinton's conduct. It is a perspective gained from experience not only as a U.S. Attorney General, but also as a State attorney general and U.S. attorney. In fact, I may well be the only person who has held all three of those jobs. I will be glad, of course, to respond to your questions and hope that my testimony will in the end have contributed to saving more time than it cost.

As you have reminded us, Mr. Chairman, the principal focus of this hearing is on the consequences of perjury and related crimes. That certainly has to be the area of your and your fellow citizens' primary concern. It does not follow, however, that there needs to be comparable emphasis on evidentiary matters. There is no material difference, indeed, between the Starr report's allegations and the President's admissions: It is accepted that he did in fact over a period of months deny, withhold and misrepresent the truth as to his relationship with Monica Lewinsky. This committee, moreover, has no need to decide whether or not these lies constitute perjury as that term is defined by criminal law. Taking into account the number, persistence, and context of these lies, as well as the fact that they were deliberately intended to mislead bodies officially charged with pursuing the truth, you could reasonably regard them as warranting impeachment, even though they may not fall within the definition of perjury.

But Article II, Section 4 of the Constitution specifies that on conviction by the Senate for an impeachable offense, the only available penalty is removal from office. To contemplate impeachment, therefore, is to raise the question of whether or not the circumstances justify so drastic a penalty.

The members of this committee, I submit, already have all the information they need on which to base their own individual answers to this question. If a majority of you conclude that the answer to this question should be no, it is obvious that the actual adoption by the House of Representatives of impeachment charges would be pointless. Worse, such action would automatically trans-

the Supreme Court "has consistently emphasized the gravity of perjured testimony"); *United States v. Messerlian*, 832 F.2d 778 (3d Cir. 1987) (finding that "the evidence of perjury as an 'overt act' of conspiracy could legitimately support a conviction on Count 2 by a rational trier of fact").

mit those charges to the Senate for trial, thus indefinitely prolonging final resolution of this matter. The Senate itself, meanwhile, would have no alternative but to convict or acquit: No intermediate outcome would be possible.

This body, by contrast, is in a position right now to submit to the House as a whole its best judgment as to an intermediate course. And since, unlike a judicial sentence, such an outcome—censure or rebuke, with or without a formal acknowledgment of guilt—cannot be made proportional in severity to the seriousness or number of the offenses charged, an attempt by the House to make the grounds for its intermediate action seem more precise would serve no useful purpose.

To my mind, the intermediate course offers the most appropriate and least destructive solution. The initial wrongdoing was not criminal, and did not, in contrast to that of Richard Nixon, entail the abuse of power. Given a President's unique status as a Chief Executive whose authority derives from a majority vote of the American people, his crimes or misdemeanors should, in order to justify his removal, have to be higher than those at issue here.

Thank you, Mr. Chairman. That completes my prepared statement.

Mr. HYDE. Thank you, Mr. Richardson.

[The prepared statement of Mr. Richardson follows:]

PREPARED STATEMENT OF HON. ELLIOT L. RICHARDSON, MILBANK, TWEED, HADLEY & McCLOY, WASHINGTON, DC

Mr. Chairman and members of the committee: Thank you for giving me this opportunity to share with you my perspective on the responsibilities thrust upon you by President Clinton's conduct. It is a perspective gained from experiences as a U.S. Attorney, State Attorney General, and Attorney General of the United States. In fact, I believe that I'm the only person who has held all three of these jobs. I will be glad, of course, to respond to your questions and hope that my testimony will in the end have contributed to saving more time than it cost.

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Thank you, Mr. Chairman. That completes my prepared statement.

Mr. HYDE. Admiral Edney.

STATEMENT OF LEON A. EDNEY, ADMIRAL, USN (RET.)

Mr. EDNEY. Good afternoon, Mr. Chairman. It is a pleasure to appear before your distinguished committee today. I ask that you bear with my voice today. One of the benefits of reaching my stage in life is that you get to take your grandchildren to the Macy's Day Parade. Those that witnessed it this year, it rained the entire time, but I did enjoy my time in the Big Apple.

In view of my particular experience as a career military officer serving this Nation's defense needs for 37 years, I will focus my remarks on the importance of ethics and integrity in the military chain of command of this great country, and at the top of that chain of command, as we all recognize, is our Commander in Chief.

We live in a society that more and more is transmitting a confused message on the subject of ethics and integrity, so much so that it often makes one wonder if we are losing our way. Faced with this reality, the Armed Forces have concluded, all personnel must be inculcated repeatedly with the requirement and expectation that military leadership must evolve from a foundation of trust and confidence. Ethics and integrity of our military leadership must be much higher than the society at large, and even the elected officials that serve that society. Success in combat, which is our business, depends on trust and confidence in our leaders and in each other. Ethics and integrity are the basic elements of trust and confidence, both in our military leadership, both from above and, more importantly, from below.

So today in our military, we are asking our people, what is right? Why do what is right? The moralist answer is, because it is the right thing to do. Our answer is, because the trust and confidence required of our profession demands it. This trust and confidence must exist up and down the chain of command where operations require execution of orders that endanger lives. Doing what is right based on the whole truth must be natural and automatic to the American military officer.

Whenever one reflects on the need for ethics within the military profession as executed by those who have the privilege of leading the American soldier, sailor, marine, airman and Coast Guardsman and the duty of defending our national security interests, I believe it is necessary to reflect on the roots of our Nation, for it is there where the higher calling of this Nation, some call it a moral purpose that we serve today, began. We must never forget the values that this Nation was founded on. They are marked forever by the lives of those who fought and gave the ultimate sacrifice for those principles and beliefs.

I would submit to you, while there are many effective styles of leadership, two essential ingredients of successful military leadership are integrity and ethics. Rank and high positions do not confer privileges. They entail unavoidable responsibilities and accountability. Young Americans, and that is who fights and loses their lives in our wars, and we should never forget it, young Americans in our military place their leadership on a pedestal of trust and confidence when they earn it. The troops have the right to expect unfailing professional performance and integrity from each level of leadership. As military leaders at all levels, we need to consistently display that match between words and deeds, between laws and compliance, between institutional values and behavior.

Now, the catch is this match must take place 24 hours a day. There is no duty time and that off time where you can let your hair down and not represent these basic values. There can be no compromise on this issue, when professionally the ultimate you can demand of a subordinate is that he or she lay down their life in the execution of your orders on behalf of this country.

When all is said and done, military leadership must have a moral base, a set of ethical values to keep us true to the high ideals of our forebears, who provided us the cherished inheritance of freedom and justice. The integrity of an officer's word, signature, commitment to truth concerning what is right, and acting to correct what is wrong, must be natural, involved and rise to the forefront of any decision or issue. Leadership by example must come from the top; it must be consistently of the highest standards, and it must be visible for all to see. Do as I say and not as I do won't hack it in our military. This country is firmly entrenched in the principle of civilian leadership of our military and the authority of the President of the United States. Therefore, I believe those who hold that leadership position to be credible should meet the same standards.

America and our Armed Forces have always stood on the side of right and human decency. You do not throw these core values away in the process of defending them. You also do not lower the bar of ethical standards and integrity when individuals fail to live up to them. We must continue to remove those who fall short and seek those who meet and exceed the requirements. Dual standards and less accountability at the top will undermine the trust and confidence so essential to good order and discipline, as well as mission success.

Mr. HYDE. I would remind you that you need to close.

Admiral EDNEY. The fact is these are core values for military leadership. Concerning what is right and what is wrong, there are any number of courses of action that they can take. Mistakes will happen and can be corrected, usually with a positive learning curve. To cover up mistakes and responsibility by lying or obstruction cannot be tolerated. The leadership of our Armed Forces must be based on principle, not litigious double-talk. Thus, the leadership trade of our military as well as the civilian leaders of the military must demonstrate above all else a commitment to integrity and ethics on a daily basis.

In summary, we must learn from our past mistakes, but we must get on with the business at hand and focus on the future, not our

wake. Military readiness and mission accomplishment depends on the trust and confidence and the integrity of our leader. The actions of the leader are more important than the words. It is important for those who lead to know what you stand for. It is also important to know what you won't stand for.

Finally, regardless of what the exit polls say, the character of a nation and its leaders does matter, and it matters most to those who are prepared to lay down their lives for that nation. Those entrusted with the defense of our Nation are in the risk-taking business.

Finally, our leaders must eschew obfuscation in all we do. Our national leaders must talk straight and with integrity on every issue. If we lie to ourselves as an institution, or as individuals within that institution, we are laying the seeds of our own individual and national destruction.

Thank you for the privilege of addressing this committee.

Mr. HYDE. Thank you, Admiral.

[The prepared statement of Mr. Edney follows:]

PREPARED STATEMENT OF LEON A. EDNEY, ADMIRAL, USN (RET.)

Mr. Chairman, I appear before your distinguished committee today to participate in a panel discussion addressing leadership and ethics as they relate to the current issues before this committee and the nation. In view of my particular experience as a career military officer serving this nation's defense needs for over 37 years, I will focus my remarks on the importance of ethics and integrity in the military leadership of this great country of ours. For the past 2 years, I have been the full-time occupant of the Distinguished Leadership Chair at the U.S. Naval Academy. This Chair is endowed by the private donation of one the Academy's alumni and therefore my remuneration is not paid for with government or taxpayers' dollars. I spend my time teaching ethics 3 days a week, leadership 2 days a week and participate in a Brigade-wide Integrity Development Program once a month. This is an indicator of the relevance and importance placed on these subjects by those charged with developing the ethical-based leadership required by our officer corps. While I provide this information as background, I appear before you today and make this statement as a concerned individual citizen and retired military officer; not as a representative of any organization with which I am currently affiliated.

We live in a society that more and more is transmitting a confused message on the subject of ethics and integrity, which makes one wonder if we are losing our way. In our last Presidential election, both candidates emphasized family values, one wanted two parents to be the center of the family responsibilities. The other felt it takes a village of caring people to raise our children; it seems to me both were right. When we look in the window of the American society to see how we are doing, the picture is not too comforting. Approximately one out of four babies born today is illegitimate and 25% of all children are being raised by a single parent. Even in the declining base of our more traditional two-parent families, both parents routinely work full-time jobs. It often appears we are more interested in raising wealth than our children. Consequently, TV viewing is up 60% among our children and scanning the Internet, not reading the classics, is a close second. Those interested in leadership and ethics development must ask this question: What ethical messages are our children getting from many afternoon TV talk shows as well as the prime time violence and comic titillation on TV in the evening? Now this same material is easily available on the Internet. Recent surveys indicate 70% of college students admit cheating at least once. You can buy books on how to cheat and succeed in most off-campus book stores. The suicide rate among teens is up 11% in the last 5 years. Crime and drugs remain dominant factors in our cities. More interesting is the fact that 50% of our crime involves employees stealing from employers. These are values and lessons of life that are getting transmitted to our youth. It is often a message that subtly implies: So what if it is wrong, everyone is doing it. This is the background from which our entry-level enlisted and officers are coming from.

Faced with this reality, the armed forces have concluded, all personnel must be inculcated repeatedly with the requirement and expectation that military leadership must evolve from a foundation of trust and confidence. The ethics and integrity of our military leadership must be much higher than the society at large and even the

elected officials that serve that society. Success in combat, which is our business, depends on trust and confidence in our leaders and each other. Ethics and integrity are the basic elements of trust and confidence in our military leadership, both from above and more importantly from below.

While the requirements for successful military leadership are clear, it is also clear we do not always meet these standards. At the end of the Gulf War, just 7 years ago, our military and its leaders stood at the pinnacle of professional performance and public esteem following the dramatic successes in the Gulf War. We led everyone's list of those for whom the public had trust and confidence. Since then we have had Tailhook as a watershed event. There have been serious sexual harassment and ethical behavior charges in all the services, many involving very senior leadership that have resulted in more than a dozen flag officers being removed from office for violations of integrity and ethics. The issue of chemical weapons exposure in the Gulf War raises questions concerning straight talk if not the integrity of the leadership with regards to our troops and the public. Leadership within the Army has been tarnished by Skin Head racial incidents at Fort Bragg, the revelations at Aberdeen and the alleged abuses of the former Sergeant Major of the Army. The tragic shoot down of friendly helicopters in Northern Iraq as well as several Navy and Marine air accidents also raised questions of confidence and integrity in the military training process. The Naval Academy had the EE Cheating Scandal in 1993-1994 plus a few highly publicized incidents of drug use and car thefts by members of the Brigade. The Marine Corps had cheating on exams at their Officers Basic School, the publicized tradition of blood pinning and the recent relief of a commander in the field for apparently advocating the destruction of any films documenting routine failures in flight discipline. Unfortunately, I could list more examples but the message is our house does not look in order on the issue of ethics and integrity, no matter where you look from the White House to the house next door. Whenever these disconnects between our standards of behavior and our actions occur, the solution is not to lower our standards. Rather, we must maintain the standards and improve our performance while holding those who fail accountable.

In the military profession, a breach of your integrity, ethics or honor is always accompanied by a leadership failure. The bottom line for our military leadership requirements is that integrity and ethics cannot be taken for granted or treated lightly at any level of training or interaction. All our personnel must be inculcated repeatedly with the requirement that military leadership must evolve from a foundation of trust and confidence in our ethics and core values of honor, courage and commitment to do what is right. Today we are asking our people, What is right? Why do what is right? The moralist answer is because it is the right thing to do. Our answer is because the trust and confidence required of our profession demands it. Doing what is right based on the whole truth must be natural and automatic for the American military officer. We need to clearly identify our core values and repeatedly reinforce them among all members of the armed forces so that they become second nature.

Whenever one reflects on the need for ethics within the military profession, as executed by those who have the privilege of leading the American soldier, sailor, airman, marine and Coast Guardsman in the duty of defending our national security interests, I believe it is necessary to reflect on the roots of our nation. For it is there where the higher calling of this nation, some call it a moral purpose that we serve today, began. Some current day thinking would have us believe that those who espouse a bridge to the past have no vision. I submit if the vision of the present is missing the values that this nation was founded on, we should strengthen that bridge to the past, for it is built on the lives of those who fought and gave the ultimate sacrifice for those principles and beliefs.

While there are many effective styles of leadership, two essential ingredients of successful military leadership are integrity and ethics. Rank and high positions do not confer privileges; they entail unavoidable responsibilities and accountability. Young Americans in our military place their leadership on a pedestal of trust and confidence when we earn it. They have the right to expect unflinching professional performance and integrity from each level of leadership. Military leaders at all levels need to consistently display that match between words and deeds, between rules and compliance, between institutional values and behavior. The catch is this match must take place 24 hours a day, there is no duty and then off time where you can let your hair down and not represent these core values. There can be no compromise on this issue in a profession where the ultimate you can demand of a subordinate is that they lay their life on the line in the execution of your orders.

When all is said and done, military leadership must have a moral base, a set of ethical values, to keep us true to the high ideals of our forbears who provided us the cherished inheritance of freedom. The integrity of an officer's word, signature,

commitment to truth, discerning what is right and acting to correct what is wrong; these must be natural, involved and rise to the forefront of any decision or issue. Leadership by example must come from the top, it must be consistently of the highest standards and it must be visible for all to see. Do as I say and not as I do just won't hack it! This country is firmly entrenched in the principle of civilian leadership of our military in the authority of the President. Therefore, those who hold that leadership position, to be credible, must meet the same standards.

America and her Armed Forces have always stood on the side of right and human decency. You do not throw these core values away in the process of defending them. You also do not lower the bar of ethical standards and integrity when individuals fail to live up to them. We must continue to remove those who fall short and seek those who meet and exceed the requirements. Dual standards and less accountability at the top will undermine the trust and confidence so essential to good order and discipline as well as mission success. The fact is, core values for military leaders and their civilian Commander in Chief remain in effect no matter where they are or what they are doing, 24 hours a day. When observed by anyone, they must reflect the institution's core values of respect for decency, human dignity, morality and doing what is right—in or out of uniform, on or off duty. I believe that ethical men and women have a conscience that warns you when you are about to cross the line from right to wrong. The true test of integrity for the ethical leader is doing what is right when no one is watching. He or she knows and that is all that is required to do what is right. Unfortunately, those few senior military and civilian officials that bring shame on themselves, their families and their country by ethical indiscretions were probably doing the same thing as more junior officials. It was not newsworthy then, but it was just as wrong. If in these cases the leader chooses to lie or otherwise avoid his/her responsibilities, the continuation of that military leadership is adverse to morale, good order and discipline and eventually combat effectiveness. As has been said on many occasions: "Habit is the daily battleground of character."

I agree with Stephen Crater's three requirements for ethical action on issues of integrity. First, discern what is right and what is wrong based on all the facts and the truth. This takes pro-active involvement not selective avoidance. Second, you must act on what you discern to be wrong, even at personal cost and I might add the corrective action must be effective. And third, openly justify your actions as required to meet the test of right and wrong. Under this clear definition, whenever an individual or collective breakdown in our core values is observed, immediate corrective action must be taken. There are any number of courses of action available and the best one will depend on the circumstances at the time. What is never acceptable, is the toleration of observed wrong actions or the acceptance of an environment that allows wrong actions to occur. To allow this is a fundamental breakdown in the integrity of the leadership responsibilities and trust placed in the acceptance of one's oath of office. Above all else, military leadership is a commitment to seek out responsibility, to understand and accept accountability, to care, to get involved, to motivate, to get the job done right the first time, through our people. Mistakes will happen and can be corrected, usually with a positive learning curve. The cover-up of mistakes and responsibility by lying or obfuscation cannot be tolerated. The leadership of our Armed Forces must be based on principle, not litigious double talk. Thus the leadership traits of our military as well the civilian leadership of the military must demonstrate above all else, a commitment to integrity and ethics on a daily basis. This must be most visible at the top, if we as a nation are to meet our constitutional responsibilities to "Provide for the Common Defense" now burdened with the mantle of world leadership.

In closing, I offer the following summary observations on ethics and military leadership:

- We must learn from our past mistakes, but we must get on with the business at hand and focus on the future, not our wake. We have a cadre of young leadership in our armed services that makes me confident for the future.
- Ethics and integrity essential for successful military leadership starts at the top. In our country the top military leadership is subject to duly elected civilian authority specifically empowered in the office of the President of the United States.
- Military readiness and mission accomplishment depends on trust and confidence in the integrity of the leader.
- Actions of the leader are more important than words.
- It is important for those you lead to know what you stand for and equally important what you won't stand for.
- Loyalty down is just as important as loyalty up.

- Regardless of what the exit polls imply, the character of a nation and its leaders does matter and it matters most to those who are prepared to lay down their lives for that nation. Those entrusted with the defense of our nation are in a risk-taking business. If we ever become risk adverse because the integrity of our leadership is in question or even perceived to be in question, we all lose.
- Finally, our leaders must “eschew obfuscation” in all we do. Our national leaders must talk straight and with integrity on every issue. If we lie to ourselves as an institution or as individuals within that institution, we are laying the seeds of our own individual and national destruction.

Thank you for the privilege of addressing this Committee on these important issues.

Mr. HYDE. Lieutenant General Carney.

**STATEMENT OF THOMAS P. CARNEY, LIEUTENANT GENERAL,
USA (RET.)**

Mr. CARNEY. Thank you, Mr. Chairman, members of the committee. I have been asked to testify to the importance of a code of ethics and particularly to integrity on the effectiveness of military forces. I emphasize as you did, Mr. Chairman, I am speaking for myself as a private citizen who happens to be a retired Army lieutenant general; I am not speaking for the military.

Prior to attending West Point almost 40 years ago, my Jesuit high school mentor made me aware that I would have to swear an oath and that I better be comfortable with it. When I read it, I found it to be an oath I could live with. Later at West Point I learned how unique it was in military history. American servicemen and women swear allegiance to the concepts embodied in a document. We do not swear allegiance to a king or a President or the motherland or to the regiment. We swear to support and defend the Constitution of the United States against all enemies, foreign and domestic, and to bear true faith and allegiance to the same. Even in retired status, we live by that oath.

Indeed, even in retired status we are subject to the Congress's body of law for the military known as the Uniform Code of Military Justice, to include Article 88, which precludes contentious words against the President, and I intend certainly not to make any such remarks today, although I believe actions to which he admitted we would find personally to be contemptuous. Of course, also included in that oath is that we will, and I quote, “obey the orders of the President and the officers appointed over me.” That is in the oath, and that is not negotiable.

We have a professional military today, the best the world has ever seen. It is not a drafted military, as the one I first joined; it is a military that is guided by its oath and by its supporting code of ethics. Regardless of the service, as the admiral has pointed out, these codes are quite similar, but I will discuss the Army's in particular, of which I am most familiar.

The first of those codes I encountered was the West Point motto: Duty, Honor, Country; three simple words that I still study today. The boundless nature of the word “country” is best described in article 1 of the prisoner of war's code of conduct. Quote: “I am an American fighting man. I serve in the forces which guard my country and our way of life, and I am prepared to give my life in their defense.”

The word “honor” includes all the chivalrous aspects of the word, including integrity. Integrity was very clearly delineated for us in

the cadet honor code. Quote: "A cadet does not lie, cheat or steal, nor associate with those who do." No one ever made a distinction about whether or not you were under oath or not.

The rationale for the code went beyond the notion that honorable men do not lie, cheat or steal. It included the reality that battlefield reports impact decisions that affect the outcomes of battles and the lives of soldiers. Consequently, soldiers don't want to serve with or around other soldiers that they don't trust. For this trust to exist, the military must insist on the highest standards of integrity.

And the word "duty" in the duty, honor, country motto said to us that we are not just prepared to give our lives, we are prepared to live tough lives as well. So today, soldiers are months away from their families serving in Haiti, Bosnia, and Croatia, Macedonia, Kuwait, Korea, Central America and elsewhere.

Now, there have been very good efforts over the years to add clarity to the words, duty, honor, country, and in my view none has been any better than the recent articulation of the seven Army values. This particular card is carried in the wallets of all of the U.S. soldiers, and a dog tag, slightly smaller, is worn on their dog tag chains. Those three words I discussed are expounded on in the seven words duty, honor, loyalty, integrity, selfless service, courage, and respect for others. Note that integrity has now been separately listed from honor to add even more emphasis to its importance.

Why is it important that the military services be value-based institutions? There are both external and internal reasons. Externally, to paraphrase a great American, America's military is created by America, is for America, and is from America. It hasn't been any other way for the 225 years of its history, and particularly the last 25, since the draft ended. It is not really an all-voluntary Army, it is an all-recruited Army, and each year a half a million American men and women have to personally elect to join it, and another 1.8 million have to elect to remain. That is truly *from* America. So the military must have a positive image, or frankly, we will have to return to the draft.

Despite occasional mistakes and setbacks, the military has been the most admired institution in America for almost two decades, according to the Gallup Poll's survey of Americans' confidence in their institutions. It is my own view as an old recruiter that it can't be any other way. If you erode the value system, Americans will not be proud to join, nor to stay. Fortunately, today's highest military leaders are attuned to this reality, and none of them need to be reminded of the importance of an ethical climate. They talk it, and they walk the talk.

The internal reasons for having solid values. Those half million who join us every year come from all backgrounds and all walks of life, and not every one of them has had the advantage of being born to parents like my mom and dad. Not all of them have been exposed to the Ten Commandments and the 12 points of the Scout law, so the Army has an aggressive program of character development starting with basic training.

I am not so naive as to think that the Army of a million men and women, Active, Guard and Reserve, are void of weak leaders. Certainly not. But the good news is that there are systems to weed

them out in peacetime so that the terrible wartime consequences can be avoided.

Will soldiers follow weak leaders that don't abide by the standards I have attempted to describe? The answer is yes. They must, for they are bound by their oath to "obey the orders of the President and the officers appointed over me." But the difference between an average unit and the best unit is most often its leaders. Great leaders, men of character, inspire soldiers to do extraordinary things. Conversely, a general malaise hangs over units whose leaders are weak. Soldiers want, indeed deserve, leaders who are held accountable for the same standards that they are held. The credibility of the system is at stake when that is not the case. The military cannot afford to have its standards viewed as irrelevant or out of step. Military leadership development programs, the code of ethics and the Uniform Code of Military Justice all work together in concert to ensure that the standards are applied equally up and down the chain.

I look forward to your questions, sir.

Mr. HYDE. Thank you, General.

[The prepared statement of Mr. Carney follows:]

PREPARED STATEMENT OF THOMAS P. CARNEY, LIEUTENANT GENERAL, USA (RET.)

I have been asked to testify to the importance of a Code of Ethics, and particularly integrity, to the effective leadership of military forces. My biographical sketch was sent to the committee last week. To summarize it, my active duty military career ended 4½ years ago as the Army's Deputy Chief of Staff for Personnel. One of my duties in that position was to advise the Chief of Staff on leader development programs. Prior to that time I had the privilege of leading American soldiers on three continents from platoon to division level. That experience included two Infantry combat tours in Vietnam, including command of a company of paratroopers.

Prior to attending West Point almost 40 years ago, my Jesuit high school mentor made me aware that I would have to swear an oath, and that I'd better be comfortable with it. When I read it I found it to be an oath I could live with. Later at West Point I learned how unique it was in military history. American servicemen and women swear allegiance to the concepts embodied in a document. We do not swear allegiance to a king or a president or the motherland or the regiment. We swear to support and defend the Constitution of the United States against all enemies, foreign and domestic, and to bear true faith and allegiance to the same. Even in retired status we live by the oath—indeed, even in retirement we are subject to the Congress' body of law for the military known as the Uniform Code of Military Justice.

Of course, also included in that oath is that we will, and I quote, ". . . obey the orders of the President and the officers appointed over me." That's in the oath. It is non-negotiable.

We have a professional military today—the best the world has ever seen. It's not a drafted military as was the one I first joined. It's a military that is guided by its oath and by its supporting code of ethics. Regardless of the service, they are all quite similar. I will discuss the Army's, of which I'm most familiar.

The first of those codes I encountered is the West Point motto—Duty, Honor, Country. Three simple words that I'm still studying to this day.

The boundless nature of the word "Country" is best described in Article I of the Prisoner of War's Code of Conduct: "I am an American fighting man. I serve in the forces which guard my country and our way of life. I am prepared to give my life in their defense."

The word "Honor" included all the chivalrous aspects of the word, including integrity. Integrity was very clearly delineated for us in the Cadet Honor Code: "A cadet does not lie, cheat or steal, nor associate with those who do." The rationale for the code went beyond the notion that honorable men do not lie, cheat or steal. It included the reality that battlefield reports impact decisions that affect the outcome of battles and the lives of soldiers. Consequently soldiers don't want to serve with or around other soldiers they don't trust. For this trust to exist, the military must insist on the highest standard of integrity.

And the word “Duty” in the Duty, Honor, Country motto, said to us that we’re not just prepared to give our lives, we’re prepared to lead a tough life as well. We’re prepared to move our family and our household 28 times in 31 years. We’re prepared to spend countless nights and days in field training, or to jump out the door of a perfectly good airplane on a moonless night. And today’s soldiers can add months away from their families while in Haiti, Bosnia, Croatia, Macedonia, Kuwait, the Sinai, Korea, Germany, Central America and elsewhere.

There have been very good efforts over the years to amplify on the meaning of Duty, Honor, Country. In my view none has been any better than the recent articulation of the seven Army values:

Duty
Honor
Loyalty
Integrity
Selfless Service
Courage
Respect for Others

Note that Integrity has now been separately listed from Honor to add even more emphasis to its importance.

Why is it important that the military services be values-based institutions? There are both external and internal reasons. Externally, to paraphrase a great American, America’s military is created by America, is for America and is from America. It hasn’t been any other way for 225 years, but particularly the last 25 years since the draft ended. This is not really an all-volunteer Army—it’s an all-recruited Army. Each year a half-million young American men and women have to personally elect to join the military, and another 1.8 million have to elect to remain. That is truly “from America.” So the military must have a positive image or frankly, we’ll have to return to the draft. Despite occasional mistakes and setbacks, the military has been the most admired institution in America for almost two decades, according to the Gallup poll survey of Americans’ confidence in their institutions. It’s my personal view as an old recruiter that it can’t be any other way. Erode the value system and Americans will not be proud to join nor to stay.

Fortunately today’s highest military leaders are attuned to this reality—and none of them need to be reminded of the importance of an ethical climate. They talk it, and they walk the talk.

Now consider the *internal* military reasons for having a solid set of core values. Those half-million who join us every year come from all backgrounds and all walks of life. Not every one of them has had the advantage of being born to parents like my mom and dad. Not all of them have been exposed to the Ten Commandments or the 12 points of the Scout Law. So the Army has an aggressive program of character development starting with basic training.

Now I am not so naive as to think that an Army of a million men and women, Active, Reserve, Guard, are void of weak leaders. Certainly not. But the good news is that there are systems to weed them out in peacetime so that the terrible wartime consequences can be avoided.

Will soldiers follow weak leaders that don’t abide by the standards I’ve attempted to describe? The answer is yes. They must, for they are bound by their oath “to obey the orders of the President and the officers appointed over me.”

But the difference between an average unit and the best unit is most often its leaders. Great leaders, men of character, inspire soldiers to do extraordinary things. Conversely, a general malaise hangs over units whose leaders are weak. Soldiers want, indeed deserve, leaders who are held accountable for the same standards that they are held. The credibility of the system is at stake when that is not the case. The military cannot afford to have its standards viewed as irrelevant or out of step. Military leadership development programs, the code of ethics and the Uniform Code of Military Justice all work together in concert to insure that the standards are applied equally up and down the chain of command.

I look forward to your questions.

Mr. HYDE. Professor Dershowitz.

**STATEMENT OF ALAN M. DERSHOWITZ, FELIX FRANKFURTER
PROFESSOR OF LAW, HARVARD LAW SCHOOL**

Mr. DERSHOWITZ. Thank you. For nearly a quarter of a century I have been teaching, lecturing and writing about the corrosive influences of perjury on our legal system, especially when committed

by those whose job it is to enforce the law, and ignored, or even legitimized, by those whose responsibility it is to check those who enforce the law.

I appreciate very much your asking me to share my experience and expertise here with you today. On the basis of my academic and professional experience, I believe that no felony is committed more frequently in this country than the genre of perjury and false statement crimes. Perjury during civil depositions and trials is so endemic that a respected appellate judge once observed that "experienced lawyers say that, in large cities, scarcely a trial occurs in which some witness does not lie." Police perjury in criminal cases, particularly in the context of searches and other exclusionary rule issues, is so pervasive that the former police chief in San Jose and Kansas City has estimated that "hundreds of thousands of law enforcement officials commit felony perjury every year testifying about drug arrests" alone.

But in comparison with their frequency, perjury crimes are among the most underprosecuted in this country. As prosecutor Michael McCann concluded, "Outside of income tax violation, perjury is probably the most underprosecuted crime in America." Moreover, there is evidence that false statements are among the most selectively prosecuted of all crimes and that the criteria for selectivity bears little relationship to the willfulness or frequency of the lies, the certainty of the evidence, or any other neutral criteria relating to the elements of perjury.

Historically, I think we can all agree that false statements have been committed of considerable variations in degree. The core concept of perjury grows out of the Bible, the Ten Commandments, "bearing false witnesses," a term that consisted in accusing another falsely of a crime.

Clearly the most heinous brand of lying is the giving of false testimony that results in the imprisonment of somebody who is innocent. Less egregious, but still quite serious, is false testimony that results in the conviction of a person who may be guilty, but whose rights were violated in a manner that would preclude conviction if the police testified truthfully. There are many other points on this continuum, ranging from making false statements about income taxes to testifying falsely in civil trials. The least culpable genre of false testimony are those that deny embarrassing personal conduct of marginal relevance to the matter at issue in the legal proceeding.

I think it is clear that the false statements of which President Clinton is accused fall at the most marginal end of the least culpable genre of this continuum of offenses and would never even be considered for prosecution in the routine cases involving an ordinary defendant.

My own interest in the corrosive influences of perjury arose from two cases that I appeared in as a young lawyer. In both cases the policemen were caught committing perjury, one on tape and the other by his own admission. In both cases, the policemen were promoted, not prosecuted. Neither of those policemen were called to appear as witnesses here today.

All reports on the pervasive problems of police perjury and tolerance of the lying by prosecutors and judges point to a widespread

problem. The Mollen Commission in New York, for example, concluded that the practice of police falsification is so common that it has spawned its own word: "testilying." Officers also commit falsifications to serve what they perceive to be legitimate law enforcement ends and are committing perjury. The Commission provided several examples of perjury cover stories that had been suggested to young officers in order to make arrests.

Many judges who listen to or review testimony on a regular basis agree with Judge Alex Kozinski of the ninth circuit who publicly stated, "It is an open secret long shared by prosecutors, defense lawyers and judges that perjury is widespread among law enforcement officials," yet there is little apparent concern to remedy that serious abuse of the oath to tell the truth, even among those who now claim to be so concerned with the corrosive influences of perjury on our legal system.

This committee, for example, in pursuance of its oversight mandate has never, to my knowledge, conducted hearings on this deeply corrosive issue, which has far more dangerous impact over our legal system than anything charged against President Clinton. If this were truly today an objective hearing on the consequences of perjury or on double standards, it would focus on the most serious types of perjury: that committed by police, with the approval of prosecutors and judges. Yet we see no such concern.

A perfect example of the selective morality regarding perjury occurred when President George Bush pardoned the former Secretary of Defense Caspar Weinberger in 1992, even though the evidence was absolutely clear and convincing.

The real issue is not the couple of convicted perjurers who appeared before this committee today or the judges who condemned the evils of perjury, but the hundreds of thousands of perjurers who are never prosecuted and who this committee does not seem to care about, many for extremely serious and calculated lies designed to undercut constitutional rights of unpopular defendants, and the judges who say nothing and do nothing about this corrosive phenomenon. You could not fit into this room or into this building all of the people who testified more perjurally than President Clinton and were not ever prosecuted.

If we really want to reduce the corrosive effect of perjury on our legal system, the place to begin is at or near the top of the perjury hierarchy. If, instead, we continue deliberately to blind ourselves to pervasive police perjury and other equally dangerous forms of lying under oath and focus on a politically charged tangential lie in the lowest category of possible perjury, hiding embarrassing facts by evasive answers to poorly framed questions which were marginally relevant to a dismissed civil case, we will be reaffirming the dangerous and hypocritical message that perjury will continue to be selectively prosecuted as a crime reserved for political or other agenda-driven purposes.

A Republican aide to this committee was quoted in *The New York Times* as follows: "In the hearing we will be looking to whether it is tenable for a Nation to have two different standards for lying under oath, one for the President and one for everyone else."

On the basis of my research and experience, I am convinced that if President Clinton were an ordinary citizen, he would not be pros-

ecuted for his allegedly false statements. If President Clinton were ever to be prosecuted or impeached for perjury on the basis of the currently available evidence, it would, indeed, represent an improper double standard, a selectively harsher one for this President and perhaps a handful of other victims of selective prosecution and the usual laxer one for everyone else, especially popular police perjurers. Thank you.

[The prepared statement of Mr. Dershowitz follows:]

PREPARED STATEMENT OF ALAN M. DERSHOWITZ, FELIX FRANKFURTER PROFESSOR OF LAW, HARVARD LAW SCHOOL

I

My name is Alan M. Dershowitz and I have been teaching criminal law at Harvard Law School for 35 years. I have also participated in the litigation—especially at the appellate level—of hundreds of federal and state cases, many of them involving perjury and the making of false statements. I have edited a casebook on criminal law and have written 10 books and hundreds of articles dealing with subjects relating to the issues before this committee. It is an honor to have been asked to share my experience and expertise with you all here today.

For nearly a quarter century, I have been teaching, lecturing and writing about the corrosive influences of perjury in our legal system, especially when committed by those whose job it is to enforce the law, and ignored—or even legitimized—by those whose responsibility it is to check those who enforce the law.

On the basis of my academic and professional experience, I believe that no felony is committed more frequently in this country than the genre of perjury and false statements. Perjury during civil depositions and trials is so endemic that a respected appellate judge once observed that “experienced lawyers say that, in large cities, scarcely a trial occurs in which some witness does not lie.” He quoted a wag to the effect that cases often are decided “according to the preponderance of perjury.”¹ Filing false tax returns and other documents under pains and penalties of perjury is so rampant that everyone acknowledges that only a tiny fraction of offenders can be prosecuted. Making false statements to a law enforcement official is so commonplace that the Justice Department guidelines provide for prosecution of only some categories of this daily crime. Perjury at criminal trials is so common that whenever a defendant testifies and is found guilty, he has presumptively committed perjury.² Police perjury in criminal cases—particularly in the context of searches and other exclusionary rule issues—is so pervasive that the former police chief of San Jose and Kansas City has estimated that “hundreds of thousands of law-enforcement officers commit felony perjury every year testifying about drug arrests” alone.³

In comparison with their frequency, it is likely that false statement crimes are among the most under-prosecuted in this country. Though state and federal statutes carry stringent penalties for perjury, few perjurers ever actually are subjected to those penalties. As prosecutor E. Michael McCann has concluded, “Outside of income tax evasion, perjury is . . . probably the most underprosecuted crime in America.”⁴ Moreover, there is evidence that false statements are among the most selectively prosecuted of all crimes, and that the criteria for selectivity bears little relationship to the willfulness or frequency of the lies, the certainty of the evidence or any other neutral criteria relating to the elements of perjury or other false state-

¹Jerome Frank, *COURTS ON TRIAL* 85 (1949).

²Many such defendants now have years added on to their sentences under the federal guidelines, which add points for perjury at trial.

³Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?* LOS ANGELES TIMES, Feb. 11, 1996, at M1.

⁴From Mark Curridden, *The Lies Have It*, A.B.A. J., May 1995, at 71, quoted in Lisa C. Harris, *Perjury Defeats Justice*, 42 WAYNE L. REV. 1755, 1768–69 (1996) (footnote omitted). See also Hon. Sonia Sotomayor & Nicole A. Gordon, *Returning Majesty to the Law and Politics: A Modern Approach*, 30 SUFFOLK U. L. REV. 35, 51 n.52 (1996) (“Perjury cases are not often pursued, and perhaps should be given greater consideration by prosecuting attorneys as a means of enhancing the credibility of the trial system generally.”); Fred Cohen, *Police Perjury: An Interview With Martin Garbus*, 8 CRIM. L. BULL. 363, 367 (1972), quoted in Christopher Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1060 n.13 (1996) (“ . . . no trial lawyer that I know will argue that police perjury is nonexistent or sporadic.”)

ment crimes. Professor Richard H. Underwood, the Spears-Gilbert Professor of Law at the University of Kentucky's law school, writes that:

. . . more often, the [perjury] law has been invoked for revenge, or for the purpose of realizing some political end (the very base reason that lies are sometimes told!), or for the purpose of nabbing a criminal who might otherwise be difficult to nab, or, dare I say it, for the purpose of gaining some tactical advantage. Proving that perjury was committed, or that a "false statement" or a "false claim" was made, may be an easier, or a more palatable, brief for the prosecution.⁵

Historically, false statements generally have admitted of considerable variations in degree.⁶ The core concept of perjury was that of "bearing false witness," a biblical term that consisted in accusing another of crime.⁷

Clearly, the most heinous brand of lying is the giving of false testimony that results in the imprisonment or even execution of an innocent person. Less egregious, but still quite serious, is false testimony that results in the conviction of a person who committed the criminal conduct, but whose rights were violated in a manner that would preclude conviction if the police were to testify truthfully. There are many other points on this continuum, ranging from making false statements about income or expenses to testifying falsely in civil trials. The least culpable genre of false statements are those that deny embarrassing personal conduct of marginal relevance to the matter at issue in the legal proceeding.

Much of the public debate about President Clinton and possible perjury appears to ignore the following important lessons of history:

1. That the overwhelming majority of individuals who make false statements under oath are not prosecuted;
2. That those who are prosecuted generally fall into some special category of culpability or are victims of selective prosecution; and,
3. That the false statements of which President Clinton is accused fall at the most marginal end of the least culpable genre of this continuum of offenses and would never even be considered for prosecution in the routine case involving an ordinary defendant.

II

My interest in the corrosive effects of perjury began in the early 1970s when I represented—on a pro bono basis—a young man who was both a member of and a government informer against the Jewish Defense League. He was accused of making a bomb that caused the death of a woman, but he swore that a particular policeman, who had been assigned to be his handler, had made him certain promises in exchange for his information. The policeman categorically denied making any promises, but my client had—unbeknownst to the policeman—surreptitiously taped many of his conversations with the policeman. The tapes proved beyond any doubt that the policeman had committed repeated perjury, and all charges were dropped against my client. But the policeman was never charged with perjury. Instead he was promoted.⁸

The following year, I represented, on appeal, a lawyer accused of corruption. The major witness against him was a policeman who acknowledged at trial that he himself had committed three crimes while serving as a police officer. He denied that he had committed more than these three crimes. It was subsequently learned that he had, in fact, committed hundreds of additional crimes, including some he specifically denied under oath. He too was never prosecuted for perjury, because a young Assistant U.S. Attorney, named Rudolph Giuliani, led a campaign against prosecuting this admitted perjurer. Shortly afterward, the policeman explained:

Cops are almost taught how to commit perjury when they are in the Police Academy. Perjury to a policeman—and to a lawyer, by the way—is not a big deal. Whether they are giving out speeding tickets or parking tickets, they're almost always lying. But very few cops lie about the actual facts of a case. They may stretch an incident or whatever to fit it into the frame-

⁵Richard H. Underwood, *Perjury: An Anthology*, 13 ARIZ. J. INT'L & COMP. L. 307, 379 (1996).

⁶See, e.g., Richard H. Underwood, *False Witness: A Lawyer's History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP. L. 215, 252 n.157 (1993).

⁷See, e.g., Underwood, *id.* at 223 and accompanying note 37.

⁸See Dershowitz, *THE BEST DEFENSE* 67 (1982). The chief of detectives of New York wrote a book about this case in which he confirmed these facts. See Albert Seedman, *CHIEF!* (1974).

work of the law based on what they consider a silly law of the Supreme Court.⁹

Nor is the evidence of police perjury merely anecdotal. Numerous commission reports have found rampant abuses in police departments throughout the country. All objective reports point to a pervasive problem of police lying, and tolerance of the lying by prosecutors and judges, all in the name of convicting the factually guilty whose rights may have been violated and whose convictions might be endangered by the exclusionary rule.

As the Mollen Commission reported:

The practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: "testilying." . . . Officers also commit falsification to serve what they perceive to be "legitimate" law enforcement ends—and for ends that many honest and corrupt officers alike stubbornly defend as correct. In their view, regardless of the legality of the arrest, the defendant is in fact guilty and ought to be arrested.¹⁰

Even more troubling, in the Mollen Commission's view, "the evidence suggests that the . . . commanding officer not only tolerated, but encouraged, this unlawful practice." The commission provided several examples of perjured cover stories that had been suggested to a young officer by his supervisor:

Scenarios were, were you going to say (a) that you observed what appeared to be a drug transaction; (b) you observed a bulge in the defendant's waistband; or (c) you were informed by a male black, unidentified at this time, that at the location there were drug sales.

QUESTION: So, in other words, what the lieutenant was telling you is "Here's your choice of false predicates for the arrest."

OFFICER: That's correct. Pick which one you're going to use.¹¹

Nor was this practice limited to police supervisors. As the Mollen Commission reported:

Several former and current prosecutors acknowledged—"off the record"—that perjury and falsification are serious problems in law enforcement that, though not condoned, are ignored. The form this tolerance takes, however, is subtle, which makes accountability in this area especially difficult.¹²

The epidemic is conceded even among the highest ranks of law enforcement. For example, William F. Bratton, who has headed the police departments of New York City and Boston, has confirmed that "testilying" is a "real problem that needs to be addressed." He also placed some of the responsibility squarely at the feet of prosecutors:

When a prosecutor is really determined to win, the trial prep procedure may skirt along the edge of coercing or leading the police witness. In this way, some impressionable young cops learn to tailor their testimony to the requirements of the law.¹³

Many judges who listen to or review police testimony on a regular basis privately agree with Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit, who publicly stated: "It is an open secret long shared by prosecutors, defense law-

⁹See Dershowitz, *THE BEST DEFENSE*, *supra* note 8, at 377. This was confirmed in a book entitled *Prince of the City* (and a motion picture of the same name), whose contents were approved by the policeman. See Robert Daley, *PRINCE OF THE CITY* (1978).

¹⁰Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Practices of the Police Department, Milton Mollen, Chair; July 7, 1994, at 36 [*hereinafter* Mollen Report]. The report then went on to describe how

. . . officers reported a litany of manufactured tales. For example, when officers unlawfully stop and search a vehicle because they believe it contains drugs or guns, officers will falsely claim in police reports and under oath that the car ran a red light (or committed some other traffic violation) and that they subsequently saw contraband in the car in plain view. To conceal an unlawful search of an individual who officers believe is carrying drugs or a gun, they will falsely assert that they saw a bulge in the person's pocket or saw drugs and money changing hands. To justify unlawfully entering an apartment where officers believe narcotics or cash can be found, they pretend to have information from an unidentified civilian informant.

Id. at 38.

¹¹Mollen Report, *supra* note 10, at 41.

¹²Mollen Report, *supra* note 10, at 42.

¹³BOSTON GLOBE, November 15, 1995, at 1.

yers and judges that perjury is widespread among law enforcement officers,” and that the reason for it is that “the exclusionary rule . . . sets up a great incentive for . . . police to lie to avoid letting someone they think is guilty, or they know is guilty, go free.”¹⁴ Or, as Judge Irving Younger explained, “Every lawyer who practices in the criminal courts knows that police perjury is commonplace.”¹⁵

As these judges attest, this could not happen without active complicity of many prosecutors and judges. Yet there is little apparent concern to remedy *that* serious abuse of the oath to tell the truth—even among those who now claim to be so concerned with the corrosive influences of perjury on our legal system. The sad reality appears to be that most people care about perjury only when they disapprove of the *substance* of the lie or of the *person* who is lying.

A perfect example of selective morality regarding perjury occurred when President George Bush pardoned former Secretary of Defense Caspar Weinberger in 1992, even though physical records proved that Weinberger had lied in connection with his testimony regarding knowledge of Iran arms sales. Not only was there no great outcry against pardoning an indicted perjurer, some of the same people who insist that President Clinton not be allowed to “get away” with lying were perfectly prepared to see Weinberger “get away” with perjury. Senator Bob Dole of Kansas spoke for many when he called the pardon a “Christmas Eve act of courage and compassion.”¹⁶

The real issue is not the handful of convicted perjurers appearing before this committee, but the hundreds of thousands of perjurers who are never prosecuted, many for extremely serious and calculated acts of perjury designed to undercut constitutional rights of unpopular defendants.

If we really want to reduce the corrosive effects of perjury on our legal system, the place to begin is at or near the top of the perjury hierarchy. If instead we continue deliberately to blind ourselves to pervasive police perjury and other equally dangerous forms of lying under oath and focus on a politically charged tangential lie in the lowest category of possible perjury (hiding embarrassing facts only marginally relevant to a dismissed civil case), we would be reaffirming the dangerous message that perjury will continue to be a selectively prosecuted crime reserved for political or other agenda-driven purposes.

A Republican aide to this committee was quoted by *The New York Times* as follows:

In the hearing, we’ll be looking at perjury and its consequences, and whether it is tenable for a nation to have two different standards for lying under oath; one for the President and one for everyone else.¹⁷

On the basis of my research and experiences, I am convinced that if President Clinton were an ordinary citizen, he would not be prosecuted for his allegedly false statements, which were made in a civil deposition about a collateral sexual matter later found inadmissible in a case eventually dismissed and then settled. If President Clinton were ever to be prosecuted or impeached for perjury on the basis of the currently available evidence, it would indeed represent an improper double standard: a selectively harsher one for the president (and perhaps a handful of other victims of selective prosecution) and the usual laxer one for everyone else.

Mr. GEKAS [presiding]. The members of the committee will refrain from demonstrations. That is not part of the decorum of this committee.

The time of the witness has expired, and we now turn to Professor Saltzburg.

STATEMENT OF STEPHEN A. SALTZBURG, HOWREY PROFESSOR OF TRIAL ADVOCACY, LITIGATION, AND PROFESSIONAL RESPONSIBILITY, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. SALTZBURG. Thank you. Mr. Chairman, members of the committee, the conflict among you is as understandable as it is power-

¹⁴Stuart Taylor, Jr., *For the Record*, AMERICAN LAWYER, Oct. 1995, at 72.

¹⁵Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596–97.

¹⁶Elaine Sciolino, *On the Question of Pardons, Dole has Taken Both Sides*, THE NEW YORK TIMES, 16 Oct. 1996, at A15.

¹⁷Eric Schmitt, *Panel Considers Perjury and Its Consequences*, THE NEW YORK TIMES, Nov. 28, 1998, at A13.

ful. On the one hand it is totally unacceptable to anyone interested in fair and equal justice to say that if the President committed perjury in a Federal court or before a Federal grand jury, he should get away with it because he is President. We cannot excuse perjury in the most highly publicized case involving the most powerful official, if we expect the oath to be taken seriously by future witnesses.

On the other hand, our Constitution uses carefully chosen words when it limits impeachable offenses to bribery, treason and other high crimes and misdemeanors. There is a strong argument that perjury, as offensive as it is, does not amount to corruption of or abuse of office when the false answers relate to questions that do not address the President's official acts and duties.

There is reason, good reason then, why members of the committee, the full House and the public are conflicted. They want to condemn lying and deceit and have their government teach that truth matters, while at the same time protecting this President and future Presidents from impeachment charges that do not rise to the level of misconduct that would justify removal from office. Is there a way to resolve the conflicts, condemn lying and deceit, affirm truth, and limit the scope of impeachment at the same time? I think there is, and that is what I want to talk about.

Judge Starr testified accurately, in my view, that some of the answers that the President gave in the Paula Jones deposition were "not true," or were "false." This is very different from saying, as some have, that the President committed perjury in giving these answers.

An example will help to make my point. During the Jones deposition, the President was asked to use a very carefully crafted definition of sexual relations. That definition defined certain forms of sexual contact as sexual relations, but for reasons known only to the Jones lawyers, limited the definition to contact with any person for the purpose of gratification. It is not at all clear that the President's interpretation of the definition of "any person" as meaning other than himself was unreasonable. The question could have been worded much more clearly, and crass and unkind as it might be to suggest it, it is also unclear whether the President sought to gratify any person but himself. Thus, his answers might, in fact, be true, rather than false.

Now, some of you will wince and say, aha, semantics, wordsmithing. But you must face the fact that you cannot investigate perjury allegations without considering the state of mind and intent of a witness, and all of the things that might be on a witness's mind are relevant to a perjury inquiry. Indeed, once you recognize the difficulty of investigating perjury, the beginning of an answer emerges to my question of how to resolve the conflicts that divide you and the American people.

In considering past impeachments involving Federal judges who can be indicted while in office, the Congress generally has waited to let the criminal process work. Only after a judge was convicted of perjury did you consider impeachment. The President's unique constitutional role makes it unlikely that he can be indicted and/or prosecuted while in office, so you do not have the option of waiting, but you do have the option of deciding that allegations of perjury that do not involve corruption of or abuse of office should not

give rise to an impeachment investigation or charge, because perjury is an elusive crime to prove, involves subjective judgments that are especially difficult to make in a politically charged environment, and when rising out of personal conduct is too attenuated from the official duties of the President.

I respectfully suggest to you that whether or not the President is guilty of perjury, he certainly answered questions in the Paula Jones deposition in a way that intended to mislead the Paula Jones lawyers about his relationship with Monica Lewinsky. I understand the President's predicament. Understanding the President's predicament, however, is not to excuse it. He could have conceded liability, thereby avoiding the need to answer questions. He could have refused to answer questions about Ms. Lewinsky and suffered the consequences. He could have sought to make an ex parte submission to the court. He could have done many things, but he was not entitled to mislead. The President made the wrong choice, and there must be consequences for that.

It is my firmly held view, however, that this committee has focused too much on whether the President actually committed perjury. It would be and it is dangerous to send a message that testimony is acceptable as long as it is not perjurious. This committee has the opportunity to promote the rule of law and to emphasize the importance of truth in judicial proceedings if it declares that no witness, not the President, not anybody, may deliberately deceive a court and deliberately create a false impression of facts. This is not exclusively a Republican or a Democratic notion, it is what ordinary, honest Americans want and expect from their judicial system.

I refer you in my written testimony to a Washington State case that I tried and won in which a law firm and a company were punished for making false and misleading, not perjurious, statements. If you agree with me that misleading a court is wrong, whether or not it is perjurious, then your path is clear. It involves two steps. One is collective, and one is individual. You should be able to unanimously agree upon a resolution that condemns the President for doing what he obviously did, which was answering questions in the Jones deposition to deceive the court and the lawyers, to condemn the President for defending that conduct before the grand jury, and to condemn him for lying to the American people. Such a resolution is perfectly consistent with your constitutional responsibilities. Nothing in the Constitution suggests that when a President engages in conduct that is reprehensible, but not impeachable, Congress must be silent.

Any resolution passed by both Houses of Congress would be placed before the President. Placing such a resolution before him would enable him to act with honor by signing it or to veto it and face the condemnation of the American people. That is the collective step.

The individual step is equally important. Each of you has the right to communicate, if you choose, your belief that Federal District Judge Wright should consider whether to impose sanctions on the President for his testimony in the Paula Jones case. Even though the case has been settled, Judge Wright retains power to sanction misbehavior litigation that was before her.

I believe it is important for Judge Wright to consider and to impose sanctions on the President. I say this because if I were in the Department of Justice and received strong evidence that a witness in a Federal civil deposition lied under oath, my reaction in almost every case would be to refer the evidence to the Federal judge to whom the case was assigned. It is hard to imagine using scarce prosecutorial resources to investigate the matter when the court and at least one party in a civil case have every incentive to do the investigation, to correct any injustice that occurred, and to sanction misbehavior.

Judge Wright is in many respects the only hero I see in this matter. Out of respect for the Presidency, she personally was present when the Jones lawyers presented their questions. She narrowed the definition of sexual relationship to protect the President. She fought to make a gag order work to protect both sides against embarrassment, and, though appointed by a Republican President, she found insufficient evidence to justify Paula Jones a jury trial.

My speculation is that Judge Wright stayed her judicial hand, while this impeachment inquiry is ongoing, not wanting to intrude or to have the judicial branch perceived as even slightly partisan. But if this committee ends its investigation, she should punish the President. She should send a clear message to all future witnesses. If she does so, she should satisfy any legitimate interest in promoting truth identified by the committee or by the independent counsel. If she does, and you agree to censure his conduct, we will have resolved the conflicts that divide you. In doing so, the government will teach the importance of truth and of responsibility; we will condemn lying and deceit and assure that consequences attach to witness misconduct, and we will carefully and properly reserve the political death penalty of impeachment for behavior more closely related to conduct of office than this President's.

[The prepared statement of Mr. Saltzburg follows:]

PREPARED STATEMENT OF STEPHEN A. SALTZBURG, HOWREY PROFESSOR OF TRIAL ADVOCACY, LITIGATION, AND PROFESSIONAL RESPONSIBILITY, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

In any discussion about perjury it is important to begin with two counterintuitive facts: (1) the making of a false statement under oath is not necessarily perjury; and (2) lying under oath is not necessarily perjury. A witness does not commit perjury unless the witness makes a false statement knowing it is false and intending to make the false statement, and the false statement relates to a material matter.

American judges and lawyers have dealt with the crime of perjury for more than 200 years. They know that it is a crime that we purposely make difficult to prove. We make it difficult to prove because we know that putting any person under oath and forcing that person to answer "under penalty of perjury" is a stressful experience. Anyone who has been a witness in any formal proceeding knows how stressful it can be. Honest mistakes are made, memories genuinely fail, nervous witnesses say one thing and in their minds hear themselves saying something different, and deceit in answers to questions about relatively trivial matters that could not affect the outcome of a proceeding but that intrude deeply into the most private areas of a witness's life causes little harm.

Like so many Americans, I have read the referral that Judge Starr submitted, I watched him testify before this Committee, and I am familiar with the testimony before the Committee on November 9th of some of my law professor colleagues and others about the meaning of "high Crimes and Misdemeanors." What I have seen, heard and read has led me to conclude that many members of the Committee and probably many more members of the full House are conflicted in their thinking about the referral that has been presented.

On the one hand, it is totally unacceptable to anyone interested in fair and equal justice to say that, if the President committed perjury in a federal court or before a federal grand jury, he should get away with it because he is President, the economy is good, or we are at peace. We cannot excuse perjury in the most highly publicized case involving the most powerful official if we expect the oath to be taken seriously by future witnesses. Let's be honest. No one here can or should bear the thought of witnesses lying under oath in the future and telling themselves that their lies are acceptable because of what they think the President did—namely, make a private judgment that it was more important to protect himself than to advance the search for truth. Government is the great teacher. We cannot permit it to teach us that lying under oath is acceptable.

On the other hand, our Constitution uses carefully chosen words when it limits impeachable offenses to bribery, treason, and other high crimes and misdemeanors. Although the debates on the impeachment language in the Constitution were sparse, there is solid support for the conclusion that the framers intended to limit impeachment to corruption of or abuse of office. There is a strong argument that perjury, as offensive as it is, does not amount to corruption of or abuse of office when the false answers relate to questions that do not address the President's official acts and duties. There is a clear danger to the Presidency of defining impeachable offenses too broadly, lest every opposition party seek to define every future instance of presidential misconduct as a crime in order to initiate an impeachment inquiry.

There is reason, good reason, then, why members of this Committee, the full House, and the public are conflicted. They want to condemn lying and deceit and have their government teach that truth matters while at the same time protecting this President and future Presidents from impeachment charges that do not rise to the level of misconduct that would justify removal from office.

Is there a way to resolve the conflicts, condemn lying and deceit, affirm truth, and limit the scope of impeachment? I think there is, and that is what I want to talk about now.

Judge Starr testified, accurately in my view, that some of the answers that the President gave in the Paula Jones deposition were "not true" or were "false." This is very different from saying, as some have, that the President committed perjury in giving these answers. That is far from clear. Let me give you an example. The President was asked whether he had ever been alone with Monica Lewinsky and answered that he had not, except perhaps when she had delivered pizza. If we accept the account of the relationship between Ms. Lewinsky and the President found in the Starr referral, we know that on various occasions only the President and Ms. Lewinsky were in particular locations in the White House. Thus, most of us would regard the President's answer as false. Now, the President's explanation appears to be that the door to the Oval Office was never completely closed and/or that Ms. Currie was always in an adjacent area. Is this explanation persuasive? Not to me. It is difficult for me to imagine the President at a news conference asked whether he had met alone with a visiting Head of State and answering "no," because he recalled that Ms. Currie was in an adjacent office. But, is it clear that the President committed perjury? Not to me. It is one thing to say that his use of the word "alone" is unpersuasive, and quite another to say that he intended to testify falsely as opposed to narrowly.

One other example will suffice to make the point. During the Jones' deposition, the President was asked to use a very carefully crafted definition of sexual relations. That definition defined certain forms of sexual contact as sexual relations but, for reasons known only to the Jones lawyers, limited the definition to contact with any person for the purpose of gratification. It is not at all clear that the President's interpretation of the definition of "any person" as meaning other than himself was unreasonable. The question could have been much more clearly worded. And, crass and unkind as it might be to suggest it, it is also unclear whether the President sought to gratify any person but himself. Thus, his answers might in fact be true rather than false.

Some of you surely will wince and say that this is semantics, word-smithing. But, you must face the fact that you cannot investigate perjury allegations without considering the state of mind and intent of a witness, and all of the things that might be on a witness's mind are relevant to a perjury inquiry.

Indeed, once you recognize the difficulty of properly investigating perjury, the beginning of an answer emerges to my question of how to resolve the conflicts that divide you and the American people. In considering past impeachments involving federal judges, who can be indicted while in office, the Congress generally has waited to let the criminal process work. Only after a judge was convicted of perjury did you consider impeachment.

The President's unique constitutional role makes it unlikely that he can be indicted and/or prosecuted while in office. So, you do not have the option of waiting until the criminal process works before considering impeachment. But, you do have the option of deciding that allegations of perjury that do not involve corruption of or abuse of office should not give rise to an impeachment investigation, because perjury is an elusive crime to prove, involves subjective judgments that are especially difficult to make in a politically charged environment, and when arising out of personal conduct is too attenuated from the official duties of the President.

You have the option of making this decision while also sending a clear message about the government as teacher. It is the role of government as teacher that I want now to address.

I respectfully suggest to you that, whether or not the President is guilty of perjury, he certainly answered questions in the Paula Jones deposition in a way that intended to mislead the Paula Jones lawyers about his relationship with Monica Lewinsky.

I understand the President's predicament. He feared that the truth about Ms. Lewinsky would provoke the public condemnation that ultimately was visited upon him. He feared that, gag orders notwithstanding, any testimony he gave would become public, a reasonable fear in my judgment having seen the response by the Jones team to the President's motion for summary judgment. He believed that Ms. Lewinsky had not been rewarded as a result of their relationship, but instead had been unceremoniously moved from the White House to the Pentagon. As a result, he reasonably believed that the Lewinsky affair did not fit any claim of a pattern of rewards and punishments as alleged by the Jones team.

Understanding the President's predicament is not to excuse it. He could have conceded liability, thereby avoiding the need to answer questions. He could have refused to answer questions about Ms. Lewinsky and suffered the consequences. He could have sought to make an ex parte submission to the court. He could have done many things. But, he was not entitled to mislead the court and the Jones lawyers, even if he did not lie. And, as a lawyer and the highest ranking law enforcement officer in the land with a duty to see that the laws are faithfully executed, he had a duty to assure that his lawyer did not file a false affidavit that would mislead the court.

The President made the wrong choice, and there must be consequences for that. It is my firmly held view that this Committee has focused too much on whether the President actually committed perjury. Resolving that question by the Congress is not worth the candle in my view given the attenuation of the alleged perjury to the President's official duties. Moreover, the Committee ought to recognize that it would be dangerous to send a message that testimony is acceptable as long as it is not perjurious. That is the wrong message for future witnesses.

This Committee has the opportunity to promote the rule of law and to emphasize the importance of truth in judicial proceedings if it declares that no witness—not the President, not anybody—may deliberately deceive a court and deliberately create a false impression of facts. This is not exclusively a Republican or Democratic notion. It is what ordinary, honest Americans want and expect in their judicial system.

A unanimous Washington State Supreme Court accepted this argument in *Washington State Physician Insurance Exchange & Assoc. v. Fisons Corp.*, 122 Wash. 2d 299, 858 P.2d 1054 (1993). In that case, sanctions were awarded against a law firm and its client company for withholding documents. The defendant drug manufacturer, sued by the family of a brain-injured young child and her doctor, promised to provide in discovery all documents relating to the product that caused the brain damage, Somophyllin Oral Liquid (SOL). After the family settled with the company and shortly before the doctor's suit was to go to trial, a document leaked to the doctor's lawyer resulted in the disclosure that the company and its counsel had withheld some 60,000 pages of documents involving "theophylline" which is the only active ingredient in SOL. The company had advertised to doctors that "Somophyllin is theophylline," but unbeknownst to the plaintiffs had never told them that when it promised to produce all documents relating to SOL it had decided unilaterally that all documents related to theophylline did not relate to SOL. According to the appellate counsel for the company and its trial lawyers, the concealment of the documents was nothing more than "ducking and dodging" which goes on all the time in litigation.

My argument in that case was that "ducking and dodging" that amounts to deceit or fraud on the court is wrong, it is sanctionable, and it is wrong whether or not it amounts to perjury. Had my argument failed, I and many other law teachers would have had to decide whether we wanted to teach our students that they had to learn how to engage in deceit, misrepresentation and fraudulent concealment

short of perjury. But, we won and established the principle that I urge upon you today: Every witness, especially the President, has a duty to provide answers under oath that are not intended to mislead the tribunal about the truth. It is not enough to avoid perjury; a commitment to the truth is required. The President has an additional obligation not imposed upon ordinary witnesses: to be honest with the American people even when not under oath.

If you agree with me, your path is clear and involves two steps, one collective and one individual. You should be able to unanimously agree upon a resolution that (a) condemns the President for doing what he so obviously did, answering questions in the Jones deposition in a way that he intended and knew would mislead the Jones team about his relationship with Ms. Lewinsky and permitting his lawyer to file an affidavit that he knew was misleading as it was characterized to the court, (b) condemns the President for defending his deposition conduct before the grand jury and for failing to recognize at a minimum that he had misled the court, and (c) condemning the President for lying to the American people. Should you pass such a resolution, it could be forwarded to the Senate which could then decide whether or not to support it.

Such a resolution is perfectly consistent with your constitutional responsibilities. Nothing in the Constitution suggests that, when a President engages in conduct that is reprehensible but not impeachable, Congress must be silent. Any resolution passed by both Houses of Congress would be placed before the President. Placing such a resolution before him would enable him to act with honor by signing it or to veto it and thereby maintain that he sees no problems with his testimony and representations to the people. The resolution would be a responsible action by Congress. Signing it would be a responsible action by the President. This is the collective step.

The individual step is equally important. Each of you has the right to communicate, if you choose, your belief that Federal District Judge Susan Weber Wright should consider whether to impose sanctions on the President for his testimony in the Paula Jones case. Even though the case has been settled, Judge Wright retains power to sanction misbehavior in litigation that was before her.

I believe it is important for Judge Wright to consider and to impose sanctions upon the President. I explain why as I come to an end. If I were in the Department of Justice and received strong evidence that a witness in a federal civil deposition lied under oath, my reaction in almost every case would be to refer the evidence to the federal judge to whom the case was assigned. It is hard to imagine using scarce prosecutorial resources to investigate the matter when the court and at least one party in the civil case have every incentive to do the investigation, to correct any injustice that occurred, and to sanction misbehavior.

This would have been the likely scenario with respect to the President but for the existence of an Independent Counsel who perceived that aspects of the Lewinsky matter might relate to his ongoing investigation. The end result was that the President has been investigated as no other person would have been. No other citizen would have agreed to testify without immunity to a grand jury that wanted to ask whether the citizen lied in a deposition. The President concluded, wrongly in my view, that he should testify. As a result he endeavored to defend the indefensible.

Judge Wright is in many respects the only hero I see in this matter. Out of respect for the Presidency, she was personally present when the Jones lawyers questioned the President. She narrowed their definition of sexual relationship to protect the President. She fought to make her gag order work to protect both sides against embarrassment. And, though appointed by a Republican President, she found insufficient evidence to justify Paula Jones a jury trial. Whether right or wrong in the end, Judge Wright demonstrated a respect for a coequal branch of government and a commitment to honest, impartial decisionmaking. She is a reminder of the vital importance of an independent, high quality judiciary.

My speculation is that Judge Wright has stayed her judicial hand while this impeachment inquiry is ongoing, not wanting to intrude or to have the judicial branch perceived as even slightly partisan. If this inquiry ends, she is free to act. If you share my view that, whether or not the President committed perjury, he misled the court, failed to demonstrate a commitment to the truth, and failed to act as a lawyer and chief executive officer should, then you can join me in urging that Judge Wright assert herself in this matter as she would if misconduct by any other witness became apparent. She should punish the President and send a clear message to all future witnesses. If she does so, she should satisfy any legitimate interests in promoting truth identified by the Committee or the Independent Counsel.

If she does and you agree to censure his conduct, we will have resolved the conflicts that divide you. In doing so, the government will teach the importance of truth and responsibility, we will condemn lying and deceit and assure that consequences

attach to witness misconduct, and we will carefully and properly reserve the political death penalty of impeachment for behavior more closely related to conduct of office than this President's.

Mr. GEKAS. The time of the witness has expired. We now turn to Professor Rosen.

STATEMENT OF JEFFREY ROSEN, ASSOCIATE PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. ROSEN. Thank you, Mr. Chairman. It is a great honor to be here today.

This is, I think Democratic and Republican Members may agree, a brutal and unforgiving time in American politics, in which ordinary citizens and their elected representatives are increasingly threatened with punishment for relatively minor transgressions of the kind that the law used to excuse. Responsibility for this unhappy state of affairs can be traced in the post-Watergate era to the explosive convergence of three novel and expanding sets of laws: the sexual harassment laws, the laws prohibiting lies to Federal officials, and the independent counsel law.

President Clinton deserves his share of blame for the expansion of these laws, and it is only fair that he be held accountable to them. Nevertheless, the appropriate response to the allegations against the President lies not in impeachment or in removal from office, but in congressional censure combined with the possibility of criminal prosecution or civil sanctions after the President leaves office.

This committee, I think, deserves great credit for focusing the attention of the Nation on the ways in which people can and are severely punished for highly technical violations of the laws against lying. In that sense, I thought the testimony this morning was terribly useful. But it is surely significant that neither the independent counsel nor anyone else, to my knowledge, has been able to identify a case where a defendant was prosecuted, let alone convicted, for peripheral statements in a civil proceeding that he or she did not initiate in order to derive some kind of benefit. This coincides with the traditional reluctance in American law to prosecute perjury based simply on statements asserting one's innocence.

Because defendants have traditionally been viewed as inherently unreliable, their testimony, unlike that of witnesses, was not taken under oath until after the Civil War. Judges recognize that the instinct for self-preservation is so strong that a guilty defendant will naturally be tempted to lie to protect himself, and it was considered a form of moral torture to force an accused to choose between incriminating himself on the one hand and facing eternal damnation for betraying his oath to God on the other.

In *Jones v. Clinton*, the Supreme Court established that a sitting President can be sued and personally deposed and his private life subject to wide-ranging discovery, even about conduct that preceded his inauguration. In an increasingly partisan environment, any remotely plausible lawsuit against a President will find ample funding, and inevitably there will be a clash of testimony.

Now, in ordinary civil suits this is nothing to worry about. Assessment of credibility, after all, is the main function of a jury, and

people who lie in civil depositions are ordinarily punished by losing the case rather than being prosecuted for perjury. Paula Jones, for example, is not threatened with a perjury prosecution, even though she may have misstated the degrees of her salary increases. If this President is impeached for lying during civil discovery, however, every time a future President's testimony is contradicted under oath, an impeachment inquiry may have to be triggered; and the country and President will again be distracted in ways whose costs are hard to measure.

The most serious allegation against President Clinton is that he may have committed perjury before the grand jury when he contradicted Ms. Lewinsky's assertion that he touched her breasts and genitals with an intent to gratify her. It seems implausible on the one hand that the core of the President's defense to the charges against him is that he didn't intend to arouse or gratify Ms. Lewinsky when he touched her. But wouldn't it be equally implausible to impeach the President of the United States on the grounds that he committed perjury when he denied that he intended to arouse Ms. Lewinsky?

This committee chose not to ask the President to clarify his state of mind about this embarrassing subject when it submitted 81 questions to him, and therefore, an impeachment count on this ground might fall short of the clear and convincing evidence standard that governed you during the Watergate impeachment hearings.

This is an indiscreet subject, but let me close with a call for prosecutorial discretion. Many of you are understandably concerned about establishing a double standard. Why should ordinary citizens be convicted of perjury for lying about sex while the President escapes punishment? But this concern is unfounded. If you exercise your discretion not to impeach the President, he will still be subject after he leaves office to precisely the same legal penalties as the witness who testified so movingly before us this morning: possible criminal prosecution and conviction, as well as possible civil sanctions or disbarment. Indeed, you may well choose to rebuke the President with a reputational sanction that no ordinary citizen faces: a congressional resolution of censure.

The Lewinsky investigation has been, in many ways, a nightmare for the country, but it has also been, for all of us, a constitutional education, reminding us that even well-intended laws can have illiberal consequences when they are expanded beyond their historical roots. By reclaiming your constitutional duty to exercise your sole power of impeachment, which includes the power not to impeach, you can offer the country an inspiring example of statesmanship, while at the same time rebuking the President for his reckless conduct in a way that will remain a permanent part of his legacy. Thank you.

[The prepared statement of Mr. Rosen follows:]

PREPARED STATEMENT OF JEFFREY ROSEN, ASSOCIATE PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

My name is Jeffrey Rosen. I am an associate professor at the George Washington University Law School, where I teach constitutional law and criminal procedure. I am also the legal affairs editor of *The New Republic* and a staff writer for *The New*

Yorker. It is a great honor to be here to today to testify about “The Consequences of Perjury and Related Crimes.”

This is, I think Republican and Democratic members will agree, a brutal and unforgiving time in American politics, when ordinary citizens and their representatives are increasingly threatened with punishment for relatively minor transgressions of the kind that the law used to excuse. Responsibility for this unhappy state of affairs can be traced, in part, to the convergence of three sets of laws—the sexual harassment laws, the laws prohibiting lies to federal officials, and the Independent Counsel law—which have been recklessly expanded in the post-Watergate era. President Clinton deserves his share of the blame for the expansion of these laws, and it is only fair that he should be held accountable to them. But the appropriate legal response to the allegations against the president lies not in impeachment or removal from office, but in congressional censure, combined with the possibility of criminal prosecution or civil sanctions after the president leaves office. The well-intentioned but ill-advised Independent Counsel law has already wreaked enough havoc on our constitutional order. If you let it further distort the standards for impeachment, our system of government will be altered, with consequences that are beyond our power to imagine.

In the course of preparing an article about perjury for *The New Yorker* last August, I was struck by the degree to which the public appears to recognize instinctively what the law has long acknowledged: that lies vary in degree and in kind, and that they should be treated accordingly. Historically, American law has been sensitive to the distinction among different kinds of lies, and American prosecutors and judges have made allowances for human frailty. They have examined a liar’s state of mind, the seriousness of the lie, and its effects on other people, before deciding which lies deserve to be punished. In the post-Watergate era, however, thanks to an unfortunate combination of judicial decisions and overreaching by Democratic and Republican prosecutors and independent counsels, the laws of perjury and obstruction of justice have been expanded far beyond their historical roots. As a result, there is now a gap between the kinds of lies that most people think should be illegal and those the law actually forbids. And this greatly increases the importance of prosecutorial discretion—the central question you face as you debate whether or not to impeach the president of the United States.

There is no doubt that some independent counsels and ordinary prosecutors in the post-Watergate era have abused their discretion, indicting people for relatively trivial lies. This is why I think you and your colleagues, Chairman Hyde, have performed an important service by focusing the nation’s attention on the degree to which people’s lives can be destroyed for highly technical violations of the laws against lying. But many of these cases are cautionary tales of prosecutorial excess to be avoided, not examples to be emulated. Moreover, the convicted perjurers from whom we will hear this morning told lies that met the legal standard for perjury beyond reasonable doubt: that is to say, they were clearly intentional and highly material to the legal proceedings in which they were told. By contrast, it is far less clear that a jury would convict the president of the United States for perjury in the *Paula Jones* case, in the face of his testimony that he believed his statements were legally accurate when he made them, and the fact that reasonable people can disagree about whether or not the statements were material to the case at the time they were told. If one thing is clear from the history of past Independent Counsel investigations, it is that juries, faced with ambiguous charges of perjury, often give the defendant the benefit of the doubt: when Lawrence Walsh prosecuted Oliver North for lying to Congress, a Washington, DC, jury refused to convict.

You, of course, are meeting not as an ordinary grand jury, but in your most extraordinary constitutional capacity, as grand inquest of the nation, deciding whether or not to recommend the impeachment of the president of the United States. And here the case for prosecutorial discretion is especially strong. There is, I know, disagreement among you about whether or not high crimes and misdemeanors are limited to offenses against the structure of government. I agree with those representatives and scholars who have concluded that constitutional text and history, as well as congressional precedent, suggest that lies about private transgressions unconnected to the president’s official duties should not be considered impeachable offenses. But even those of you who take a far more expansive definition of impeachable offenses—even if those who believe that it may include perjury that has nothing to do with the president’s official duties—still have the obligation to ask yourselves not whether you may vote for impeachment, but whether you should. Just as ordinary prosecutors and grand juries often decide not to indict crimes that are technically indictable, because they are unlikely to secure convictions, so you must ask yourself whether it is worth putting the country through the trauma of an im-

peachment trial when both the Senate and the people of the United States have strongly indicted that conviction, on the current facts, is highly unlikely.

There are special reasons to be concerned about prosecutorial discretion as you contemplate whether or not to impeach a president for perjury and obstruction of justice in a civil lawsuit unrelated to his conduct as president. Such a precedent might put future presidents at risk in a way that does the country serious harm. In *Jones v. Clinton*, the Supreme Court established that a sitting president can be sued and personally deposed, and his private life subjected to wide-ranging discovery, even about conduct that preceded his inauguration. In an increasingly partisan environment, any remotely plausible lawsuit against a president will find ample funding, far beyond the economic constraints that ordinarily discipline civil litigation. Inevitably, there will be a clash of testimony. In ordinary civil suits, this is nothing to worry about: assessment of credibility is the main function of the jury; and people who lie in civil depositions are ordinarily punished by losing the case rather than being prosecuted for perjury. Paula Jones, for example, is not threatened with a perjury prosecution, even though the evidence suggests she may not have been telling the truth when she claimed that her salary increases were diminished after she rebuffed Governor Clinton's alleged advance.

If the president is impeached for lying during civil discovery, however, every time a future president's testimony is contradicted under oath, a serious investigation may have to be triggered. Even if the Independent Counsel statute is not renewed, as its constitutional flaws are increasingly obvious to Democrats and Republicans, future Justice Departments and future House Judiciary Committees will find it hard to ignore potential offenses no less grave than those that lead to President Clinton's impeachment. If the House is controlled by the opposing political party, furthermore, the investigation will gain a partisan motor. The brutal machinery will again grind into motion, a special prosecutor will be appointed, and the country and the president will again be distracted, in ways whose costs are hard to measure.

Many of you are understandably considered about establishing a double standard. Why should Barbara Battalino be convicted of perjury for lying about sex in a civil case while the President escapes punishment? But this concern is unfounded. If you exercise your discretion not to impeach the president, he will still be subject, after he leaves office, to precisely the same legal penalties as the witnesses who are testifying before you today: possible criminal prosecution and conviction, as well as possible civil sanctions or disbarment. Indeed, you may well choose to rebuke the president with a reputational sanction that no ordinary citizen faces: a congressional resolution of censure, expressing your collective disapproval of his reckless conduct. But the question before you today is not whether the president should be liable to ordinary criminal punishment, but whether impeachment is an appropriate punishment for lying about sex in a dismissed civil case, despite the fact that the president was elected twice by the American people and continues to retain their confidence.

It is surely significant that neither the Independent Counsel nor anyone else, to my knowledge, has been able to identify a case where a defendant was prosecuted, let alone convicted, for peripheral statements in a civil proceeding. This coincides with the traditional reluctance, in American law, to prosecute perjury based simply on statement's asserting one's innocence. For most of English and American history, courts avoided putting defendants in situations where they might be tempted to perjure themselves under any circumstances. Judges recognized that the instinct for self preservation is so strong that a guilty defendant will naturally be tempted to lie to protect himself, and it was considered a form of moral torture to force the accused to choose between incriminating himself on the one hand and facing eternal damnation for betraying his oath to God on the other. It's because of a similar awareness of human frailty that prosecutors traditionally don't prosecute criminal defendants for perjury after they've taken the stand to insist on their innocence and are subsequently found guilty.

Because defendants were viewed as inherently unreliable, their testimony, unlike that of witnesses, was not taken under oath until after the civil war. Moreover, the way that reform came about was not exactly a model of enlightenment. After Reconstruction, Southern states were forced to repeal laws that had prohibited African-Americans from appearing as witnesses in court. As blacks began to sue to enforce their newly acquired rights, racist white Southerners worried that juries might be more likely to believe a black witnesses who had sworn to the truth of his testimony than a white defendant who had not. So at the end of the nineteenth century, Southern states began to introduce the defendant's oath. The famous perjury trials in America, from Alger Hiss to H.R. Halderman, are twentieth century affairs.

But the most dramatic expansion of the law of lying in America took place in the post-Watergate era, and it was driven by the passage of the Independent Counsel Act in 1978. From the beginning, Independent Counsels who have had difficulty

proving the crimes they were appointed to investigate have tried to justify their labors by indicting people for lying and obstructing their investigations. The Independent Counsel's best friend has turned out to be an old law called the False Statements Act, which prohibits "any false, fictitious, or fraudulent statements" to federal officials, even if the statements weren't made under oath. Originally adopted during the New Deal to cover any statements by citizens to government agencies, the law was invoked during the nineteen-eighties and nineties by a parade of independent counsels to punish unsworn lies to F.B.I. agents, to Congress, and eventually, to the independent counsel's themselves. As a result, the day-to-day enterprise of politics has become a very risky affair.

During the 1980s and 90s, judges worried about the unfairness of prosecuting people for the entirely natural impulse to deny their guilt when asked point blank if they were guilty. Everyone *expects* a suspect to lie when cornered, after all. To prevent unscrupulous prosecutors from trapping their targets this way, several federal courts carved out an exception to the False Statements Act, which they called the "exculpatory no." According to the "exculpatory no" doctrine, if you do nothing more than deny your guilt, without actively misleading federal investigators, you haven't committed a federal felony. The "exculpatory no" doctrine was a short-lived effort by judges to ensure that the law of lying coincided with our common sense intuitions about which lies deserve to be punished and which do not, but that effort turned out to be short lived. Last January, in *Brogan v. U.S.*, the Supreme Court ruled that lower-court judges had exceeded their authority by creating an "exculpatory no exception." In a separate opinion, Justice Ruth Badger Ginsburg worried that "an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—will create a crime by surprising the suspect, asking about those acts, and receiving a false denial."

Like the false statements act, the perjury and obstruction of justice laws have been expanded in the post-Watergate era so that they no longer require active misleading and are sometimes invoked to punish purely self-protective lies. In his legal referral, for example, the Independent Counsel points to the Battalino case to support his claim that false denials of sexual relations in connection with a pending civil proceeding can form the basis of an obstruction of justice charge. A Veteran's Administration psychiatrist named Barbara Battalino, whose testimony we will hear today, resigned after her supervisors learned that she was having an affair with one of her patients, a man named Edward Arthur. Mr. Arthur later sued for medical malpractice, and Ms. Battalino asked the U.S. Attorney for the District of Idaho to "certify" her under for coverage under the Federal Tort Claims Act. Interviewed by attorneys for the United States, Ms. Battalino denied that she had engaged in sexual relations with Arthur in her office on June 27, 1991. She was certified for coverage relating to conduct on or before, but not after June 27, 1991, and on appeal, she again denied, in a hearing before a magistrate, that anything of a sexual nature took place in her office on June 27, 1991. In April, 1998, Ms. Battalino was charged with obstructing justice by falsely denying that she had "performed oral sex" on Arthur in her office. Shortly after, she pleaded guilty to obstruction of justice.

But there is an obvious and important difference between the Battalino case and the allegations against the president. Ms. Battalino's attempt to hide the timing of her sexual encounter with Mr. Arthur was the central question at issue in the civil suit against her, and it also went to the heart of her effort to get the federal government to cover any damages that Mr. Arthur might be awarded. As a result, Ms. Battalino's false statements look almost like an attempt to defraud the government, and are therefore far more material than the president's statements about his relationship with Monica Lewinsky, which were peripheral, at best, to the *Paula Jones* case. The analogy would be more precise if, while the Paula Jones suit was pending, President Clinton had filed for coverage under the federal tort claims act, and in the course of appealing the denial of his claim, had denied in a court hearing that he had ever met Paula Jones.

To support his argument that withholding evidence in a civil proceeding can constitute obstruction of justice, the Independent Counsel also points, in his legal referral, to the recent Texaco case in New York, in which federal prosecutors indicted two former Texaco executives, Robert Ulrich and Richard Lundwall, for conspiring to obstruct justice when they discussed withholding documents in a discrimination suit against the company. But the Texaco case shows how rarely the obstruction of justice statute is applied in this context. The prosecution arose out of the political firestorm that followed a report in *The New York Times* that a group of Texaco executives that included Ulrich and Lundwall had been caught on tape using racial epithets. Although it later emerged that the reports of racial epithets were exaggerated, Texaco responded by docking the retirement benefits of Ulrich and Lundwall and settling the antidiscrimination suit for \$176 million. Public outrage, however,

was so intense that Mary Jo White, the U.S. Attorney for the Southern District of New York, felt moved to go further, and she indicted Lundwall and Ulrich for obstruction of justice, pointing to the fact that they had placed certain documents in a folder marked “withheld from legal” in the Texaco case. Lundwall and Ulrich successfully argued that this was the first time in 166 years that the federal obstruction of justice law had been invoked to punish someone for withholding documents in a civil case that hadn’t even been subpoenaed by the other side. Their lawyers convincingly portrayed them as innocent but legally unsophisticated employees, who had tried to separate the relevant documents from ones they thought were irrelevant, including an order form for an egg salad sandwich at a company lunch. Last May, a federal jury in White Plains acquitted Lundwall and Ulrich on all counts.

In allowing the unprecedented Texaco prosecution to go forward, the U.S. District Court for the Southern District of New York stressed the “great many good reasons why federal prosecutors should be reluctant to bring criminal charges relating to conduct in ongoing civil litigation. Civil litigation typically involves parties protected by counsel who bring frequently exaggerated claims that, under supervision of a judicial officer, are narrowed and ultimately compromised during pretrial proceedings. Prosecutorial resources would risk quick depletion if abuses in civil proceedings—even the most flagrant ones—were the subject of criminal prosecutions rather than civil remedies. Thus, for numerous prudential reasons, prosecutors might avoid entering this area.” The ultimate acquittal of the Texaco defendants suggests that prosecutors who fail to exercise discretion in close cases involving allegations of perjury or obstruction of justice are unlikely to persuade ordinary citizens to convict.

The most serious allegation against the president is that he may have committed perjury before the grand jury when he appears to have contradicted Ms. Lewinsky’s assertion that he touched her breasts and genitals with an intent to gratify her. But the President’s denial was phrased with typically exquisite legalisms: He testified: “If you had direct contact with intent to arouse or gratify, that would fall within the definition . . . You are free to infer that my testimony is that I did not have sexual relations, as I understood this term to be defined.” It seems absurd, on the one hand, that the only thing standing between the president of the United States and impeachment is his suggestion that he didn’t intend to arouse or gratify Ms. Lewinsky during their encounters. But it would be equally absurd to impeach him on the ground that he committed perjury because he actually intended for her to enjoy herself. Because this committee chose not to ask the president to clarify his state of mind about this embarrassing subject during its eighty-one questions to him, an impeachment count on this ground might fall short of the clear and convincing evidence standard that governed the Watergate impeachment hearings. Moreover, impeaching the president based on his failure to admit that he intended to gratify Ms. Lewinsky would be hard to reconcile with the Watergate Congress’s refusal to vote an impeachment count for President Nixon’s alleged false statements on his tax returns.

Finally, if one takes the view, as many constitutional scholars do, that the president cannot be criminally indicted while he is in office, it’s arguable that the sole purpose of calling the president before the grand jury was to obtain testimony from him in order to accuse him of perjury before the House. This looks uncomfortably like what some courts have defined as a “perjury trap,” and while the precise legal contours of the perjury trap defense are unsettled, the House can certainly weigh the possibility that the president was set up by federal prosecutors, acting indirectly in concert with private litigants, as it decides whether or not to impeach.

Let me end with a call for prosecutorial discretion. The Lewinsky investigation has been, in many ways, a nightmare for the country; but it has also been a constitutional education, reminding all of us that even well-intentioned laws can have illiberal consequences when they are expanded far beyond their historical roots. The Independent Counsel law, we can now see more clearly than ever, has dramatically unsettled the constitutional balance, creating a politically unaccountable and unconstrained officer who combines the functions of prosecutor, impeachment investigator, legislator, judge, and jury. By reclaiming your constitutional duty to exercise “the sole Power of impeachment,” which includes the power *not* to impeach, you can offer the country a shining example of statesmanship, while at the same time censuring the president in a way that will remain a permanent part of his legacy.

Mr. GEKAS. Thank you very much, Professor Rosen. We will now begin the 5-minute rule exposition of the Members of the committee. We will begin with 5 minutes granted to the gentleman from Michigan.

Mr. CONYERS. Thank you very much. I want to thank every one of you who have been here today. For us the wait was worth it. We only hope that it has some small measure of fulfillment for you yet. I commend everyone here. Let us talk in terms of the realities that confront the 37 Members in front of you. How do we move toward the exit door with some small measure of grace, Judge Higginbotham? How do we put a wrap around this inquiry for when it is studied by future scholars and by other Members on the Judiciary Committee? How do we put an end to it even though we are so fragmented at this point apparently? But somehow around this one question of perjury, which I think has been discussed very importantly, Professor Dershowitz, and I think that we have a frame of reference on it, what do you think we might want to do? Professor Saltzburg has been most explicit about that and I thank you for that part of it. But would you begin this dialogue with us, please? Because that is the key here. How can we find some path of reconciliation that will get us with some small measure of honor out of the door altogether?

Judge HIGGINBOTHAM. Were you talking to me, sir?

Mr. CONYERS. I was.

Judge HIGGINBOTHAM. More than 100 years ago when Justice Holmes gave his famous common law lectures, he said that "the life of the law has not been logic: it has been experience." At another time, he said that a page of history is worth a volume of logic. It seems to me that you have to put this impeachment issue within the corridor of history. There is another poignant reminder chiseled on the walls at Auschwitz that "Those who cannot remember the past are condemned to repeat it." If this committee reflects on history and becomes aware of the fact that there has never been, never been an impeachment proceeding at such a minuscule level, then it seems to me you must pause and question whether an impeachment is appropriate.

Everyone talks about the Nixon experience. But that is as different as the difference between zero and infinity. In the Nixon case, he was using the Internal Revenue Service, not patting some woman on the side, using the Internal Revenue Service, to engage in improper tax audits and investigation of political enemies. In the Nixon case, he was attempting to obtain confidential information maintained by the IRS concerning political enemies. In the Nixon case, he was using the Federal Bureau of Investigation, the Secret Service and other executive personnel to undertake improper electronic surveillance and other investigatory techniques with regards to political enemies. In the Nixon case, he was creating and maintaining a secret investigative unit within the Office of the President which utilized the resources of the Central Intelligence Agency, engaged in covert and illegal activities, and I could name several others that are beyond dispute.

Is that comparable to this? If it is not, then I think Justice Holmes was right, a page of history is worth a volume of logic.

Mr. CONYERS. Thank you so much, Judge. Professor Dershowitz, would you elucidate for us, please?

Mr. DERSHOWITZ. I think history will not be kind to this committee. History will not be kind to this Congress. I think this committee and this Congress will go down in history along with the Con-

gress that improperly impeached Andrew Johnson for political reasons. I think there is no exit strategy that will permit this committee and this Congress to regain any place in history which is going to look positively. It made a dreadful mistake by ever opening up an impeachment inquiry on the basis of sex lies and coverups of sexual events. It is down that line. Now it is getting worse. It is like my typical client. First, he commits the crime and then he compounds the crime by making it worse. Now it is becoming worse, because now we are seeing incredible hypocrisy introduced into the debate. "Oh, we care so much about perjury. What a terrible thing perjury is." The only reason the majority of this committee cares about perjury is because they believe that President Clinton, their political opponent, is guilty of it. They couldn't have cared less about perjury when Caspar Weinberger was guilty of it.

Mr. GEKAS. The time of the witness has expired and the time of the gentleman from Michigan has expired.

Mr. DERSHOWITZ. And they don't care at all about perjury by the police, as evidenced by the lack of attention to this problem.

Mr. CONYERS. Judge Gekas' patience has expired.

Mr. GEKAS. That is exactly right. Now you may applaud. Please don't take me literally.

The Chair now turns to the gentleman from Florida, Mr. McCollum.

Mr. MCCOLLUM. Thank you very much, Mr. Chairman. First of all, I sat on the Iran-Contra committee and I do not believe for one minute that Caspar Weinberger committed perjury, but that is beside the point. I also am chagrined with some other testimony today that implies that the President of the United States is irreplaceable. I don't think anybody is irreplaceable. I don't think anybody is indispensable. I think Al Gore would make as fine a President as President Clinton. I don't necessarily agree with him politically but I certainly do.

I also am very concerned that some have tried to diminish the nature of the perjury and the obstruction of justice, which I think there is compelling evidence of. The President committed perjury, from my reading of every bit of the facts we have here, and I am really convinced of this the more I have studied it, and I have studied it a great deal more even this weekend, when he lied both before the grand jury and in the Paula Jones case about whether he had sexual relations with Lewinsky, whether he was alone with her, whether he talked with her about her testimony and on numerous other occasions, and not only that but it is very clear that long before she was subpoenaed in the Jones case, the President and Monica Lewinsky had an understanding that she would deny and he would deny any sexual relations if anybody ever asked about it, and then when she was subpoenaed he suggested that she file an affidavit knowing good and well that it was going to be false and encouraged her to do that. And then when there was a subpoena for her to produce any gifts that he had given to her that specifically named a hat pin and she wondered why in the world that was named there and was really worried about it because that was the first gift she said he ever gave her, he then conspired with her to hide those gifts from the court. And then after that, he encouraged his secretary, Betty Currie to lie to protect him.

Now, all of that to me if proven, and I think it has been proven in this case and I think it would be proven in any court of law and a jury would convict him of all of those things, rises to a very high level of high crimes and misdemeanors. Not only does it do that, but to me the problem that we see in this is that there is injury to the Nation, grave injury, if we find this to be true that the President has committed these crimes and then we tolerate them, then we don't impeach him.

The real question here today shouldn't be what are the consequences of perjury, the real question is what are the consequences of not impeaching the President if he has committed perjury and obstruction of justice and witness tampering? What are the consequences? What are the consequences to the courts with respect to that if we look the other way? There are parties to every civil lawsuit. Those parties to every lawsuit out there expect truth to be told. If witnesses that they call or witnesses who are called lie or encourage other people to lie or hide evidence or encourage other people to hide evidence, then the parties to that lawsuit can't get justice, they can't get a fair judgment. That is what undermines the court system. And to have the President of the United States engaging in activities that do that and then we don't impeach him, he gets away with it, we tolerate it, we don't hold him accountable, that is the problem. Congress has that responsibility under the Constitution. I think that is the injury to the Nation there.

Then with respect to our military, as, Admiral Edney, you and General Carney well stated and Admiral Moorer said in written testimony that he didn't give here today, what about his role as Commander in Chief. When you expect military officers to be the leaders and you expect military officers to be, as Admiral Moorer, a former chairman of the Joint Chiefs of Staff has said to us, to serve as role models for honorable and virtuous conduct and you find that we don't hold the President accountable, the Commander in Chief accountable for matters that officers would be removed for, probably court-martialed for, what does that do to undermine our military and our good order and discipline in the military?

So I have two questions to ask. One I want to ask to Judge Tjoflat and one I want to ask to you, Admiral Edney. Judge Tjoflat, if we find the President guilty of perjury, obstruction of justice, and so forth, and do not impeach him, what injury do you believe this could cause to the justice system? Are people more likely to commit perjury in the future if we do that than not? And then because my time is running out, I want to ask Admiral Edney if we find the President to have been guilty of perjury, obstruction of justice, and so forth, and don't impeach him, what does this mean since he is the Commander in Chief? Does it mean that we are undermining the trust and confidence you discussed essential to good order and discipline in the military? Will we be undermining it if we don't impeach him if we find him guilty of these crimes I just described?

Judge Tjoflat, would you first respond and then Admiral Edney.

Mr. TJOFLAT. I think your question implies the answer.

Mr. MCCOLLUM. And the answer is?

Mr. TJOFLAT. If that is the committee's finding, then there is going to be an effect on the administration of justice.

Mr. MCCOLLUM. A negative effect?

Mr. TJOFLAT. Yes.

Mr. MCCOLLUM. If we don't impeach him?

Mr. TJOFLAT. Well, I don't know about the remedy. All I am saying is if that is the committee's finding, then you have a negative effect on the administration of justice, if that is the case.

Mr. MCCOLLUM. What about the good order and discipline of the military, Admiral Edney, you described? I have always heard the term prejudice to the good order and discipline. Could you tell us what that means and would we be undermining that if we didn't impeach the President of the United States if he is guilty of these crimes that have been described if we find him so?

Mr. EDNEY. I don't believe that there is any straight, clear answer to that, because the military of this country serve under a different code, which you recognize as the UCMJ, and the President operates under the civilian laws. The professional military of this country will perform their duties in loyalty to the Constitution and the Office of the President. That is the strength of the military. Will it undermine the good order and discipline to have that example? That is like how you ensure safety. But it will not have a beneficial effect in the ability to measure the disadvantages or the adversarial effects as far as who stays in the military, who will come in the military, who will serve and the quality of the people. We need a portion of this country's best to serve in the military. It is hard for me to put an exact quantitative statement to your question, but certainly it is an issue that will not affect the performance of the military, but it might affect the quality and the numbers that make it a career.

Mr. GEKAS. The time of the gentleman has expired. We turn to the gentleman from Massachusetts for 5 minutes.

Mr. FRANK. Admiral, let me follow up on that because I gather you are saying that while you can't quantify, and I appreciate your pointing out we all tend sometimes to be alarmists and I would certainly agree with you that people that are in the military now are going to do their best and we should not assume they are as easily swayed from their duty and people will make that on both sides, but you said it could have a longer term negative effect and that is because the commander, the person right up there in the chain of command, in the civilian chain of command but nonetheless in the chain of command, might be seen to be getting away with conduct and not be held accountable for conduct that would be severely punished in the military, is that true?

Mr. EDNEY. What you will see in my judgment, Congressman Frank, is a tendency to see the rationale that is being put forth here on the insignificance of lying and the insignificance of adultery and these other issues as then being used as a defense, and in that manner it will undercut the good order and discipline.

Mr. FRANK. We don't have to speculate, because in December of 1992, George Bush, the outgoing President, pardoned Caspar Weinberger, who had been Secretary of Defense for I think 6 years during the Reagan administration. While the Commander in Chief is here, the Secretary of Defense is between you all and the Commander in Chief, and he has a very direct relevance here. So I guess I would ask you, my colleague from Florida says he is confident that Caspar Weinberger didn't commit perjury. I don't know

whether Caspar Weinberger committed perjury or not and will never know because George Bush pardoned him. He was indicted on four counts, including obstruction of Congress, false statements and two counts of perjury, and George Bush pardoned him after the 1992 election. So the Secretary of Defense, who is obviously very directly in the chain of command of the Armed Services was indicted on two counts of perjury and the President of the United States pardoned him. Did that have the negative effect on the military that you are afraid? If not, why not? Because isn't it very similar? The Secretary of Defense certainly has a relevance to the military. He is in the chain of command.

Mr. EDNEY. No, first of all, the Weinberger case was never carried forth, so we do not know—

Mr. FRANK. As a matter of fact, the President pardoned him. But he was indicted. And the question about whether or not it was carried forth begs the question because the question is whether we should carry this forth. Caspar Weinberger was indicted. I guess the question is, when George Bush pardoned Caspar Weinberger was he saying to the military, "Look, he's not going to be held accountable," and did that not have a bad effect to pardon someone before he was even tried but was indicted?

Mr. EDNEY. There was no proof on whether or not Caspar Weinberger committed—

Mr. FRANK. Of course there was no proof because it didn't go to trial. There couldn't be proof. George Bush made it proof-proof. That is the problem. It would be similar here. So if we don't move to impeach President Clinton there wouldn't be any proof either. In both cases independent counsel have made charges. In fact, in the Weinberger case, the independent counsel went a step further. He brought indictments. In this case he just came and told us. They are on the same footing. I have to say if in fact this was the case, my guess is this doesn't have a big effect on morale in either case.

I do want to say, I remember when George Bush pardoned Caspar Weinberger, Les Aspin, the late Les Aspin who later became the Secretary of Defense, he was chairman of the Armed Services Committee, he praised, he said it was okay for George Bush to do that. He wasn't terribly partisan. I don't criticize George Bush for pardoning Caspar Weinberger, but I do think what is sauce for the wild goose chase ought to be sauce for the gander, to join our metaphors of the day.

Mr. EDNEY. Pardon my voice. One of the differences is the Weinberger case involves the execution of foreign policy, which is much more complex to understand than the issues involved, whereas the issues involved here are a very common, frequent occurrence in the military and they get—

Mr. FRANK. I think, A, you are denigrating the military, at least the top ranks. I would hope they would understand national security policy that had to do with arms sales which I think frankly many of you understand better than I, but also I would say the charge was lying and not remembering. It wasn't some complex question about name six Ayatollahs. It was not a foreign policy test. It was, "Do you remember?" "No, I don't remember." It happened last week. Do you know of any such things? They were on

his desk. According to them he was denying that he remembered things that were on the desk a little bit away.

Bill Clinton is being accused by my friends on the other side of perjury before the grand jury because he said in August of 1998 that the activity began in February of 1996 and Monica Lewinsky said November of 1995. That is one of the three counts of grand jury perjury. A question of a couple of months difference in remembering something over 2 years. Caspar Weinberger was asked for a much shorter period of time.

So I disagree with you as to the complexity and I must say I think that I, unfortunately, have to infer a lack of objectivity in your approach to this.

Mr. EDNEY. I am not implying on either case, but I will say that no matter who does it, whether it is a Republican or a Democrat, if you are found to be guilty of lying under oath, under the judicial system of this country, it is a serious offense.

Mr. FRANK. But neither one has been found because of the pardon and—

Mr. EDNEY. Then there is no conclusion to your question. If you haven't found guilt in Weinberger or the President, I'm not making any conclusions.

Mr. HYDE. The gentleman's time has expired. The gentleman from Pennsylvania, Mr. Gekas.

Mr. GEKAS. I thank the Chair. Many of the Members who have immediately rushed to the side of President Clinton, as they did from the very first moment that this case began, have already even from that very first moment pronounced that the President is guilty of no offense, even though he lied under oath or may have committed perjury or all these others, it is not an impeachable offense. In my estimation, they have issued individual pardons to the President as they sit here as Members of Congress. They say he committed these acts, we don't think that they should be impeachable.

Mr. NADLER. Will the gentleman yield?

Mr. GEKAS. I will not yield.

I want to go to a little scene that was erected by Judge Higginbotham and ask if I might use assuming arguendo back at you for a moment.

Mr. HIGGINBOTHAM. It would be a pleasure. I want you to know that I once lived in your great Commonwealth.

Mr. GEKAS. Very good. The scene that you constructed was of the President admitting only to going 49 miles per hour while everybody in the world knew that he was doing 55. Is that what you said?

Mr. HIGGINBOTHAM. No, I did not state it with that precision. It is here, in my statement. I said the hypothetical was the President factually was going 55 miles per hour in a 50 miles per hour zone. He is questioned before a grand jury as to what was his speed, and he says 49, knowing that it was 55.

Mr. GEKAS. Very good. Stop right there. Can you, assuming arguendo, assume also that there is another person involved in this case, a woman or a man or someone whose child was run over by the defendant who insisted he did not go over 50 miles per hour but everyone in the world knows that he violated the speed limit

at 50 and thus he could amount to be a destroyer of the case of the plaintiff who insists that negligence, or speeding, or going over the speed limit is the cause of the great damage to one's family. Is that an assumption that is beyond scenario?

Mr. HIGGINBOTHAM. I am perfectly willing to accept your amendment of the scenario and I am willing to answer it if you will allow.

Mr. GEKAS. I will let you in a moment. What I am asking is, isn't that tantamount to the *Paula Jones* case where Paula Jones, whether you agree or not that she should have been granted the right by the Supreme Court to sue the President of the United States. By the way, I disagreed with that opinion of the Supreme Court. I still rue the day that the Supreme Court ruled that way in that particular case. But now that is history. Paula Jones was entitled, then, under the ruling of the Supreme Court, was she not, Judge Higginbotham, to the pursuit of her rights to find damages against the defendant in her case? Now, if indeed the President and Monica Lewinsky testified falsely in those proceedings in order to destroy the case of a fellow American citizen, to get away with not having to pay damages, to avoid the possibility of being found liable by a jury, to do all of those things, isn't that more serious than just a case of a triviality like a traffic offense where if it is limited to a traffic offense all of us would say you are absolutely correct, but when it involves destroying a negligence case or a reckless case of involuntary manslaughter, doesn't it take on different connotations when rights are destroyed by virtue of false statements under oath? That is a very important question to me.

Mr. HIGGINBOTHAM. No doubt about it. I tried personal injury cases for 13 years as a Federal district court judge. Not in your area, sir, but in Philadelphia. I must have had 200 right angle collisions tried before me where there was a traffic light.

Mr. GEKAS. That is why I didn't go to Philadelphia.

Mr. HIGGINBOTHAM. In 200 cases, 199 of them had the green light on each side. So that either Philadelphia has the worst traffic light system in the world where all the lights are green when people approach them or there is a diminution of accuracy in such case.

Mr. HYDE. The gentleman's time has expired.

Mr. GEKAS. I ask unanimous consent for 30 seconds more.

Mr. HYDE. Of course.

Mr. GEKAS. I am simply drawing the parallel and you have helped me to draw it, that the added element of the fact that certain other American citizens' constitutional rights, to use the words of Professor Dershowitz, the constitutional rights, might be damaged by perjury where he thinks that should be investigated further, these constitutional rights to sue for damages might have been damaged by the testimony before a grand jury.

I yield back the balance of my time.

Mr. HIGGINBOTHAM. If you want me to answer, Mr. Chairman, I am perfectly willing to, but I don't want to be disrespectful of your ruling.

Mr. HYDE. You are being instructed that you should answer.

Mr. HIGGINBOTHAM. All I was suggesting is you can't apply a *per se* rule and you have to be factually specific.

Mr. GEKAS. And you have helped me.

Mr. HIGGINBOTHAM. Okay.

Mr. HYDE. I thank the gentleman. Mr. Boucher, the gentleman from Virginia.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I will direct this question to Professor Rosen, Professor Saltzburg and Professor Dershowitz, and following their answers if others on the panel would also like to comment and if time permits, we would be happy to hear from them as well.

Since the referral to this committee of September 9 by the Office of Independent Counsel, a great deal has been said about the supremacy of the rule of law and the principle of American jurisprudence that no person, including the President of the United States, should be above the law. We have heard statements from witnesses today referring to those principles and a number of Members of this panel have talked about those very important principles in their questions. Some have suggested that if one concludes that the President committed a crime such as perjury, the only way to pay service to these important principles is to impeach and remove the President from office. But the constitutional history of the impeachment power suggests that it was not designed as a punishment for individual misconduct on the part of the President. Rather, it was designed to protect the Nation from the conduct of a President who through his actions has become a national threat. Punishment of the individual for any crimes that the individual may have committed while he holds the office of the presidency is expressly provided for in Article I, Section 3 of the U.S. Constitution.

In his testimony before this committee last week, the independent counsel, Mr. Starr, stated that in his view the President would be vulnerable to the criminal justice process when he leaves the office of the presidency in January of the year 2001. He stated that the President at that time could be indicted, tried, convicted and given appropriate sentence for any crimes, including perjury, that were committed by the President during his tenure in the presidency. Mr. Starr also confirmed that the statute of limitations for the offenses that are described in his referral is 5 years and that there would be time remaining within the statute of limitations to indict and prosecute the President after he leaves office in the year 2001.

So given the fact that the President can be prosecuted for any crimes that he may have committed while in office and given the fact that the impeachment power was designed for the protection of the Nation, not for the punishment of the President individually, should the House of Representatives decide that the President should not be impeached, would you not agree that the rule of law and the principle that no person is above the law, including the President of the United States, is well served because the President is vulnerable to prosecution, indictment and trial for any crimes that he commits while he holds the office of President?

Mr. Dershowitz, let's begin with you.

Mr. DERSHOWITZ. Theoretically the President could be prosecuted after he leaves office. The President will not be prosecuted after he leaves office, for several reasons. First, this would be a selective prosecution. People who commit acts like the President are never prosecuted for those acts. Second, no prosecutor in his right mind

would indict a President unless he were confident he would get a conviction. There would be no conviction in this case. The problem is that by Kenneth Starr holding this threat of prosecution over the President and his lawyers, they have made it impossible for the President to come and apologize and do what many Members of this House would like him to do, acknowledge more than he has already acknowledged. As a practicing criminal lawyer, I can tell you no lawyer worth his salt would ever recommend the President acknowledge anything while there is a prosecution pending. So the answer is very simple. Let Kenneth Starr announce now what he will inevitably announce months from now, he will not prosecute the President, and I have a relatively high level of assurance that the President would respond by making statements unlike the statements he has made up to now. But don't expect the President to admit complicity while at the same time encouraging the independent prosecutor to threaten him with prosecution. It won't happen.

Mr. BOUCHER. Let me briefly ask the other two witnesses to respond. And the question is this. Is not the rule of law well served by the President being vulnerable to the criminal justice process just as any other American is for crimes that he commits while he holds the office of the presidency?

Professor Saltzburg.

Mr. SALTZBURG. I want to begin my answer by just saying to the chair that a couple of us have to leave at 5 and I know that by yielding, if there are questions Members want to ask, we would like to be able to answer them and I want to answer this one. I think that it is very clear to me that there is now a threat of criminal prosecution against the President. I am very serious when I suggest to you that but for this committee's going forward, I believe there is every reason to think that Judge Wright would do what judges ought to do, which is at the first hint, not just of perjury but that the court has been deceived, it ought to take action. If you wanted to really send a message to the American people that everybody is equal under the law and you really cared about honesty and integrity in the court system, what you would do is you would put it in the hands of the court, where it can't be now because the court out of respect for a co-equal branch of government would just leave it with this committee. There is a solution that would guarantee that the President would be no better off and no worse off but for timing.

Mr. BOUCHER. Professor Rosen.

Mr. ROSEN. I agree with Professor Saltzburg that Kenneth Starr may indeed bring a criminal prosecution. But I'm interested in the light that your question casts on the decision that your colleagues on the other side face—those who believe that the perjuries in question are impeachable offenses. What light does the unlikelihood that a jury would convict cast on the question of prosecutorial discretion? The lying cases suggest that even overzealous prosecutors who bring lying prosecutions rarely succeed.

Oliver North, for example, was prosecuted for lying to you, for lying to Congress, and a Washington, DC, jury acquitted. There are many other cases of juries who are far more indulgent of lies because they have common sense intuitions about what lies should be

punished and therefore they ultimately acquit. It seems that if you conclude that your jury, your trier of fact, the Senate, is unlikely to convict, that might indeed be a factor in your decision as the grand inquest of the Nation whether or not to bring an impeachment article in the first place.

Mr. HYDE. The gentleman's time has expired. Mr. Coble.

Mr. COBLE. Thank you, Mr. Chairman. Thank you all for being with us, gentleman. Judge Tjoflat, is perjury a less offensive transgression in a civil case rather than a criminal one?

Mr. TJOFLAT. No, the perjury is the same regardless of the circumstances. I think that that is well-settled.

Mr. COBLE. Thank you, sir. That was my thought as well.

Admiral or General, I am familiar with the military imposition of sanctions for fraternization. I have always felt that they should probably be imposed more flexibly. As an enlisted member I have gone ashore with officers. As an officer I have gone ashore with enlisted members and never had any fraternization problems. So that is why I am thinking the way that I do.

But let me put this to you, Admiral. In the unlikely event, probably unlikely event that an admiral would have a sexual affair with a seaman or a third class petty officer and it was ultimately revealed, what would be the consequences?

Mr. EDNEY. The consequences would be immediate removal from the position they held and a required resignation and potential loss of salary. But certainly the first two, removal from office and a required resignation. And then it would be up to the Congress what the salary of my retirement would be.

Mr. COBLE. General, I am sure you concur with that probably?

Mr. CARNEY. It depends on the nature of the discredit to the service. If this had become rather public within the command, it was viewed to be detrimental to the good order and discipline.

Mr. COBLE. And I will talk with you all later on ashore one night about the flexibility of sanctions. We will do that another day. Professor Saltzburg, Professor Dershowitz says that he believes that history will not smile favorably upon this committee nor upon this Congress. How do you think history will smile upon this committee, this Congress and President Clinton?

Mr. SALTZBURG. Let me say that I think anyone who predicts history is wrong. Having said that, I will answer your question. I don't think that—as for this committee, I think Professor Dershowitz is premature. You haven't reached a judgment yet. I know some of the press say you have. But if I thought you had, I wouldn't have come today. You are struggling with important issues. If you do your job well and, in my judgment, if you decide that there is a better way to handle this than impeachment, that there is a better way, then history will say that you took a difficult task and you did it well.

I think as for the Congress, it depends also on what this committee does. It is hard to know how the Congress will be judged because it will depend upon what you do first. And as for the President, I think tragically, for any President, I don't just say this about this President, I think that throughout history, every time the name Bill Clinton is mentioned, the name Monica Lewinsky

will be mentioned also, and that for any President has to be the ultimate tragedy.

Mr. COBLE. Of the professorial staff you were sitting in between the two learned men, so I went in the middle. Let me put a question to the appellate judges. Gentlemen, have you all ever upheld a perjury case that was sent to you by a district court?

Mr. TJOFLAT. Yes, I think many times.

Mr. COBLE. Judge Wiggins.

Mr. WIGGINS. Yes.

Mr. COBLE. And Judge Higginbotham.

Mr. HIGGINBOTHAM. Yes, I cite some cases which I wrote in footnote 13, sir.

Mr. COBLE. I see my time is about to expire. I want the chairman to recognize that I beat the red clock again, Mr. Chairman. Good to have you with us, gentlemen.

Mr. HYDE. Thank you, Mr. Coble.

Mr. Nadler.

Mr. NADLER. Thank you, Mr. Chairman. Mr. Chairman, I have a question for the three professors at the end, Professors Dershowitz, Saltzburg and Rosen.

We have talked a lot today about equality before the law. The President is neither—should not be above the law, presumably shouldn't be beneath the law either but he shouldn't be above the law any more than any other person. I would like to ask the three of you two separate questions on this. In terms of the fairness of the procedure, I alluded earlier today to the fact that we are considering impeachment, we are going to be voting on articles of impeachment next week, and so far what has happened is that an independent counsel gave us a report in which he characterized testimony that he received or his people received, he reached conclusions from it, conclusions of fact and conclusions of law, the President did this, the President did that, we know that from so and so's testimony, and these deeds amount to impeachable offenses. He reached those conclusions, he gave those conclusions to us. The only witness we have had as to that so far has been the prosecutor, who in effect said I was right in the report, these witnesses said these things, we conclude, or I conclude that he committed impeachable offenses and they are impeachable offenses.

Now we are told that we don't need, the prosecution in effect doesn't have to call any witnesses before the committee because after all they testified under oath at the grand jury. We don't need to hear them. We are also told—and they are believable because they testified under oath. We are also told that by the defense in effect, the Democrats here, not calling any witnesses, we are pleading *nolo contendere*, we are essentially admitting the facts. Some of us think the facts haven't been put before the committee because there is no evidence before the committee since the prosecutor's opinions and conclusions are not evidence.

My first question is how would you judge all of that? Have we followed any kind of procedure that comports with due process or is this upside down?

My second question is a more simple question. The analogy has been made to the grand jury, we don't have to call their witnesses here, we are more like the grand jury, we just have to find prob-

able cause and pass it on to the Senate. Given the precedents, do we need probable cause, do we need clear and convincing evidence, what is our role?

Mr. DERSHOWITZ. I think the two questions really are rolled up into one. If in fact Congress is like the grand jury and if impeachment is exactly like indictment, then what they are doing is flawless. But obviously the analogy is completely flawed. Indictment is the second most serious act that can be taken in a constitutional government, second only—I am sorry, impeachment, second only to removal. When you impeach a President, you have gone down historically and made a very significant decision. Andrew Johnson was impeached. That will live with him for the rest of his life. It doesn't get undone, in the rest of our lives, in the rest of the lives of our country. It doesn't get undone simply by the fact that he was not removed by one vote. And so for impeachment to occur, you need to do what the committee did last time around with President Nixon. You need to hear evidence. You need to make credibility determinations. You need to ask yourselves the question, is the evidence, has it reached a level of clear and compelling evidence so that you are prepared to go down on record historically as saying, I am prepared to impeach a President of the United States, to start the process of undoing an election, to in effect implement a legislative coup d'état, the most dramatic act of check and balance. To think that it is like an indictment which could be handled on the basis of hearsay testimony, having a prosecutor come in and say I have interviewed six witnesses and this is what they say because the courts say you can indict on the basis of hearsay, is to misunderstand the difference between a criminal case and a great constitutional crisis.

Mr. NADLER. Professor Saltzburg.

Mr. SALTZBURG. Congressman, I don't know that you are going to like my answer, but it is going to be shorter and straightforward. As one who has watched this committee struggle a little bit with accusations flying back and forth, let me answer you this way. There was no independent counsel in 1974. There was no one who did that kind of investigation, and it makes all the difference in how you view due process in my judgment. I think that the independent counsel's report is a fair starting point. I think that it is wrong to suggest that you ignore it and proceed as though it didn't exist, and that it is perfectly fair for the majority to say point to the things that we ought to take evidence on. I don't see how—having said that, however, I don't see how, to answer your first question, certain judgments could be made without certain witnesses. I don't see how you could make an obstruction of justice conclusion regarding gifts without hearing from the participants because as I read the information that you have, the testimony is absolutely confusing as to the gifts. You have to hear that. That is one, while others, it seems to me, you wouldn't have to hear witnesses. You know what the President said. You heard his explanation. It is enough to make a judgment about whether you think this is impeachable.

As for the standard, you know, there isn't a one of the three of us who can give you much help on this because you know more about it than we do. We didn't run for office. We didn't go out to

the voters and get elected. We aren't the ones who held ourselves out there to be criticized, to fight those battles. You know much better than anybody what this is about. What it is about is a simple question. If you decide to impeach the President, you are saying that it is important enough to paralyze this country for some period of time because that is what it will be. You have got to decide that it is that important. And if it is, if you reach that conclusion, you will do it. All I can tell you is, I have a judgment about that but it is no better than yours and I don't think I can help you. It is not just indictment. We can indict any individual anywhere anytime without paralyzing the country. So the question you ask yourself, is the quality of the evidence and the nature of the charges enough to warrant putting the country, not just the President but the country, through that kind of proceeding?

Mr. HYDE. Go ahead, Professor.

Mr. ROSEN. I'm not sure that was shorter than Professor Dershowitz's

Mr. SALTZBURG. You don't have tenure. You should be careful.

Mr. ROSEN. The one salutary effect of this particular hearing is to convince people on both sides of the political spectrum of the deep constitutional problems with the independent counsel statute, and I think this goes to the core of the question. Section 595(c), which requires the independent counsel to advise the House of Representatives of substantial and credible evidence, arguably requires him to turn over raw information. It is arguably a derogation of your sole constitutional authority, under Article I, Section 2, to exercise the sole power of impeachment if you allow the independent counsel or anyone else to do the narrative project of forming legal conclusions and judging the credibility of witnesses. Clearly you do have an obligation to engage in independent fact finding about whether or not the alleged statements in question rise to the technical level of perjury.

As to the second question, regarding the Johnson Congress, its name was taken in vain earlier today and I would like to say a word on its behalf. The Johnson Congress acted with such constitutional scrupulousness. The Senate carefully separated the lower level charges of public disorderliness and general partisanship from the abuse of power charge, violating the tenure of office act. On that count—and this is an important precedent, I think—it was established beyond clear and convincing evidence. President Johnson didn't dispute that he had, indeed fired Stanton, or that he was indeed guilty of the charge in question. Therefore, the relevant precedent sets the bar quite high. This is not probable cause. This is a question about which the entire Congress, Members from both parties, converged and agreed.

Mr. HYDE. The gentleman's time has expired. The Chair will yield himself 5 minutes. I missed part of Professor Dershowitz's statement and I regret that. I had to attend to some other business. But I take it there was some concern about this committee being the only engine in the country that is moving in the direction we are moving in. By way of defense for this committee, I am proud of this committee, both sides of this committee. We are fighting really for a principle that is submerged in all of the personality that overwhelms this discussion and in the Dow Jones average.

We are fighting for the rule of law really. What does it mean? What does an oath mean? It isn't that you tell a falsehood about 55 miles an hour. It is that you have sworn to almighty God to tell the truth, the whole truth, and nothing but the truth in a formalized procedure and that you are the one man in the country who has a constitutional obligation to take care that the laws are faithfully executed. You are the chief law enforcement officer in the country, and you have taken that oath and you have cheapened it. You have disparaged it. And is that not worth our time and discussion? Because the rule of law—if you look at Auschwitz—do you see what happens when the rule of law doesn't prevail?

Now, I do not leap from the Oval Office on a Saturday afternoon to Auschwitz, but there are similarities when the rule of law does not obtain, or where you have one law for the powerful and one for the nonaristocratic. That is what we are discussing, the significance of the oath, the significance of truth, the breach of promise when someone lies to you having raised their hand and sworn to tell the whole truth. I wonder why they don't just say tell the truth. Why do they say the whole truth and nothing but the truth? Evasions. Evasions. There are all kinds of lies. There are fibs, little white lies, there is hyperbole, exaggeration, mental reservations, evasions. But then there is swearing to God to tell the truth, the whole truth, and nothing but the truth and then deliberately deceiving and lying. I think that is worth our time to thrash this thing out. I don't know where it is going to come out. I think if many of you—if Mr. Wiggins, who surprised me today, has his way—we will pass a resolution of impeachment out of here and it will fail on the floor and that will end it. And what becomes of the rule of law? What has happened to the oath? Has it been cheapened? And what does that mean for the rule of law? These are important questions. And what about that taking care that the laws be faithfully executed? Have we diminished that?

Mr. DERSHOWITZ. May I respond?

Mr. HYDE. Yes. If I am running out of ideas, you may respond.

Mr. DERSHOWITZ. I think you have made an excellent point and I think it is crucially important for this committee to be concerned with the rule of law and the importance of the oath. I think this committee is doing a terrible, terrible disservice to the rule of law and to the sanctity of the oath by trivializing the differences, as Judge Tjoflat said in one of the most unbelievably wrongheaded statements I have ever heard from a judge, that there is no difference between types of perjury. I challenge anybody to respond and say that there is no difference between a police officer who deliberately frames an innocent man or woman who he knows is guilty and subjects that person to false imprisonment or the electric chair and someone who lies to cover up a private embarrassing sex act. What this committee is doing is trivializing the oath. What this committee is doing is trivializing the rule of law. By only focusing on perjury because they want to get a President of the opposite party, they are telling the American public they don't care about perjury, they don't care about the real perjury that exists and is pervasive in this country in courthouses and in courtrooms and police stations. All they care about is Democratic perjury, not Republican perjury by Caspar Weinberger, which doesn't exist be-

cause you have read that record and you don't believe it is perjury, not perjury by police officers, not perjury that affect the lives of Americans on a daily basis but only perjury committed by one Democratic President. Nothing can trivialize the rule of law more than to selectively isolate this case and act as if it is the only case of perjury that is worth—that is important.

Mr. Chairman, you contributed to that in the beginning when you said that this was going to be a broad hearing about the pervasive influence of perjury on the American system. That is Hamlet without the prince. To talk about the pervasive influence of perjury on the American legal system and ignore 100 years of police perjury and documented reports about police perjury and pretend and close your eyes and make believe that the only perjury worth considering is perjury about a sex lie committed by a President of the opposite party trivializes the rule of law and trivializes the oath of office.

Mr. HYDE. I thank you, Professor Dershowitz. I don't thank you for criticizing the motives, saying that we are out to get the President. You haven't the slightest idea of the agony that many of us go through over this question. Many of us are sensitive to those concerns, all of us I daresay. I think you have disparaged us by leaping to conclusions without any basis.

I will tell you something. These two women who came here today are suffering permanent damage because they lied under oath about matters that are relatively trivial, relatively trivial, and we are concerned about the double standard. That may mean nothing to you.

Mr. DERSHOWITZ. It means a great deal to me.

Mr. HYDE. But it means something to us.

Mr. DERSHOWITZ. It means a great deal to me. You selected these two women. When is the last time this committee has expressed concern about the rights of criminal defendants? Separate criminal defendants can show that the President is being selectively prosecuted.

Mr. CONYERS. Mr. Chairman.

Mr. HYDE. Yes, Mr. Conyers.

Mr. CONYERS. And I thank you for this interchange, but it is not unknown to ourselves and to anyone that has been watching our proceedings in the Judiciary Committee that we are split totally down the middle in the most partisan fashion that has ever happened. Never, Judge Wiggins, in our '74 proceedings were we split this far apart. The result is fairly obvious of what is going to happen to anybody with the least understanding of this matter. So for you to be offended by the Dershowitz evaluation strikes me as a little disingenuous. You know what we are going to do here, because it has been said repeatedly by every Republican Member of the committee. So let's not get offended by the truth at this point in our proceedings.

Mr. HYDE. You know a lot more than I know about how the Republicans, every Member, is going to vote, because I don't know.

Mr. CONYERS. Well, I have heard them tell me what they were going to do. They tell me what is impeachable. I have heard it, sir. And I thank you for the intervention.

Mr. HYDE. You bet. The gentleman from Texas.

Mr. SMITH. Mr. Chairman, I am going to yield part of my time to my colleague from California, Mr. Gallegly.

Mr. GALLEGLY. Thank you very much for yielding, my good friend from Texas, Mr. Smith. Mr. Chairman, thank you for your comments. You echoed, I am sure, the sentiments of many Members on this committee, and we share that frustration. I want to thank this witness panel for coming here today. I know the hour is getting late. I understand we have a couple of individuals that have to leave here shortly. We still have 20 Members of our committee that have not had an opportunity to ask a question. So for the sake of brevity and respect for the gentleman that yielded to me, I would just like to ask Judge Tjoflat one question.

Judge, if you would be kind enough to explain to us your opinion of what the consequences would be to our system of justice if perjury becomes commonplace in our courts? What would happen if lying on the witness stand is winked at because the person on the witness stand for whatever reason feels it is inconvenient, embarrassing or maybe even politically harmful if he or she told the truth under oath?

Mr. TJOFLAT. As I said in my opening remarks, the system of justice functions because of three things: First an impartial judge, second lawyers who obey the canons of ethics and thirdly witnesses who take the oath sincerely. And it is a three-legged stool. If any one of those legs collapses, then the system is unable to render justice, as I see it. And of course if it happens repeatedly, then the people lose respect for the law, they lose confidence in the system of justice and they resort to other means to resolve their disputes.

Mr. GALLEGLY. Thank you very much, Judge Tjoflat. I want to thank Mr. Smith for yielding to me and would yield back to him.

Mr. SMITH. Mr. Chairman, I am going to reclaim my time and address my first question to Judge Wiggins. Judge Wiggins, in your prepared testimony, you made this assertion: "The answer to the question of whether perjury or obstruction of justice is a high crime or misdemeanor is a relatively simple one. Of course it is." It is not that clear to everybody here today and perhaps to some of your panelists, though it is clear to a large number of other people. Why is it that you feel that perjury is an impeachable offense?

Mr. WIGGINS. Why do I feel that way?

Mr. SMITH. Yes.

Mr. WIGGINS. I think the phrase treason, bribery and other high crimes and misdemeanors is a deliberately vague phrase and does not have a fixed meaning, except perhaps for treason and bribery. But the others, offenses, are vague. And I don't think that you must impeach for every finding of perjury and every finding of obstruction of justice. But there are some findings of perjury and obstruction of justice that are so clearly important to arouse public attention to the gravity of the offense and misconduct of the offender and you must react. Now I think that if you say that is the crime of perjury, for example, an impeachable offense, of course it is. It is a crime. It is a felony. Thousands of people are in jail or have been in jail for violating that crime. If the President commits perjury, he is vulnerable for impeachment. But—and that is the issue before this committee. But once it passes from this committee—

Mr. SMITH. I understand.

Mr. WIGGINS. It is for the House of Representatives and that is where I may draw a different conclusion.

Mr. SMITH. The point that I was hoping to make, which you did make, was that perjury, in your judgment at least, is clearly and can be an impeachable crime. Is that right?

Mr. TJOFLAT. Of course it can be.

Mr. SMITH. Thank you.

Thank you, Mr. Chairman.

Mr. HYDE. Thank you.

Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. Chairman, I want to submit for the record with unanimous consent a copy of Rule 6(c) of the Rules of Criminal Procedure that state that the court shall appoint one or more jurors to be the foreperson and another to be deputy foreperson. The foreperson shall have the power to administer oath and affirmations and shall sign all indictments.

It is my understanding that the President was sworn in by one of the prosecutors at the grand jury testimony. I also have a copy of a memo from Bob Weinberg that outlines the basis for raising questions about the oath and two cases that are relevant to this issue, and I would like these introduced into the record.

Mr. HYDE. Without objection, so ordered.

[The information follows:]

RULES OF CRIMINAL PROCEDURE FOR THE U.S. DISTRICT COURTS

III. INDICTMENT AND INFORMATION

Rule 6. The Grand Jury

* * * * *

(c) Foreperson and deputy foreperson. The court shall appoint one of the jurors to be foreperson and another to be deputy foreperson. The foreperson shall have power to administer oaths and affirmations and shall sign all indictments. The foreperson or another juror designated by the foreperson shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. During the absence of the foreperson, the deputy foreperson shall act as foreperson.

THE FATAL FLAW IN STARR'S CASE FOR GRAND JURY PERJURY: AN ESSENTIAL
ELEMENT IS MISSING

(By Robert L. Weinberg¹)

Introduction

Now that the post-election proceedings of the House Judiciary Committee are focusing on whether any of the Independent counsel's charges rise to the level of an impeachable offense, the alleged grand jury perjury of the President is the charge that impeachment proponents most strongly argue constitutes a "high Crime or Misdemeanor." For example, at the November 9 Judiciary Subcommittee Hearing seeking to define impeachable offenses, South Carolina Rep. Lindsey Graham opined that Clinton should not be impeached for his allegedly perjurious deposition in the *Paula Jones* case but that the President's alleged perjury before the grand jury

¹Robert L. Weinberg has been a Visiting Lecturer in Criminal Procedure at the University of Virginia School of Law for the past 33 years, and was the court-appointed counsel for the appellant in the District of Columbia Circuit case of *Gaither v. United States* (cited above). He is a former president of the District of Columbia Bar.

would be “a good candidate for an article of impeachment.” (*The Washington Post*, Nov. 10, 1998, p. A4.

The President has of course vigorously denied the factual basis of Starr’s charge of grand jury perjury, which rests upon certain contradictions between the grand jury testimony of Lewinsky and Clinton. But close scrutiny of the record of Clinton’s grand jury appearance may render it unnecessary for the House and Senate to adjudicate this underlying factual controversy, because it will show that the charge of grand jury perjury lacks an essential legal element. This missing element would require dismissal of an indictment against the President for the ordinary crime of perjury. It should likewise defeat a charge by the House that he is guilty of the “high crime” of grand jury perjury.

The Oath

The transcript of President Clinton’s grand jury testimony, submitted to Congress by the Office of Independent Counsel (OIC) in support of its perjury allegation, recited that Clinton was “duly sworn.”²

But was he? Or is this transcript misleading?

By omitting a verbatim transcription of the administration of the oath to the President, the OIC transcript glosses over the circumstance that the grand jury oath was given to the President by the wrong person. The Clinton grand jury transcript contrasts with the transcripts of grand jury testimony by Monica Lewinsky and other witnesses, which recite that the witness was “duly sworn by the Foreperson of the Grand Jury.”³ The difference is critical, because the Federal Rules of Criminal Procedure authorize only the grand jury foreperson (or in her absence, the deputy foreperson) to swear the witness.

A different version of the transcript, attributed to the Federal Document Clearing House, was printed in *The Washington Post* the day after the videotaped version was publicly released by the House.⁴ The *Post* version does include the verbatim transcription of the administration of the oath to President Clinton, recording that the oath was given by a Mr. Bernard J. Apperson. But Mr. Apperson is not the grand jury foreperson; she was sitting a mile away from the President with the other grand jurors, listening to the oath in the Court House on a video feed. The oath-giving Mr. Apperson was identified in the *Post* transcript as an associate counsel of OIC, a member of Kenneth Starr’s prosecution staff.

Legal Argument

Under the federal perjury statute, 18 U.S.C. § 1621, the prosecution must establish, as the first essential element of the offense of perjury, that the defendant took “an oath authorized by a law of the United States.”⁵ This requirement, that the oath be authorized by a federal statute, rule or regulation, has been recognized in numerous cases, including the U.S. Supreme Court’s decisions in *U.S. v. Hvass*, 355 U.S. 570, 574 (1958), and *U.S. v. Debrow*, 346 U.S. 374, 376 (1953). “the oath administered must be authorized by a law of the United States.” *Debrow* at 377.⁶ It necessarily follows that: “An oath taken before an officer who has no authority to administer it cannot serve as the basis for an indictment for perjury.” *U.S. v. Doshen*, 133 F.2d 757, 758 (3rd Cir. 1953).⁷

This requirement is no recent innovation. It has been an essential element of perjury ever since the federal perjury statute was adopted, in 1790. In an 1882 Supreme Court case reviewing an indictment brought under the federal perjury statute, the perjury counts were invalidated because the oath had been taken before a notary public who was not authorized by the laws of the United States to administer the oaths in question (oaths which were required for certain reports to the Comptroller of the Currency). The Supreme Court held:

²House Doc. 105–311, p. 454.

³House Doc. 105–311, pp. 723, 964; House Doc. 105–316, pp. 14, 124, 173.

⁴The President’s Grand Jury Testimony,” *The Washington Post*, Sep. 22, 1998, p. A31.

⁵The quoted language appears in *U.S. v. Hvass*, 355 U.S. at 574 (1958), which in turn quotes it from *U.S. v. Debrow*, 346 U.S. at 376 (1953).

⁶In *Hvass*, the Court held, 8 to 1, that an oath required by a duly promulgated Rule of a Federal District Court was an oath authorized by “a law of the United States” within the meaning of Section 1621.

⁷In *Doshen* the conviction on a perjury count was reversed by the Third Circuit because the immigration officer who administered the oath was not authorized to swear a witness in the particular type of immigration proceeding that was involved. In *Smith v. United States*, 363 F.2d 143, 144–45 (5th Cir. 1966), the Fifth Circuit reversed a perjury conviction because the prosecution failed to offer the evidence needed to prove “an essential element of the crime of perjury,” “Proof of the charge requires that sufficient evidence be adduced before the jury upon which it can be found beyond a reasonable doubt that an oath was administered to the defendant by some officer authorized to do so.”

“It is fundamental in the law of criminal procedure that an oath before one who, although authorized to administer some kind of oaths, but not the one which is brought in question, cannot amount to perjury at common law, or subject the party taking it to a prosecution for the statutory offense of wilfully false swearing.” *United States v. Curtis*, 107 U.S. 671, 672–73 (1882). (Emphasis supplied.)

Thus President Clinton cannot be charged or convicted “for the statutory offense of wilfully false swearing” before the grand jury, if Mr. Apperson, who administered the oath, lacked legal authority to do so. Indeed, Mr. Starr’s own legal memorandum, transmitted to Congress in support of his Referral, recognizes this principle in its analysis of the elements of the federal perjury statute, 18 U.S.C. 1621; but it does not even consider whether the Independent Counsel might have failed to comply with the statutory requirement. See Legal Reference by OIC, House Doc. 105–311, pp. 268–69.⁸

Prior to the adoption of the Federal Rules of Criminal Procedure, which became effective in 1946, the federal perjury statute had included an express requirement that an indictment for perjury aver the name of the person who administered the oath and his authority to do so. (R.S. § 5396; former 18 U.S.C. § 558.) Although this formal pleading requirement was replaced by the more liberal pleading provisions of the Federal Rules of Criminal Procedure, Rule 7(c)—under which it was sufficient for perjury indictments to allege that the oath was “duly authorized”—proof of this essential element of due authorization still required proof at trial that the oath which had been administered to the defendant was one authorized by law. This is shown by the Supreme Court’s decision, upholding the validity of a perjury indictment and conviction, in *U.S. v. Debrow*, 346 U.S. 374 (1953).

The only authorization in federal law for administering an oath to a grand jury witness is found in Rule 6(c) of the Federal Rules of Criminal Procedure. That Rule provides that the Court shall appoint the foreperson and deputy foreperson of each federal grand jury, and that: “The foreperson shall have power to administer oaths and affirmations During the absence of the foreperson, the deputy foreperson shall act as foreperson.” The U.S. Supreme Court, in describing the duties of the grand jury foreperson,⁹ lists “administering oaths” as one of the foreperson’s three responsibilities. *Hobby v. U.S.*, 468 U.S. 339, 344–45 (1984). Similarly, a Justice Department Manual provides that “the witness is sworn by the grand jury foreman” and that “one of the foreman’s most important functions is the administration of the oath to witnesses.” U.S. Department of Justice Antitrust Division, *Grand Jury Manual* (1976) at p. 149 and p. 25.

Nowhere in the Federal Rules of Criminal Procedure, or any statute governing grand jury proceedings, is a prosecutor authorized to administer the oath to grand jury witnesses. Only the grand jury foreperson, or deputy foreperson, is authorized to swear the witnesses. The lack of such authority for prosecutors is not an oversight, or a technicality; it is inherent in the constitutional role of the grand jury. The framers of the Bill of Rights included in the Fifth Amendment a guarantee of grand juries for the federal courts, in order to protect the ordinary citizen against the power of the federal prosecuting authorities. Just as grand juries in the thirteen colonies had served to protect colonists from oppressive prosecutions by the Crown, the Fifth Amendment’s grand jury clause was intended to protect Americans from unwarranted prosecutions by the new federal government. Opinions of the U.S. Supreme Court have often noted the constitutional obligation of the federal grand jury to stand as an independent body between the prosecuting attorney and the accused; e.g.

Stirone v. United States, 361 U.S. 213, 218 (1960); *Russell v. United States*, 369 U.S. 749, 770–71 (1962); *Ex parte Bain*, 121 U.S. 1, 11 (1887). The U.S. Court of Appeals for the District of Columbia—the jurisdiction where the Starr grand jury sits—has followed the teaching of these cases in *Gaither v. United States*, 413 F.3d 1061 (D.C. Cir. 1969), where the court invalidated longstanding practices of prosecutorial infringement on the independence of all D.C. grand juries. As stated by the

⁸Starr’s discussion is directed specifically to 18 U.S.C. § 1621. The Memorandum also discusses a slightly different perjury statute, 18 U.S.C. § 1623, listing the five minor respects in which § 1623 differs from § 1621; but the oath requirement is not one of these differences. See Legal Reference, House Doc. 105–311, at pp. 269–70, n.6.

⁹The opinion uses the term “foreman.” Subsequently, Rule 6(c) was amended to use the gender neutral term “foreperson.”

D.C. Circuit in *Gaither*: “The grand jury is interposed ‘to afford a safeguard against oppressive actions of the prosecutor or the Court.’”¹⁰

In its most recent analysis of the grand jury’s constitutional role, the Supreme Court noted: “the grand jury is mentioned in the Bill of Rights, but not in the Constitution In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people.” As one manifestation of this independence, “It swears in its own witnesses.” *United States v. Williams*, 504 U.S. 36, 47, 48 (1992).

It is thus hardly surprising that only the neutral foreperson, and not the partisan prosecutor, was entrusted with the authority to administer oaths to witnesses when the Supreme Court promulgated, and the Congress approved, Rule 6(c) of the Federal Rules of Criminal Procedure. Independent Counsel Starr and his staff simply failed to follow the prescribed procedure for predicating a perjury charge on a duly authorized grand jury oath.

A possible reason for OIC taking this risky course is suggested by an intriguing colloquy between the President and a Deputy Independent Counsel, recorded near the end of the Clinton transcript. The President notes that he had invited all the grand jurors to come to the White House to participate in the proceeding. (If they had come, then the grand jury foreperson would presumably have been there to administer the oath.) But the Deputy Independent Counsel responds that the President’s invitation was rejected because, if the grand jurors attended at the White House, then videotaping of the session would have been precluded. (House Doc. 105–311, pp. 627–28.) Thus OIC’s tactic for obtaining a videotape which it presumably contemplated releasing to Congress, undercut OIC’s strategy of ensnaring the President in a perjury net before the grand jury.

The invalidity of the OIC-administered oath did not, however, deprive the President’s questioning of its value for the grand jurors. They were provided the opportunity to hear and evaluate the information provided by the President under 4 hours of interrogation by the OIC staff, and to consider that information in their subsequent deliberations. The situation is similar to a grand jury receiving and considering a report, transcript or videotape of a police or FBI interview in deciding whether or not to charge the interviewee, or anyone else, with a substantive crime. But since the interviewed witness was not sworn, he obviously could not be charged with perjury, even if the grand jury disbelieved his answers to the police. In the absence of an oath validly administered to President Clinton, there likewise is no predicate for charging him with perjury before the grand jury, as a ground for impeachment or in a criminal indictment.

While a majority of the Judiciary Committee, or of the House, might seek to argue that a false but non-perjurious statement to grand jurors could still be considered an impeachable offense, it is much harder to make the case that a non-perjurious denial of details of private sexual conduct amounts to a “high Crime or Misdemeanor.” Among all the grounds of impeachment urged in the Starr report, the ringing charge of “perjury” before the grand jury has presented the strongest case for OIC and its Congressional supporters to argue that a “high Crime or Misdemeanor” is properly alleged for a potential impeachment trial before the Senate. But if the “perjury” charge must be dismissed because an essential element of the “high crime” is lacking, then there is no occasion for the Senate to try, or the House to resolve, the underlying substantive issue: whether President Clinton or Monica Lewinsky was untruthful in their conflicting grand jury testimony as to who touched whom, where and when. The Senate can be spared an unseemly trial, and the House a fatally flawed charge.

¹⁰The D.C. Circuit’s quotation was from the Fifth Circuit’s decision in the famous case of *U.S. v. Cox*, 342 F.2d 167, 170 (5th Cir.), *cert denied sub nom Cox v. Hauberg*, 381 U.S. 935 (1965). “The constitutional provision is, as has been said, for the benefit of the accused.” *Ibid*.

UNITED STATES v. HVASS

No. 92

SUPREME COURT OF THE UNITED STATES

JANUARY 27, 1958, ARGUED

MARCH 3, 1958, DECIDED

Prior history

Appeal From the U.S. District Court for the Northern District of Iowa.

Disposition

147 F.Supp. 594, reversed and remanded.

Core terms

Perjury, oath, indictment, regulation, administered, clear legislative, prescribe, authorizes, contest, lawfully, founded, competent tribunal, satisfactory, resident, Criminal Appeals Act, fitness to practice, rules of practice, willfully false, homestead entry, decisional law, material fact, time to time, local land, local rule, prescribed, supplied, residing, wilfully

Summary

An indictment charging an attorney with violating the federal perjury statute (18 U.S.C. 1621) by making a wilfully false statement of a material fact in a hearing under oath, held pursuant to a local rule of a Federal District Court in which it was sought to determine the attorney's fitness to practice before the court, was dismissed by the U.S. District Court for the Northern District of Iowa, Central Division. The dismissal was based upon the District Court's holding that the local rule under which the attorney took his oath was not a law of the United States for purposes of the perjury statute's provision that perjury is committed by one who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, wilfully and contrary to such oath states any material matter which he does not believe to be true.

On appeal, the U.S. Supreme Court reversed the judgment below. Eight members of the Court, in an opinion by Whittaker, J., after ruling that the Supreme Court had jurisdiction of the appeal under the statute dealing with direct appeals by the government in criminal cases since the District Court's dismissal of the indictment was based upon its construction of the perjury statute, stated that, because federal statutes as well as the Federal Rules of Civil Procedure authorize federal courts to establish rules for the conduct of their business, the hearing at which the attorney testified under oath was a "case in which a law of the United States authorizes an oath to be administered," within the meaning of that clause as used in the perjury statute.

Douglas, J., agreed that the Court had jurisdiction of the appeal, but dissented on the merits, taking the view that a judge-made rule is not "a law of the United States" within the meaning of the perjury statute.

When a Federal District Court holds that an indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, there necessarily occurs a construction of that statute, within the meaning of the federal law (18 U.S.C. 3731) permitting direct appeal by the government to the Supreme Court from a District Court's decision or judgment dismissing any indictment where such decision or judgment is based upon the construction of the statute upon which the indictment is founded.

Under the federal statute (18 U.S.C. 3731) providing that an appeal may be taken by the United States direct to the Supreme Court of the United States from a District Court decision or judgment dismissing an indictment where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded, the U.S. Supreme Court has jurisdiction, on appeal by the government, to review a District Court's dismissal of an indictment charging that wilfully false statements of material facts were made by an attorney in proceedings, conducted under a local rule of a Federal District Court, to determine his fitness to practice before it, where the ground for the dismissal was that the local rule was not a law of the United States within the meaning of the federal statute specifying that whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be adminis-

tered, that he will testify truly, wilfully and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury.

On an appeal by the government from a District Court's dismissal of an indictment in a criminal case, under the statute (18 U.S.C. 3731) permitting such appeals where the District Court's dismissal is grounded upon the construction of the statute underlying the indictment, the U.S. Supreme Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment; the government's appeal does not open the whole case.

The essential elements of the crime of perjury, as defined in 18 U.S.C. 1621, are: (1) an oath authorized by the law of the United States, (2) taken before a competent tribunal, officer, or person, and (3) a false statement wilfully made as to facts material to the hearing.

The phrase "a law of the United States," as used in the federal perjury statute's (18 U.S.C. 1621) provision respecting cases "in which a law of the United States authorizes an oath to be administered," is not limited to statutes but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base.

Under the statutes (28 U.S.C. 2071, 1654, respectively) authorizing the federal courts to prescribe rules for the conduct of their business, and authorizing parties to plead and conduct their own cases personally or by counsel as, by the rules of such courts, are permitted to manage and conduct causes therein, and under Rule 83 of the Federal Rules of Civil Procedure which provides that each District Court may from time to time make and amend rules governing its practice, a District Court is lawfully authorized to prescribe its local rules, and such rules have a clear legislative base.

The federal perjury statute (18 U.S.C. 1621) covers ex parte proceedings or investigations as well as ordinary adversary suits and proceedings.

A hearing under oath, held pursuant to a local rule of a Federal District Court, in which it is sought to determine an attorney's fitness to practice before that court, is a "case in which a law of the United States authorizes an oath to be administered," within the meaning of that clause as used in the federal statute (18 U.S.C. 1621) providing that whoever, having taken an oath before a competent tribunal, officer, or person, "in any case in which a law of the United States authorizes an oath to be administered," that he will testify truly, wilfully and contrary to such oath states any material matter which he does not believe to be true, is guilty of perjury.

Syllabus

1. When a Federal District Court dismisses an indictment on the ground that it does not allege a violation of the statute upon which it was founded, not merely because of some deficiency in pleading but with respect to the substance of the charge, that is necessarily a construction of the statute, and a direct appeal to this Court lies under 18 U.S.C. § 3731. Pp. 573-574.

2. A willfully false statement of a material fact, made by an attorney under oath during a Federal District Court's examination into his fitness to practice before it constitutes perjury within the meaning of 18 U.S.C. § 1621, when the examination was made under a local rule of the District Court specifically authorizing such examination under oath; since such an examination is a "case in which a law of the United States authorizes an oath to be administered," within the meaning of the statute. Pp. 574-577.

(a) The phrase "a law of the United States," as used in the perjury statute, is not limited to statutes, but includes as well rules and regulations which have been lawfully authorized and have a clear legislative base, and also decisional law. P. 575.

(b) There can be no doubt that the District Court was lawfully authorized to prescribe its local rules and that they have a clear legislative base. Pp. 575-577.

Counsel

Ralph S. Spritzer argued the cause for the United States. On the brief were Solicitor General Rankin, Warren Olney, III, then Assistant Attorney General, and Beatrice Rosenberg.

Warren B. King argued the cause for appellee. With him on the brief was Charles Alan Wright.

Judges

Warren, Black, Frankfurter, Douglas, Burton, Clark, Harlan, Brennan, Whittaker

Opinion

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

The question for decision is whether a willfully false statement of a material fact, made by an attorney under oath during the District Court's examination, under its local rule, into his fitness to practice before it, constitutes perjury within the meaning of 18 U.S.C. § 1621.¹

Acting under 28 U.S.C. §§ 1654, 2071, and Rule 83 of Federal Rules of Civil Procedure, authorizing federal courts to prescribe rules for the conduct of their business, the District Courts for the Northern and Southern Districts of Iowa promulgated local rules governing practice in those courts. Their Rule 3, in pertinent part, provides:

"All attorneys residing outside of the State of Iowa and having civil matters in the court shall associate with them a resident attorney on whom notice may be served and who shall have the authority to act for and on behalf of the client in all matters Non-resident attorneys who have so associated with them a resident attorney shall be permitted to participate in a particular case upon satisfactory showing of good moral character.

"Provided further that where the action is one to recover damages for personal injuries sustained in Iowa by one who at the time was a resident of Iowa . . . , the Court may on its own motion, or on motion of a member of the bar of either District, before permitting a nonresident attorney to participate in the case, require a satisfactory showing that the connection of the said attorney [with the case] was not occasioned or brought about in violation of the standards of conduct specified in Rule 8 hereof.² The Court as a part of said showing may require the plaintiff and the said attorney to appear and be examined under oath."

Appellee, an attorney residing and maintaining his office in Minneapolis, Minnesota, had instituted two actions in the District Court for the Northern District of Iowa, as counsel for citizens of Iowa, seeking damages for bodily injuries which they had sustained in that State. On October 3, 1955, the court, acting under its Rule 3, entered an order scheduling a hearing to be held by the court on October 12, 1955, for the purpose of affording an opportunity to appellee to show that his connection with the two damage suits was not brought about in violation of the standards of conduct specified in its Rule 8, and directing appellee to appear at that time and to submit to an examination under oath, if he wished further to participate as counsel in those actions. Appellee appeared at the hearing and, after being sworn by the Clerk, was examined by the District Attorney on matters deemed relevant to the hearing. On November 1, 1955, the court entered an order finding that "the applicant [had] not made satisfactory showing of the matters which must be satisfactorily shown under said Local Rule 3," and it struck his appearance as counsel in the two damage actions from the record.

On March 20, 1956, a four-count indictment was returned against appellee in the same District Court. Each count charged that appellee, while under oath as a witness at the hearing of October 12, 1955, "unlawfully, wilfully, and knowingly, and contrary to [his] oath, [stated] material matters which he did not believe to be true" (in particulars set forth in each count), "in violation of Section 1621, Title 18, United States Code." Appellee moved to dismiss the indictment for failure of any of the counts to state an offense against the United States. The court,³ after full hearing upon the motion, concluded "that Rule 3, under which the defendant took his oath, is not such a law of the United States as was intended by Congress to support an indictment for perjury," and, on that ground, dismissed the indictment. 147 F.Supp. 594. The Government brought the case here by direct appeal under the Criminal Appeals Act, 18 U.S.C. § 3731. We postponed further consideration of the question of jurisdiction to the hearing on the merits, 353 U.S. 980.

At the threshold we are met with appellee's contention that we do not have jurisdiction of this appeal. We think the contention is unsound. 18 U.S.C. § 3731, in pertinent part, provides that: "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States . . . from a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon

¹That section, in pertinent part, provides: "Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, . . . willfully and contrary to such oath states . . . any material matter which he does not believe to be true, is guilty of perjury. . . ."

²Rule 8 is a substantial adoption of the Canons of Professional Ethics of the American Bar Association.

³The court was then being presided over by a district judge from another district, sitting by designation.

which the indictment . . . is founded.” This indictment was founded on the federal perjury statute, 18 U.S.C. § 1621. The District Court dismissed the indictment not because of any deficiency in pleading or procedure but solely because it held that Rule 3 “is not such a law of the United States as was intended by Congress to support an indictment for perjury.” It thus dismissed the indictment upon its construction of the federal perjury statute. In these circumstances, the question of our jurisdiction is settled by *United States v. Borden Co.*, 308 U.S. 188, 193:

“When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute.”

Such is the case here, and the result is that we have jurisdiction of this appeal.

This brings us to the merits. The scope of this appeal is very limited. No question concerning the validity of the District Court’s Rule 3 is properly before us. Nor are we at liberty to consider any question other than the single one decided by the District Court, for when, as here, “the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government’s appeal does not open the whole case.” *United States v. Borden Co.*, *supra*, at 193.

“The essential elements of the crime of perjury as defined in 18 U.S.C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement wilfully made as to facts material to the hearing.” *United States v. Debrow*, 346 U.S. 374, 376. Only the first element of perjury is involved here because the District Court’s dismissal of the indictment was upon the sole ground that “Rule 3 . . . is not such a law of the United States as was intended by Congress to support an indictment for perjury.” Therefore, the only question open here is whether the admission hearing, held under the District Court’s Rule 3, and at which appellee testified under oath, was a “case in which a law of the United States authorizes an oath to be administered,” within the meaning of that clause as used in the perjury statute. We think it was. The phrase “a law of the United States,” as used in the perjury statute, is not limited to statutes, but includes as well Rules and Regulations which have been lawfully authorized and have a clear legislative base (*United States v. Smull*, 236 U.S. 405; *Caha v. United States*, 152 U.S. 211; *Viereck v. United States*, 318 U.S. 236; *Lilly v. Grand Trunk R. Co.*, 317 U.S. 481), and also decisional law. *Glickstein v. United States*, 222 U.S. 139. And see Wigmore, *Evidence* (3d ed.), §§ 1815, 1816, 1824.⁴

28 U.S.C. § 2071 provides: “The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.” And 28 U.S.C.A. § 1654 provides: “In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.” (Emphasis supplied.) Consistently, Rule 83 of Federal Rules of Civil Procedure, in pertinent part, provides: “Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. . . .” These statutes and Rule 83 leave no room to doubt that the District Court was lawfully authorized to prescribe its local rules and that they have a clear legislative base. Whether or not its Rule 3 is invalid for any reason—which, as stated, is a question not before us—it was prescribed pursuant to statutory authority, and expressly provides that, under the conditions specified, the court may require the “attorney to appear and be examined under oath.”

Rule 3 had at least as clear a legislative base as did the Regulations involved in *Caha v. United States*, *supra*, and *United States v. Smull*, *supra*. In the *Caha* case defendant was indicted under the federal perjury statute—then in precisely the same terms as it is now—and charged with perjury through the making of a false affidavit to officials of the Land Office of the Department of the Interior in respect of a contest, then pending in the Land Office, over the validity of a homestead entry. The defendant was convicted and on appeal contended that no statute authorized such a contest and that therefore it could not “be said that the oath was taken in a ‘case in which a law of the United States authorizes an oath to be administered.’”

⁴The author there shows that the requirement that a witness must take an oath before giving testimony goes back to early civilizations and has a long history at common law (§ 1815), and that for centuries Anglo-American law has remained faithful to the precept that “for all testimonial statements made in court the oath is a requisite.” § 1824.

By statute Congress had authorized the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, “to enforce and carry into execution, by appropriate regulations, every part of the [laws relating to public lands].” Pursuant to that authority the Commissioner adopted rules of practice including an express provision “for a contest before the local land officers in respect to homestead as well as preemption entries, and for the taking of testimony before such officers” This Court, in denying defendant’s contention and in sustaining the conviction, said:

“We have, therefore, a general grant of authority to the Land Department to prescribe appropriate regulations for the disposition of the public land. . . . Clearly then . . . the local land officers in hearing and deciding upon a contest with respect to a homestead entry constituted a competent tribunal, and the contest so pending before them was a case in which the laws of the United States authorized an oath to be administered.”

Id., at 218. (Emphasis supplied.)

The *Smull* case involved very similar facts. The District Court sustained a demurrer to the indictment, “ruling that the affidavit was not within the statute defining perjury.” The Government brought the case here under the Criminal Appeals Act. This Court reversed, saying:

“The charge of crime must have clear legislative basis. . . . This statute [the perjury statute, in precisely the same terms as the present one] takes the place of the similar provision of § 5392 of the Revised Statutes, which in turn was a substitute for a number of statutes in regard to perjury and was phrased so as to embrace all cases of false swearing whether in a court of justice or before administrative officers acting within their powers. . . . It cannot be doubted that a charge of perjury may be based upon [the perjury statute] where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. . . . When by a valid regulation the Department requires that an affidavit shall be made before an officer otherwise competent, that officer is authorized to administer the oath within the meaning of [the perjury statute]. The false swearing is made a crime, not by the Department, but by Congress; the statute, not the Department, fixes the penalty.”⁵

Id., at 408–409.

It follows that the admission hearing, held under the District Court’s Rule 3, and at which appellee testified under oath, was a “case in which a law of the United States authorizes an oath to be administered,” within the meaning of that clause as used in the perjury statute.

The judgment of the District Court is reversed and the case is remanded to that court for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS agrees that the Court has jurisdiction of the appeal; but he dissents on the merits. In his view this judge-made rule is not “a law of the United States” within the meaning of the perjury statute, 18 U.S.C. § 1621.

⁵ These cases, as well as *United States v. Morehead*, 243 U.S. 607, show that the perjury statute covers *ex parte* proceedings or investigations as well as ordinary adversary suits and proceedings.

UNITED STATES v. DEBROW

No. 51

SUPREME COURT OF THE UNITED STATES

OCTOBER 20, 1953, ARGUED

NOVEMBER 16, 1953, DECIDED

Prior history

Certiorari to the U.S. Court of Appeals for the Fifth Circuit.¹

The District Court dismissed indictments of the respondents for perjury. The Court of Appeals affirmed. 203 F.2d 699. This Court granted certiorari. 345 U.S. 991. Reversed, p. 378.

Disposition

203 F.2d 699, reversed.

Core terms

Oath, indictment, administered, perjury, subcommittee, competent tribunal, repealed, revision, definite, authorizes, wilfully, administer oaths, plead, material matter, willfully

Summary

An indictment charging perjury committed before a subcommittee of the Senate alleged that the subcommittee was a competent tribunal, pursuing matters properly before it, that in such proceeding it was authorized by a law of the United States to administer oaths, and that each defendant had "duly taken an oath." The defendants filed motions to dismiss, which were sustained below on the ground that the indictments did not allege the name of the person who administered the oath nor his authority to do so.

In an opinion by Minton, J., the Supreme Court unanimously reversed, holding that the indictment sufficiently set forth the elements of the offense sought to be charged. In particular, the requirement in the perjury statute that the oath administered must be authorized by law was held met by allegations in the indictments that the defendants had "duly taken" an oath.

Reed, J., did not participate.

An indictment is required to set forth the elements of the offense sought to be charged.

The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.

The Federal Rules of Criminal Procedure are designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure.

The essential elements of the crime of perjury, as defined in 18 U.S.C. 1621, are (1) an oath authorized by the law of the United States, (2) taken before a competent tribunal, officer, or person, and (3) a false statement wilfully made as to facts material to the hearing.

The requirement that an indictment for perjury, as defined in 18 U.S.C. 1621, allege that the oath administered must be authorized by a law of the United States is met by allegations in the indictment that the defendant had "duly taken an oath."

An oath "duly taken" means an oath taken according to a law which authorizes such oath.

The name of the person who administers the oath is not an essential element of the crime of perjury. The identity of such person goes only to the proof of whether the defendants were duly sworn.

An indictment for perjury, as defined in 18 U.S.C. 1621, clearly informs the defendant of that with which he is accused, so as to enable him to prepare his defense and to plead the judgment in bar of any further prosecution for the same offense, when it alleges that a subcommittee of the Senate was a competent tribunal, pursuing matters properly before it, that in such proceeding it was authorized by a law

¹ Together with No. 52, *United States v. Wilkinson*; No. 53, *United States v. Brashier*; No. 54, *United States v. Rogers*; and No. 55, *United States v. Jackson*, all on certiorari to the same court.

of the United States to administer oaths, and that each defendant duly took an oath before such competent tribunal and wilfully testified falsely as to material facts.

The sufficiency of an indictment is not a question of whether it could have been more definite and certain in describing the offense. If a defendant wants more definite information as necessary, he may obtain it by requesting a bill of particulars under Rule 7 (f) of the Federal Rules of Criminal Procedure.

Syllabus

The indictments of respondents under 18 U.S.C. § 1621 for perjury in wilfully testifying falsely to material facts, after each had “duly taken an oath,” before a Senatorial subcommittee duly created and duly authorized to administer oaths, complied with Rule 7 (c) of the Federal Rules of Criminal Procedure; and they should not have been dismissed for failure to allege the name of the person who administered the oaths or his authority to do so. Pp. 375–378.

(a) The name of the person who administered the oath is not an essential element of the crime of perjury. Pp. 376–377.

(b) R.S. § 5396, which required that an indictment for perjury aver the name and authority of the person who administered the oath, was repealed by the Act of June 25, 1948, 62 Stat. 862, revising the Criminal Code. P. 377.

Counsel

John F. Davis argued the cause for the United States. With him on the brief were Acting Solicitor General Stern, Assistant Attorney General Olney, Beatrice Rosenberg and Felicia H. Dubrovsky.

Ben F. Cameron argued the cause for respondents. With him on the brief were W.S. Henley, R.W. Thompson, Jr., Albert Sidney Johnston, Jr., W.W. Dent and T.J. Wills.

Judges

Vinson, Warren, Black, Frankfurter, Douglas, Jackson, Burton, Clark, Minton; Mr. Justice Reed took no part in the decision of this case.

The District Court dismissed indictments of the respondents for perjury. The Court of Appeals affirmed. 203 F. 2d 699. This Court granted certiorari. 345 U.S. 991. Reversed, p. 378.

Opinion

MR. JUSTICE MINTON delivered the opinion of the Court.

The respondents here, defendants below, were charged by separate indictments with the crime of perjury, as defined in 18 U.S.C. § 1621.² Each indictment read in material part as follows:

“The defendant herein, having duly taken an oath before a competent tribunal, to wit: a subcommittee of the Senate Committee on Expenditures in the Executive Departments known as the Subcommittee on Investigations, a duly created and authorized subcommittee of the U.S. Senate conducting official hearings in the Southern District of Mississippi, and inquiring in a matter then and there pending before the said subcommittee in which a law of the United States authorizes that an oath be administered, that he would testify truly, did unlawfully, knowingly and wilfully, and contrary to said oath, state a material matter which he did not believe to be true. . . .”

The defendants filed motions to dismiss, which were sustained on the ground that the indictments did not allege the name of the person who administered the oath nor his authority to do so.³ The Court of Appeals affirmed, one judge dissenting, 203 F.2d 699, and we granted certiorari, 345 U.S. 991, because of the importance of the question in the administration of federal criminal law.

An indictment is required to set forth the elements of the offense sought to be charged.

“The true test of the sufficiency of an indictment is not whether it could have been made more definite and certain, but whether it contains the ele-

²“Perjury generally.

“Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than \$2,000 or imprisoned not more than five years, or both.”

³*United States v. Debrow et al.*, U.S.D.C.S.D. Miss., Feb. 11, 1952 (unreported).

ments of the offense intended to be charged, 'and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction.' *Cochran and Sayre v. United States*, 157 U.S. 286, 290; *Rosen v. United States*, 161 U.S. 29, 34."

Hagner v. United States, 285 U.S. 427, 431.

The Federal Rules of Criminal Procedure were designed to eliminate technicalities in criminal pleading and are to be construed to secure simplicity in procedure. Rule 2, F. R. Crim. Proc. Rule 7 (c) provides in pertinent part as follows:

"The indictment . . . shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . . It need not contain . . . any other matter not necessary to such statement. . . ."

The essential elements of the crime of perjury as defined in 18 U.S.C. § 1621 are (1) an oath authorized by a law of the United States, (2) taken before a competent tribunal, officer or person, and (3) a false statement willfully made as to facts material to the hearing. The indictments allege that the subcommittee of the Senate was a competent tribunal, pursuing matters properly before it, that in such proceeding it was authorized by a law of the United States to administer oaths, and that each defendant duly took an oath before such competent tribunal and wilfully testified falsely as to material facts. The oath administered must be authorized by a law of the United States. This requirement is met by the allegations in the indictments that the defendants had "duly taken an oath." "Duly taken" means an oath taken according to a law which authorizes such oath. See *Robertson v. Perkins*, 129 U.S. 233, 236. The name of the person who administered the oath is not an essential element of the crime of perjury; the identity of such person goes only to the proof of whether the defendants were duly sworn. Therefore, all the essential elements of the offense of perjury were alleged.

The source of the requirement that an indictment for perjury must aver the name and authority of the person who administered the oath is to be found in R.S. § 5396, 18 U.S.C. (1940 ed.) § 558. It may be worthy of note that this provision was expressly repealed by Congress in 1948, 62 Stat. 862, in the revision and recodification of Title 18. The House Committee on Revision of the Laws had the assistance of two special consultants who were members of the Advisory Committee on the Federal Rules of Criminal Procedure and who "rendered invaluable service in the technical task of singling out for repeal or revision the statutory provisions made obsolete by the new Federal Rules of Criminal Procedure." H.R. Rep. No. 304, 80th Cong., 1st Sess., p. 4. In the tabulation of laws omitted and repealed by the revision, it is stated that R.S. § 5396 was repealed because "Covered by rule 7 of the Federal Rules of Criminal Procedure." *Id.*, at A214. The charges of the indictments followed substantially the wording of the statute, which embodies all the elements of the crime, and such charges clearly informed the defendants of that with which they were accused, so as to enable them to prepare their defense and to plead the judgment in bar of any further prosecutions for the same offense. It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged. The sufficiency of the indictment is not a question of whether it could have been more definite and certain. If the defendants wanted more definite information as to the name of the person who administered the oath to them, they could have obtained it by requesting a bill of particulars. Rule 7 (f), F. R. Crim. Proc.

The indictments were sufficient, and the dismissal thereof was error. The judgments are

Reversed.

MR. JUSTICE REED took no part in the consideration or decision of these cases.

Mr. SCOTT. I have asked Judge—excuse me—Mr. Starr to comment on this, and I am awaiting his response.

[See the December 11, 1998 letter from Judge Starr to the Committee reprinted in the Appendix, page 176, responding to Mr. Scott's argument.]

Mr. Chairman, I have raised questions of fairness and the need for the first order of business to be designating what the charges are that we are actually pursuing.

I was interested to see earlier today that, when challenged by the gentleman from Massachusetts as to one of three of the perjury

charges, maybe I misunderstood you, but I thought I understood you to say that one was not particularly serious, which would mean that we wouldn't have to respond to that one. We have also today expanded the focus of the inquiry. So without a designation of what charges we are actually investigating, it seems absurd to me to ask anyone to respond to the charges before they know what the charges are.

Another point I want to make, Mr. Chairman, is that we keep hearing that if we don't impeach the President, we condone his actions. As my colleague from Virginia, Mr. Boucher, has mentioned, we are limited in our constitutional ability to do anything unless the allegation is treason, bribery or other high crimes or misdemeanors.

We heard at our constitutional hearing that the term treason, bribery and other high crimes or misdemeanors does not cover all felonies. And, therefore, it is conceivable that the President could commit a felony and we would have no legal authority under the rule of law to do anything about it. My colleague from Virginia noted, however, that the President would be subject to indictment, prosecution and punishment for violation—for commission of a felony, but that would obviously wait until after he is out of office.

Judge Wiggins, you mentioned perjury as, of course, an impeachable offense. Could you cite any person impeached in United States history or English history, for that matter, going back to 1300, where the underlying behavior was personal in nature and not an abuse of power?

Mr. WIGGINS. I am unable to cite specific instances with it, but I will be pleased to respond to your question in writing.

Mr. SCOTT. If you find one, you will be the only person to have provided a positive answer to that question.

Mr. WIGGINS. Well, I believe I already found one.

Mr. SCOTT. The Congressional Research Service has looked back to 1300 and has not found one.

Mr. WIGGINS. You are advising me that the Congressional Research Service has determined that no public official subject to impeachment has been impeached for perjury; is that right?

Mr. SCOTT. No, for perjury involving personal behavior, not an abuse of power.

Mr. WIGGINS. Well, what is that?

Mr. SCOTT. What Richard Nixon did.

Mr. WIGGINS. I am not sure. Say again? I am eager to respond to some of these outrageous comments about Richard Nixon, but I have held my breath, but I will be pleased to do so.

Mr. SCOTT. Let me try to get in one question to Judge Higginbotham.

We have heard that all perjury is the same. In your comments, you indicated that the sentencing guidelines differentiate different kinds of perjury and punishments, depending on what kind of perjury it was. Could you comment on all perjuries being the same?

Mr. HIGGINBOTHAM. Well, it is clear that all perjury is not the same, just like all people are not the same size. You are much brighter than I am, but I am taller than you.

On page 5, I spend a considerable amount of time going over the U.S. Sentencing Guidelines, and I spell out a whole series of those

sections where there are significantly varying penalties. And as you, of course, know, that when the Founding Fathers created the Constitution, they didn't put the word "perjury" in, they put the word "treason." So you have necessarily an ambiguity. And if they felt that all perjury should be included, they would have at least put perjury.

So I am persuaded by the historians who have studied this, from my having read Farrand, from my having read Elliot, that certain types of perjury clearly involving a private activity would not reach the impeachment criteria.

Mr. SCOTT. Mr. Chairman, the—

Mr. HYDE. The gentleman's—yes.

Mr. SCOTT. I would like to, first of all, apologize to Judge Wiggins. I didn't mean to be abrupt. The point I was making was that the Congressional Research Service has not found a person's personal behavior as the subject of impeachment. I apologize for the reference to President Nixon. I didn't mean to be abrupt, but I was trying to get in one last question, so I want to apologize for being short with him.

Mr. WIGGINS. You need not apologize for comments about Richard Nixon. I lived with Richard Nixon literally all of my life because people are making adverse comments about him, but I don't understand where they get their facts. They probably read them in the newspaper. And I sat up here next to your Ranking Minority Member, Mr. Conyers, and heard evidence; and I didn't come away with that conclusion.

You know, that was a massive investigation of the Nixon administration, and the press convinced the American people that the Nixon administration had to be replaced. But the Nixon administration wasn't subject to impeachment. It was one individual, and Richard Nixon was the target. And if he didn't participate and had no knowledge or didn't conspire with others to violate the law, he is being unjustly accused. But he did conspire briefly with others to violate the law back in 1972, and he was punished for that. But it was a very brief period of time.

Mr. SCOTT. Mr. Chairman, I am glad I gave him an opportunity to respond. Thank you.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Tennessee seeks recognition to go out of order.

Mr. BRYANT. Mr. Chairman, I do ask unanimous consent. I need to catch a very important plane, and I would like the opportunity to examine the two professors who have to leave.

Mr. HYDE. Very well.

Mr. BRYANT. Thank you, Mr. Chairman.

I thank the distinguished panel for your testimony. I think about four of you showed up about a week late, I think. You missed the panel where we had the law professors and historians testifying, but I still appreciate your opinions, and I take them just as they are, opinions. I certainly think in some instances the slips were showing in terms of partisanship, but we will overlook some of that because we are used to having that said about us, too.

Let me ask the two professors on the end who have to leave, Professor Saltzburg and Professor Rosen, a question that has come up.

I am one of those people who believes that, because of the separation of powers, we have to be very careful that the fence among the three branches is very tall, and we have to be very careful when we talk about such things as censure and reprimand. I oppose that. I feel strongly that our obligation is to pursue the articles of impeachment if the proof leads us that way.

But since I do have your availability and the expertise that you bring to this table, and because it seems to be floating around in the newspapers and on all the talk shows, I wanted to ask you, Mr. Richardson, our very distinguished former Attorney General, made the comment about being limited to, if we impeach, if we send it to the Senate, they would be limited to simply removing the President from office and/or limiting his ability to serve for other Federal office, to hold office.

As I read that part of the Constitution, and I want to get the exact language, because I think this is important, under section 7 of that, it says, "Judgment in cases of impeachment shall not extend further than to removal of office" and so forth, which seems to me to set a maximum, a ceiling, if you will, which if one wanted to argue that censure or reprimand was appropriate, you could say, well, that's the ceiling, and you could do less than that if you wanted to.

And that is a position I am coming around to, but I feel very strongly, and I want to get your opinion on this, that—and the position I am coming around to, if there is censure or reprimand available, it is through the Senate only and that is their decision.

I would say that we as a House have only the constitutional requirement to charge, to impeach, if you will, not to punish. And to get to the point where the Senate could consider some type of punishment, they first have to have these articles of impeachment. We have to vote these out in order to get a censure, in effect, a reprimand, opportunity.

I would like to have your comments from you two.

Mr. ROSEN. I very much respect the seriousness with which you are struggling with this important constitutional issue, and it is a delicate and hard one.

Let's think of a range of options that you have available to you. I think no scholar would say that if you were to pass concurrent resolutions in the House and the Senate expressing your deep condemnation of the President's behavior that that would raise any constitutional difficulty at all. It wouldn't be part of the impeachment process and, therefore, it wouldn't derogate from it nor would it have the force of law that would be presented to the President for his signature and therefore couldn't be considered a bill of attainder.

Mr. BRYANT. Let me ask you this. Wouldn't that—in the interest of trying to invent something here, wouldn't that, and in the interest of expediency, wouldn't that be a terrible, terrible precedent? I mean, I know folks like me that get very upset with a President who maybe vetoes a bill that I feel we need, and wouldn't I now have that possibility if we do it here that I could say, well, let's start a move to reprimand the President over this?

I think what we have to have is a two-step process, if you are going to get to that point. The first is the indictment, so to speak,

by the House; and then it goes to the Senate to let them consider it. But I don't think either House ought to be able to independently pass a resolution to reprimand the President.

Mr. ROSEN. But then that would exacerbate the very constitutional problem you are worried about.

If the censure were part of the impeachment process, then it would derogate from the process set out in the Constitution. By contrast, a concurrent resolution wouldn't be a troubling process, because it would have no more weight than a citizen saying that the President is a bad person. Surely you have the same right to express your opinion of the President in any form you please.

You may want to go further and pass a bill presented to the President for his signature, and in that case I think you have to be very careful to make sure that it is not presented as a threat. It is not a lesser punishment, as you put it, but instead is a conditional amnesty. In other words, Mr. President, if you do X, Y and Z, then you will be censured and granted immunity. But that requires you to give him some benefit in return, and this you may not be willing to do.

Mr. HYDE. The gentleman's time has expired.

The gentleman—

Mr. CONYERS. Mr. Chairman, Professor Saltzburg had a very brief comment.

Mr. SALTZBURG. I thought that question was also directed to me, Mr. Chairman.

I disagree with my colleague in part. I agree in part. Congressman Bryant, let me see if I can explain this to you.

First, the language that you read that the punishment shall not exceed removal from office, the history of that, I am sure you heard on November 9th, was, in England, it was common when they had impeachments to prescribe punishment that included death, and the framers wanted to make sure what the limits of punishment were.

If you decide to vote articles of impeachment and they pass the House and if the Senate convicts, I believe the Constitution requires removal as a minimum. The Senate wouldn't have to convict. The Senate could acquit, and then they could propose a resolution of censure. That could happen.

The stomach for a censure resolution or anything after you went through that process I think would be unlikely that anybody would want to go forward. It is—as I said I think before, it is absolutely consistent with the Constitution for you to reach the judgment if this is what you think is right.

If you say, on balance, we don't like this conduct, but we don't think that we will vote impeachment, we don't think it rises to that level, so we have answered our question, we are not going to charge, then I agree with Jeffrey that you have every right under the Constitution to pass a resolution just as you would condemn Saddam Hussein, praising Turkey, you know, creating National Mother's Day, whatever you want to do you can do.

The thing I think he is wrong about, and I think it is not unimportant, is a joint resolution of both Houses I think must be sent to the President, and that is a significant thing. Because his sign-

ing it could be, when you talk about bringing us together, it seems to me that that is something that might work.

Mr. BRYANT. Okay.

Mr. HYDE. The gentleman's time has again expired.

Mr. Delahunt is being recognized out of order with the permission of those people disadvantaged by this maneuver.

Mr. DELAHUNT. Thank you, Mr. Chairman.

I appreciate my colleague's—I have a meeting that I have to attend to, and I appreciate my friend, Mr. Bryant, raising the issue of censure, because it is my intention to bring a resolution of censure up when we go to markup on this committee.

And I am really struck by the testimony of Judge Wiggins. I have a memory, Judge Wiggins, of watching you as a member of the minority during the Watergate hearings. I had dark hair at that point in time, and I am sure you can empathize with my position as a member of the minority.

But you said something just recently or just a moment ago regarding President Nixon, and you made the statement that you heard evidence. And I would ask you to refresh your memory as to the witnesses you actually heard from, whom you took testimony from, if you can remember.

Mr. WIGGINS. Well, yes. We heard testimony from H.R. Haldeman, from Ehrlichman, John Ehrlichman, from John Dean, from a guy named Parker, I think his name was.

Mr. DELAHUNT. That's fine. I simply wanted to make the point that during the Watergate hearings—and you were, as I indicated, a minority member, you are a Republican—the process at that particular juncture in our history was to take evidence from individuals who had firsthand knowledge of the events that occurred and which led to a vote on articles of impeachment. Is that a fair statement?

Mr. WIGGINS. I think so. But there is a difference, and I think you should recognize that difference. The President of the United States has literally admitted—

Mr. DELAHUNT. I am sorry?

Mr. WIGGINS [continuing]. Admitted to telling a falsehood.

Mr. DELAHUNT. I might disagree with you. In fact, I do disagree with you on that particular point, but I respect your opinion.

I just want to move to another subject, and that is the discussion surrounding censure. Because, again, I want to read from your written testimony, which I found interesting, and I am quoting: "I don't mind confessing that if I had a vote on this committee, I would vote to impeach the President"—

Mr. WIGGINS. Yes.

Mr. DELAHUNT [continuing]. "But before the full House of Representatives, I certainly am not sure. I am presently of the opinion that the misconduct immediately occurring by the President is not of the gravity to remove him from office."

Mr. WIGGINS. That's the remedy.

Mr. DELAHUNT. Would you then support a resolution to censure or sanction or rebuke or condemn?

Mr. WIGGINS. Oh, yes. You should read on in my testimony. I recommended that the President be sanctioned monetarily, and I

bounced a figure of \$1 million off of you, and that he be personally brought to account by the resolution of probably both Houses.

Mr. DELAHUNT. So you as a former member of this committee who sat as a member of the Watergate proceedings feel comfortable with the concept of censure?

Mr. WIGGINS. Well, yes. There is some historical precedent for it. The person of Andrew Jackson is clear, although it was reversed subsequently.

Mr. DELAHUNT. I also just want to make a point, too, in terms of your testimony, you used the concept of probable cause, and I respectfully take issue with that particular standard, because from everything that I have been able to discern from the precedents and the literature, the standard is clear and compelling evidence, or clear and convincing evidence.

Mr. WIGGINS. Well, it has been articulated in many ways, and I think you will probably find the use of the term beyond a reasonable doubt in the Nixon impeachment process.

Mr. DELAHUNT. In—my time is running out, and again, I don't mean to interrupt you—

Mr. WIGGINS. The proper analogy is the grand jury analogy.

Mr. DELAHUNT. Fine. Let me just conclude by asking this particular question. Do you think it is the responsibility of this committee to hear evidence as you did during the Watergate hearings from witnesses who had firsthand knowledge? By doing that, I believe—and I will give you my opinion—I believe we meet our constitutional responsibility, rather than simply accept a report from a prosecutor which clearly creates in many areas disparate inferences and can lead to varying conclusions. Do you feel that we have that constitutional responsibility?

Mr. WIGGINS. Well, I am not sure. I am not sure. I think your responsibility is to get at the truth and to resolve the legal question of whether the offenses alleged are high crimes and misdemeanors.

Mr. DELAHUNT. I note my time is up, and I want to thank you very much. I would also just note for a matter of record that—while I don't want to get into the nuances of perjury, there are gradations.

Mr. WIGGINS. Oh, yes indeed.

Mr. DELAHUNT. In Massachusetts, for example, if you commit perjury in a capital case, the sanction, the penalty is life imprisonment. If you commit perjury in a civil deposition, clearly the court I presume would entertain something less than life imprisonment.

Mr. HYDE. The gentleman's time has expired.

Mr. DELAHUNT. Thank you, Mr. Chairman.

Mr. HYDE. The gentleman from Florida, Mr. Canady.

Mr. CANADY. Thank you, Mr. Chairman.

I want to thank all of the members of this panel for being with us here today. We appreciate your testimony, which I think has been helpful to the work of the committee.

I want to go back to a question that was raised by Mr. Scott on the issue of whether any official has ever been impeached for personal misconduct as opposed to abuse of office.

I can't give an exhaustive answer to that, but one clear example of an official recently being impeached for personal misconduct as opposed to abuse of office is the case of Judge Harry Claiborne, a

district court judge from the State of Nevada. In that case, Judge Claiborne was impeached by the House and removed from office because he signed an income tax return that was false. Basically, he was removed because he made a false statement about his personal income. I think that example is very clear, it is relatively recent, and I think that should be noted.

Now, on this issue about perjury and gradations of perjury, I think all of us would recognize that any offense, depending on the context, may be more serious than that same offense in another context. That is not really contested. What I object to is the argument that any acts of perjury that the President may have committed would fall into the category of less serious offenses of perjury.

Now, I agree that we should not apply a per se rule that any perjury automatically, regardless of the context, would result in impeachment. But I think we have to look at several factors in the evidence before us which go to the seriousness of the offenses that the evidence shows the President committed. And I haven't reached a final conclusion on that, but so far we are seeing no effort to really rebut the facts.

And the facts show that this was a pattern of conduct. It shows that there were multiple instances of perjury. There was a false affidavit. There were multiple lies, which Mr. Goodlatte recounted in his statement earlier today, in the President's deposition. There was perjury before a grand jury. And, finally, I believe that there were false and misleading answers to the questions that the Chairman of this committee propounded to the President very recently.

Beyond that, the perjury was calculated. This is not a case of a witness being surprised and reacting instinctively and understandably to cover up an embarrassing situation. Instead, this is the case of a witness who went in with a plan to lie. This was calculated. And I think that goes to the seriousness of the offense. And, to state the obvious, the perjury was sustained. The evidence points to the conclusion that the President has been lying for nearly a year.

Now, I suggest to you that all of this points to the conclusion that the President has been guilty of an egregious disregard for the oath that he took to tell the truth, the whole truth and nothing but the truth. Now, we can have differences of opinion on that, but I think we need—if we look at this in context, we are pushed toward the conclusion that this is, indeed, not a trivial instance of perjury, but a serious matter.

Now, I would again refer the members of the committee to something I read earlier. Now, this is a statement that was prepared, a report prepared by the Association of the Bar of the City of New York on the law of presidential impeachment. I think this is important, because this was prepared long ago in the context of the Nixon impeachment. This was not aimed at anybody who is before us today. This wasn't framed with a view toward getting at President Clinton. But what the lawyers of the bar association of New York said is this. This is their conclusion:

"We believe that acts which undermine the integrity of government are appropriate grounds for impeachment, whether or not they happen to constitute offenses under the general criminal law. In our view, the essential nexus to damaging the integrity of gov-

ernment may be found in acts which constitute corruption in or flagrant abuse of the powers of official position. It may also be found in acts which, without directly affecting governmental processes, undermine that degree of public confidence and the probity of executive and judicial officers which is essential to the effectiveness of government in a free society.”

I believe that this is a reasonable interpretation of the impeachment power, and I believe that the course of conduct which the evidence points to here undermines the integrity of government. I don't know how else you could interpret that.

So I would just ask that the members step back and look at all of the evidence, look at this in a dispassionate way, and I think if we do that, we are going to understand that we have a very, very serious matter before us.

Mr. Dershowitz, I just want to respond to what you said about the motives of the members of the committee. None of us are enjoying this. This is not to the political advantage of anyone, and you don't have to be very smart to figure that out. But we have a serious matter before us, and we are trying to deal with it in a responsible way, and I think that is the duty that we have under the oath that we have taken under the Constitution.

I yield back the time which I don't have remaining.

Mr. HYDE. The gentleman's time has expired.

Once more, we leap out of turn for Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman.

First, I would yield to Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

The gentleman from Florida mentioned the Claiborne case. First, I would like to clarify the question that I asked Judge Wiggins was whether he knew of any individual impeached for personal activity involving perjury. It wasn't any impeachment; it was just perjury. But since—

Mr. CANADY. If the gentleman would yield.

Mr. BARRETT. No, no.

Mr. SCOTT. But since the gentleman mentioned the Claiborne case, I just want to say 727 F.2d at page 42, where it says that count 1 of the indictment alleged Claiborne solicited and received \$30,000 in return for being influenced in his performance of official acts, and footnote one said that counts 4, 5 and 6 charge that Claiborne failed to report bribes as income on his tax returns, which I think associates it, and it was still doing research on this.

Mr. BARRETT. I yield to Mr. Conyers.

Mr. CONYERS. Professor Dershowitz, do you happen to have a response to my friend from Florida's reference to the New York bar evaluation in 1974? About this pattern of lies and so forth that, to him, creates a case. I just wanted to see if there was a brief response from you.

Mr. DERSHOWITZ. I appreciate that. I think the Association of the Bar of the City of New York report is regarded very well by people, historians and legal scholars. It was talking largely about impeachment in general of judges and not singling out the President. I think many scholars now agree that the criteria for impeaching and removing a President must be different from the criteria for removing a single member of the judiciary. A member of the judici-

ary, for example, serves during good behavior, and any failure of good behavior might constitute an impeachable offense or removable offense. The President is the executive branch of government—

Mr. BARRETT. If I could, I would reclaim my time.

Mr. DERSHOWITZ. I am sorry—so I think it is quite different.

Mr. BARRETT. We have had a good afternoon. We have heard from 9 gentleman who are very good. Last week, we heard from 9 or 10 gentleman who are experts on impeachment, and one woman. I think the time is now to bring in 10 mothers or 10 grade school teachers to talk about what we do when someone has done something wrong, because that is what has occurred here. We need again to move forward.

I hear my colleagues from the other side who say that perjury is a serious offense, and I agree with that. People should not perjure. It is that simple. People should tell the truth when they are under oath.

But the question that we face is if we want this principle to be held in high regard, what do we do? And I have yet to talk to one single person who thinks that the U.S. Senate would ever have a two-thirds vote to convict the President and remove him from office. So if we are going to go down that route, at the end of the day, those people who say that he must be held accountable are going to be as angry then as they are now. The only difference is we are going to drag this country through a year of hearings, and I don't think that that is going to increase respect for the rule of law. I think the longer we drag this thing out, the worse it is going to get.

This whole incident, escapade, reminds me of a problem in a family: Uncle Harry did something wrong, and I think the question we have to decide is are we going to continue to flog ourselves for 9 months, 10 months a year as a family, as a national family, or are we going to deal with it?

The American people have said over and over and over again, we want you to deal with it. And I think that the censure resolution shows the gravity of the offense and allows us to do it in a way that does not drag this on. We should move on to something else. We should move on to the Nation's business.

If in the end we are going to have an impeachment without a conviction, it is really no different in effect than a censure, because an impeachment without a conviction is also just a slap in the face. Some might argue it is a stronger slap in the face or it is a constitutionally created slap in the face, but it is a slap in the face, nothing more.

President Clinton is going to carry this with his legacy, and when he gets to heaven or wherever he goes and all the ex-presidents are standing there, and they are going to say what was the biggest event in your last 23 years, his legacy is going to be: I either escaped impeachment or I didn't. If I were President of the United States, that is not something I would be proud of. So I think he is carrying a scar with him, and it is a scar that he can't escape, regardless of what this committee does.

But I think it is time for us to move forward. I think that the Chairman should get together three Republicans and three Demo-

crats, or four Republicans and four Democrats, on a bipartisan basis. It would be just like we did when Speaker Gingrich got in trouble. We had people from both parties sit down, iron out what the language should be, and then we bring it to the floor. And we move on.

We should be acting like the Ethics Committee in that matter where the Speaker had lied. We can do that, and we should do that. If we do, I think this committee will be remembered as doing something great, Mr. Dershowitz. I think we will be remembered as a committee that fought bitterly, but in the end decided that, for the sake of this country, it was more important for us to say that perjury is wrong, to say that lying under oath is wrong, and to say this is what the condemnation will be: a public reprimand.

And that is not something that is taken lightly. The last time it happened was 150 years ago. I don't think that there is a danger that you are going to have every Congress applying the same remedy simply because they disagree for political reasons.

I yield back the balance of my time.

Mr. HYDE. I thank the gentleman.

I would announce that it is almost 5 o'clock, and some of the panel have expressed a desire to leave because of commitments, and we sure understand that. So I want you to know, none of us will be offended if you should head towards the door, but we will try to wind up as quickly as we possibly can if the questions are crisp and the answers are crisper.

So the gentleman from South Carolina, Mr. Inglis.

Mr. INGLIS. Thank you, Mr. Chairman.

We have heard the other view. You know, it is interesting. Apparently, no matter what, particularly you, Mr. Chairman, do, you will be criticized, because now we hear that we need to move along and not I assume have any witnesses. That was the import of the last discussion, no witnesses, move along. So I really understand the challenge that the Chairman has. He has really got to figure out these sort of conflicting arguments that we are hearing.

Another point that I would make, Mr. Chairman, is Mr. Frank mentioned earlier something that I dare say that neither Admiral Edney or General Carney would probably be comfortable speaking of, but, if I may, I will not speak on your behalf but on behalf of many South Carolinians who have said this to me, is that they and military families are severely affected by what is going on in the White House and that morale is dangerously low and dangerously affected by what they perceive is a clear lie by the commander in chief.

Again, I won't put the folks in uniform or formerly in uniform on the spot there, but that is what I am hearing. It is the same thing that I hear from my 8 year old who said to me recently, Daddy, the President is lying, isn't he? I said, yes, he has admitted to lying, admitted to lying under oath.

Now, he would say it is not technically perjury, and maybe Professor Dershowitz has a new client here because he says that his clients commit the crime and then they compound their problem by lying about it. So he may have a new client here down at the White House. William Jefferson Clinton would be available as a good client to fit that MO.

But there is something that I would particularly like to take up with my evidence professor, Professor Saltzburg. There is something that I do find that I agree with Professor Dershowitz about, and I would disagree with what you were saying, and that is, I think Professor Dershowitz is right. The prospect of this President being prosecuted after leaving office is really a nonstarter.

I mean, I would love it if it weren't, because I think that is, as you said earlier, a way of vindicating the rule of law. If we don't impeach and if the President has committed the crimes that he is accused of and if we don't impeach, then prosecuting him upon leaving office is one way to vindicate the rule of law.

And in response to some questions from Mr. Boucher earlier, there was some discussion from Professor Dershowitz about how that is really a nonstarter.

So I would ask you, Professor Saltzburg, the prospect of this President entering the east front of the Capitol, walking over to the west front to swear in a new President in 2001 and then walking back to the east front and being handcuffed upon descending the stairs is probably not a picture that any President who succeeds him would want to be part of.

So is that really a nonstarter in what we are talking about here? Your suggestion that he might be prosecuted and that would be a way of vindicating the rule of law, is that really a nonstarter? Do you disagree with Professor Dershowitz on that?

Mr. SALTZBURG. I disagree with him in part.

By the way, it is quite an honor to have a former student hold your position. It makes me very proud. That is why we teach. I had hoped that you would put a question to me, and I would try my best to answer it.

Mr. INGLIS. Let me put a hypothetical to you. That would be a better way, and then I could call on you: Mr. Saltzburg, answer this question.

Mr. SALTZBURG. I think the—what I would say is, I don't want to repeat myself, but, immediately, I think if you make a decision or the House makes a decision not to proceed further, I think that the President, like any person who deceived a Federal court as a litigant, can be punished by the court without any doubt, and I think that will happen. I think that is a starter. I think that is required if this system is going to make any sense.

Now, as to whether he will be prosecuted, I have my doubts. I have my doubts. Because I tell you what I really think will happen. I believe that when this process ends, and I believe it will end, I think the Republican candidate for President, whoever that person is, will say, I would pardon him if somebody would try to prosecute him because this process has punished him.

Every punishment comes in very, very different ways. We all know that. No other American would be put through anything like this process. No other American would be censured as he might be.

And I think that if I were Judge Wright and the case were before me rather than before you, the punishment I would impose in terms of a sanction on him would be so much higher than I would impose on any other citizen to send a message that what I believe is not only that honesty and integrity in the courts matter, for the reasons Judge Tjoflat said, but that responsibility does increase

with the office that you hold. And the lessons we teach are important. I just tried to say, you don't need to impeach a President to teach those lessons. There are better ways to do it.

Mr. HYDE. The gentleman's time has expired.

The gentlelady from Texas.

Ms. JACKSON LEE. I think you are aware, Mr. Chairman, that I am not taking anyone's place out of order.

Mr. HYDE. No, ma'am.

Ms. JACKSON LEE. Let me—as Professor Saltzburg has to go, let me thank him for his presence and thank every one of the panelists for what has been an eloquent presentation of a very difficult question. Each of you have acknowledged the task and the charge that we have before us. And excluding the military witnesses and I believe Judge Tjoflat, I think collectively witnesses on both the minority and majority side seem to conclude that there is a major question as to whether or not we have in these fact situations impeachable offenses. And I think, frankly, surprisingly for all of us, on December 1, 1998, we may have some form of consensus.

I think it is also good that many of us are discussing censure in this committee. Several of us, including myself, have drafted resolutions on censure and expect to offer them. So maybe we have come further than we thought we would have come.

So I would like to just pose some questions and make some comments, in particular to Judge Higginbotham and General Richardson.

I think that our Republican friends are splitting hairs, if you will. Royalty of many years ago stated, let them eat cake. And for some reason, I think my colleagues are attempting to have their cake and eat it, too. And the reason I say that is because impeachment is decidedly a constitutional process.

But yet my colleagues today have been reminding us constantly of the rule of law, and I would simply bring to the panelists' attention as to whether or not we have actually had the rule of law in these proceedings. Was it the rule of law when due process was denied the President by way of no notice and the lack of the opportunity of his lawyers to make a presentation for more than 30 minutes until raised in the committee? Was the rule of law followed when attorney-client privilege was obliterated and ignored? Was the rule of law followed when grand jury testimony was released not to the Nation or to the House of Representatives but to the world?

And, frankly, do we have the rule of law when we ignore the rights that are given to any American who might defend themselves against perjury on the grounds that they thought they were telling the truth, or whether or not the issue was material?

So I think that as we discuss this very somber process we have to consider what we have done to the rule of law and realize that we are standing more grounded in the basis of constitutional premises as we decide really the decision that will warrant one of conscience and understanding of the Constitution.

Let me, before I ask a question, just simply say to the gentlemen representing the military, I have the highest degree of respect for you and your service and the men and women who have served us and are serving us in this Nation. In fact, it saddens me that this

week in Texas we lost Roy Benvedes, a Medal of Honor winner, who rose time and time again, wounded in Vietnam, to save several of his comrades, to participate in reconnaissance. And when they wanted to applaud him, he simply said, it was my duty.

So I would take issue with you about any suggestion of the demoralizing of the outstanding military personnel that we have for the bad acts, of the commander in chief, or any other commander in chief, such as President Reagan, who did not remember the Iran Contra Affair: selling weapons for drugs or vice versa. I respect you for your presence.

But let me ask Judge Higginbotham and the General these questions. Judge Higginbotham, I would ask the questions, if you would answer it. Would you help me understand the distinction between the criteria for a presidential and judicial impeachment? That has been raised about an impeachment of a judge, and we keep talking about double standards around here and why the President is privileged, and I think the American people should not have a distorted perspective. I am going to finish my question, and then I would like you to answer it.

General Richardson, let me thank you for being a great American. You were actually in the midst of the proceeding, the activities of 1974. You resigned rather than be fired by the President of the United States because you refused to fire, I believe, Archibald Cox, if I have it accurately, who refused to accept the compromise of President Nixon. Do you think at that time there was abuse of power, and do you feel that we would be in a comfortable position if we offered to resolve these matters with a censure by this body, by this House?

Mr. RICHARDSON. I would say very clearly that the distinction is sharp and wide because of the pattern of some actions undertaken by Richard Nixon, all of which were antecedent to, or separate from, any false statement by him. He was, in addition, charged with false statements, the so-called cover-up of the burglary. But there was a pattern shown in Watergate which involved abuses of executive power, the deliberate undercutting of the procedures of various institutions of government, and the condoning, indeed, of a second burglary, that of the psychiatrist Elsburg, a man who had written a critical analysis of the conduct of the Vietnam War.

To put it briefly, there is no comparison between the aggregate of the things for which this committee voted articles of impeachment in 1974 and the conduct of the President in a sexual relationship with a White House intern. So if you put the conduct on one side and look at the conduct of President Clinton and compare it with the conduct of President Nixon, the contrast is marked and dramatic.

On the other side, the elements of concealment primarily noted in the Nixon case are with regard to the burglary. But a long series of attempts to conceal, avoid, deny, and deceive goes back to the very existence of the sexual relationship with Monica Lewinsky.

So the issue before the committee is how seriously should we regard that cumulative series of efforts to hide the relationship. There is a lot of it, but there is only one underlying situation, and that one underlying situation did not in any respect involve matters of state or the powers of the president per se.

So it is against that background one addresses the question—was this aggregate set of misleading statements—lies, whether or not technically perjury, sufficient to be regarded as a high crime or misdemeanor?

Now, what I have suggested and I would submit to this committee—and I am glad I have the opportunity to restate it—is that there are only three possible outcomes of this matter. One is removal from office. If the President is impeached by the House, it automatically then and there goes to the Senate. The Senate is then required to hold a trial. A trial can only have two possible outcomes: acquittal or conviction. If the President is convicted, there is only one penalty permitted by the Constitution, and that is removal from office.

Now, this committee can right now, as I have tried to emphasize, address the question of whether everything you know, assuming the worst—with great respect to the members of the committee who have said, well, we haven't heard the witnesses, I would say, yes, if the question of whether or not to impeach might be tipped one way or the other, by all means, hear the witnesses. But if you assume the worst of everything that has been said and ask yourselves the question, do we believe that because of this issue of lies the President of the United States should be removed or not? You know everything you need to know to answer that question. Why not address it?

If the answer is, yes, he should be removed, then you vote the articles of impeachment that would get submitted to the House and if approved by the House, it would go to Senate. But if you think that is too much—and, by the way, as a law clerk for judges, I learned that all the hard questions are questions of degree. You can't divide the outcome into a series of graduated responses, no matter how close the call may be. You only, as a practical matter, have one choice, to impeach or not, censure or not.

Mr. HYDE. The time of the gentelady has expired.

Mr. CONYERS. Judge Higginbotham was asked a question, sir.

Ms. JACKSON LEE. I would appreciate it if he could answer the question.

Mr. CANNON. Mr. Chairman, the lady's time has far since expired.

Mr. CONYERS. We weren't questioning that, sir. We were just pointing out that Judge Higginbotham had been asked the first question and had not responded.

Mr. HYDE. Certainly. We will hear from Judge Higginbotham.

Ms. JACKSON LEE. Thank you, Mr. Chairman. Thank you, Mr. Conyers.

Mr. HIGGINBOTHAM. Well, Mr. Chairman, keep the light on. I won't be long.

Mr. HYDE. Sounds like a commercial for a motel, doesn't it? We will keep the light on for you.

Ms. JACKSON LEE. I will be there.

Mr. HIGGINBOTHAM. There is a Brahman expression, if you don't know where you are going, any road will take you there. And the importance of a civilized society is that you have due process so that you do have a road map which describes the journey which one must take to get justice.

I think that there are more profound injustices which are caused by procedural unfairness than by substantive adjudication. So in terms of what this group should do, you, I submit respectfully, should be the models of fairness from an analytical way in terms of how you probe evidence.

More than 60 years ago, a governor of Mississippi pled before the U.S. Supreme Court in behalf of black prisoners who had received capital punishment; and he said to Chief Justice Hughes, help us save my State, because they have been denied due process. And that was the first case where the U.S. Supreme Court ever held that a confession which had been extracted involuntarily with brutality and cruelty was not admissible, and that is a gloried day in the history of the Supreme Court.

It seems to me that you have the same kind of obligation that Chief Justice Hughes recognized the Nation must have in terms of procedural fairness, and the questions you raised fit within that.

Mr. HYDE. The gentlelady's time—are you through, Judge? I am sorry.

Mr. HIGGINBOTHAM. I will waive the rest of what I was going to say.

Ms. JACKSON LEE. Mr. Chairman, he had a question on comparing.

Mr. HYDE. Ma'am, really—

Ms. JACKSON LEE. May I just ask him to put it in writing for me, please?

Mr. HYDE. Yes.

Ms. JACKSON LEE. Judge Higginbotham, I will await your answer in writing on the difference between presidential and judicial impeachments.

I thank you. I know that you answered several questions at once.

Mr. HIGGINBOTHAM. And I have it on page 10 and 11 of the document I submitted to you, because I think it is one of profound difference.

Ms. JACKSON LEE. Thank you.

Mr. HYDE. Mr. Goodlatte.

Mr. FRANK. Mr. Chairman, could I just for a second thank you for your forbearance? This has been a tough day, and you have really gone out of your way to keep this in the best possible light. I want to express my appreciation.

Mr. HYDE. I owe you a very good cigar.

Ms. JACKSON LEE. I echo that, Mr. Chairman. Do I get one as well?

Mr. HYDE. I plead the fifth.

Mr. FRANK. Not from me.

Ms. JACKSON LEE. Mr. Chairman, we are an aboveboard committee here.

Mr. HYDE. Yes, we are, indeed.

The gentleman from Virginia.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, all afternoon we have been treated to diatribes by Professor Dershowitz regarding the motivation of the members of this committee regarding the issue of perjury and his assertion that we don't care to address it except when it amounts to what he considers to be the lowest level of perjury, which is somebody

lying to conceal something—their embarrassment about their personal indiscretions.

First, I reject both of the premises. I agree with the gentleman from Florida that no one on this committee on either side of the aisle has asked to have this burden placed upon us, and it is incumbent upon us to deal with the facts that we have before us. But most especially I reject the second assertion, and that is that this is simply about lying to cover up personal indiscretions.

First, with regard to the testimony before the grand jury, at the end of the process, I would like to read something written on August 20th of this year: “If the President’s public speech is any guide to what he swore behind closed doors, it may be possible to discern his new battle plan, to admit to private sexual indiscretions, which are provable but not impeachable, and to deny obstruction of justice and subornation of perjury, which would be impeachable but are not provable.”

You wrote that, Professor Dershowitz—

Mr. DERSHOWITZ. That is right.

Mr. GOODLATTE [continuing]. In the Boston Herald on August 20th under your byline, and it seems to me that on August 20th, you hit the nail on the head. The reason for the President testifying falsely under oath, if indeed he did, before that grand jury was not to cover up personal indiscretions, because he went on national television moments after that testimony and admitted those personal indiscretions. The reason he lied, if the evidence supports that conclusion, is because he wanted to evade criminal prosecution for his previous efforts to obstruct justice, suborn perjury, and commit perjury in the Paula Jones lawsuit.

So now we go back to the Paula Jones lawsuit, and we say, well, did the President of the United States lie under oath in that case for the purpose of avoiding personal indiscretions? Well, I suggest not, because in those very depositions he admitted to other personal embarrassing indiscretions that he had committed.

No, I would suggest to you that the evidence would suggest that he did so for the purpose of defeating that lawsuit, of winning the case, which, I might add, is exactly the same reason why you have criticized and rightly criticized police officers and others for committing perjury and lying under oath in cases involving your clients that you have defended and others, to win the case. It is exactly wrong for them to do it and exactly wrong for the President to do it, and we certainly should take a strong stand against perjury, including perjury by law enforcement officers.

And recently a Boston police officer—you may be familiar since you are from the Boston area—was recently sentenced in Federal court to 2 years and 10 months in prison for being convicted of one count of perjury before a Federal grand jury and one count of obstruction of justice for giving evasive and misleading testimony and withholding information from the grand jury. The officer lied about his observations of events where a plainclothed officer mistaken for a suspect was beaten by other Boston police officers.

I agree with you. I was going to ask you the question before we ever got your testimony at the outset, and I agree with you, though, that lying under oath by law enforcement officials is particularly egregious. But what about lying under oath by the chief

law enforcement officer in the country, the President of the United States, and not simply to cover up personal indiscretions but to defeat a lawsuit and to avoid criminal prosecution because of previous violations under the law? That, it seems to me, is the heart of what this matter is about before this committee, not lying to cover up personal indiscretions.

I will give you an opportunity to respond. Briefly, since I have very little time.

Mr. DERSHOWITZ. I appreciate it. Thank you very much.

First of all, I did not engage in diatribes against this committee. I responded to a point made by the Chairman characterizing my remarks which he did not hear, and I responded to a specific allegation made in a single instance, and I stick by what I said. If I offended anybody, I am sorry. I certainly don't want to attack the——

Mr. GOODLATTE. Apology accepted.

Mr. DERSHOWITZ. Well, I don't want to attack the motivations of any individual on this committee, and I intend to—what I have looked at is the votes of the committee on a partisan basis. That is upsetting. The issue that you have put is a very good one. In a book that I have written analyzing the case, I don't completely disagree with your analysis. I think that the problem began with an attempt to keep from the President's family a matter of personal interest. It then may have evolved and evolved and evolved. I take it very, very seriously. And I am very critical of the President's actions, I am critical of the actions of his lawyer Robert Bennett for allowing him to get into this situation rather than settling the case, and I don't mean in any way to trivialize the President's misbehavior. I do very strongly take the position, though, that there is a difference between an impeachable crime of perjury and condemnable but not impeachable allegations of perjury.

Mr. GOODLATTE. Since my time is very brief and may have already expired, let me recall my time that is remaining and serve you some more of your words, because I think that is the heart of the question there, divining between whether or not this is an impeachable offense or not, because you do agree with us that certain types of perjury would be an impeachable offense.

Mr. DERSHOWITZ. Of course.

Mr. GOODLATTE. Well, on July 29, 1998, you appeared on the show *Hardball* with Chris Matthews. During that show you said, I think his lawyers and he are in a very difficult dilemma, referring to the President, precisely because it is what he does from now on, and your comments were prescient because this was in July before he ever appeared before the grand jury. If he were now to go in front of a grand jury and he were to repeat his apparently categorical denial of any sexual contact and get himself into a swearing contest with a bought witness, Monica Lewinsky, that could cause a very serious problem. If the prosecutor could prove that he committed perjury in front of a grand jury, he would, I believe, be impeached.

Mr. DERSHOWITZ. I stick by that position.

Mr. GOODLATTE. That is what we are going to decide in this committee, Mr. Chairman. I yield back.

Mr. DERSHOWITZ. Let me please finish the answer because you have taken my answer out of context. I was very prescient. Before he ever testified in front of the Paula Jones case, I urged settlement or default. I wish he had taken that advice. I also urged that he be completely forthright in his grand jury testimony. I don't believe he was completely forthright in his grand jury testimony. But I don't believe that he committed perjury in his grand jury testimony.

And there is a big difference. He did not categorically deny any sexual contact. He admitted sexual contact. And then he refused to answer questions, and the committee—I'm sorry, and the Starr people didn't press him, as perhaps they should have and might have. And so I think we have a record that is not—does not demonstrate perjury in front of a grand jury. If it did, or if there were evidence of subornation of perjury, of the kind of cover-up that you describe, I think it would be a very, very different matter. Even though the origin was an offense of sexual conduct, if it eventually escalates to the point of obstructing and suborning and compounding the perjury in front of a grand jury, that escalates the matter very considerably.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Massachusetts Mr. Meehan.

Mr. MEEHAN. Thank you, Mr. Chairman.

The hour is getting late. It has been a long day. I guess we do impeachment by news cycles. I guess the news cycle today is going to be that the impeachment matter is going from the Lewinsky matter to campaign finance. We are going to have a reprise of Dan Burton's greatest hits. That will be the news cycle tomorrow.

I always find it interesting to hear many of the committee's Republican members expounding on the campaign finance abuses. It seems that many of them didn't appear the slightest bit interested in closing the soft money loophole, which is the root of many of our campaign finance abuses, at the time when we debated the issue on the floor of the House, when we had a bipartisan bill that 51 Republicans voted for, but the vast majority of members of the committee didn't vote to close that loophole at that time. Nonetheless, we were able to pass a bill through the House.

I am interested in many of the comments. I associate myself with the comments of Mr. Barrett, my colleague from Wisconsin, when he talks about the need for bipartisanship, and wouldn't it be great if we could get three Republicans and three Democrats to get together and work out some kind of a censure or some kind of a reasonable middle ground. But it isn't going to happen. Every Republican member of this committee will vote to impeach the President. It is a vote that is going to take place next week, because the week after that, we need to have the full House come in to vote on it. So as much as it would be nice if we could listen to the witnesses and determine whether there is a reasonable middle ground, this is a done deal. The die has been cast. We are going to vote; a majority of the members of the committee are going to vote to impeach the President of the United States sometime next week, regardless of who is subpoenaed, regardless of who is or isn't called as witnesses, and whether they are material or not.

I was interested to hear Attorney General Richardson talk about the gravity of what we face, because I hear a lot of Republican Members say, "Well, we are going to vote to impeach the President, but we are just like a grand jury. We are a grand jury here. We just determine whether we send it over to the U.S. Senate for trial. The trial would be over there. This is the same standard that any grand jury would have to meet."

Well, that is fine. But any of us who have been around grand juries clearly recognize that the old saying that a grand jury would indict a ham sandwich if a prosecutor suggested they should is true. I call this, by the way, the "Ham Sandwich Theory of Impeachment." "We are just a grand jury, we are going to send it over to the Senate. Let them decide whether the President should be removed."

I was interested, Attorney General Richardson, on your perspective on that. I am wondering, what do you think about a lax level of scrutiny, and is it appropriate for the Judiciary Committee or the full House to use this grand jury "ham sandwich" level of scrutiny to impeach the President?

Mr. RICHARDSON. Obviously my answer is clearly no. When I was U.S. Attorney for the District of Massachusetts, my instruction to my assistants was that they should never seek an indictment unless, if they were the trial judge, they would reject a motion for a directed verdict of acquittal at the end of the government's case. And I think that is the standard that this committee ought to have. But I have to reiterate that in the criminal process, in the criminal courts, the sentence can be very precisely adjusted to the relative seriousness of the offense.

I don't yield to anybody at this table, including my military colleagues, as to the seriousness of the offense of perjury or misrepresentation of the truth in any government context. But unlike the Federal district court, the Senate has no choice in deciding what the appropriate sentence should be. That is why, as I say, from my point of view, I say respectfully, you could address any old time the issue of whether or not removal would be the correct result. A vote to impeach is a vote to remove. If Members of the committee believe that should be the outcome, they should vote to impeach. If they think that is an excessive sentence, they should not vote to impeach, because if they do vote to impeach, the matter is out of their hands and, if the Senate convicts, out of its hands.

Mr. MEEHAN. Thank you.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Indiana Mr. Buyer.

Mr. BUYER. Thank you very much.

I have with me here testimony of Admiral Thomas H. Moorer, U.S. Navy, retired, a former Chairman of the Joint Chiefs of Staff and would ask unanimous consent that his written testimony here be placed in the record, Mr. Chairman.

Mr. HYDE. Without objection, so ordered.

[The prepared statement of Mr. Moorer follows:]

PREPARED STATEMENT OF THOMAS H. MOORER, ADMIRAL, USN (RET.), FORMER
CHAIRMAN OF THE JOINT CHIEFS OF STAFF

I appreciate the Judiciary Committee's invitation to submit these comments on the corrosive effects on the military's code of honor of having a Commander in Chief

who has admitted misleading the nation. The President, by his own poor choices, has created a crisis of constitutional proportion within the same Armed Forces he is duty-bound to lead. It is now up to Congress to solve this crisis by holding the President accountable.

When I had the honor to serve as Chairman of the Joint Chiefs of Staff in the early 1970's, I was the senior uniformed member of the U.S. Armed Forces. As such, like every other commissioned officer, I served "during the pleasure of the President." Like every other officer, I also swore to "support and defend the Constitution of the United States against all enemies foreign and domestic," and to "bear true faith and allegiance to the same. . . . So help me God."

The Committee is addressing today a critical problem within the Armed Forces that many civilians do not fully appreciate. The President is the Commander in Chief. Although he does not wear a military uniform, he is a military leader. In this regard, I urge the Committee to address two fundamental issues of military leadership: honor and accountability. Within the leadership of the U.S. Armed Forces, these virtues are indispensable. Without them, soldiers, sailors, airmen, marines, and civilians die unnecessarily.

If the Committee finds that the Commander in Chief has engaged in conduct that undermines the standards Congress has set for military leadership—to which the President has already indisputably admitted—I urge Congress to hold the Commander in Chief accountable not only for the good order and discipline of the U.S. Armed Forces, but also, more fundamentally, for the survival of the American Rule of Law.

When a military leader chooses to engage in dishonorable conduct, he either resigns or is removed from any position of responsibility, *i.e.* cashiered, by those to whom he is accountable. In any event, military leaders are accountable for poor choices. Military leaders also serve as role models for honorable and virtuous conduct. Their troops expect no less. When the troops know a leader is not being held accountable for dishonorable conduct, the "corrosive effect" is devastating on the good order and discipline of the Armed Forces.

President Theodore Roosevelt, who served as Assistant Secretary of the Navy, leader of the "Rough Riders" in the Spanish-American War of 1898, as Vice President, and then as President and Commander in Chief, said this about American national greatness and leadership:

The stream will not permanently rise higher than the main source; and the main source of national power and national greatness is found in the average citizenship of the nation. Therefore it behooves us to do our best to see that the standard of the average citizen is kept high; and the average cannot be kept high unless the standard of the leaders is very much higher.

Congress is responsible for setting these "very much higher" standards of leadership for the U.S. Armed Services. Section 8 of Article I empowers Congress to "make Rules for the Government and Regulation of the land and naval Forces." Congress is also responsible for holding the Commander in Chief accountable for "high Crimes and Misdemeanors."

Technical legal arguments that the Uniform Code of Military Justice may not apply to the Commander in Chief miss the point. At issue are some of the first principles upon which our colonial forefathers pledged their "sacred honor."

The First Article of the 1775 "Rules for the Regulation of the Navy of the United Colonies of North-America," which is still public law (10 U.S.C. 5947), mandates that: "All commanding officers and others in authority in the naval service are required to show in themselves a good example of virtue, honor, patriotism, and subordination; . . . to guard against and suppress all dissolute and immoral practices, and to correct, according to the laws and regulations of the Navy, all persons who are guilty of them." Likewise, the current congressional mandate that all commissioned officers comport to a higher standard of personal behavior—both on and off duty—traces to the 1775 "American Articles of War," which forbade officers from "behaving in a scandalous, infamous manner," and required that any officer found guilty "of any fraud . . . be *ipso facto* cashiered, and deemed unfit for further service as an officer."

A crisis of military discipline looms if any commander, by his words and actions, promotes an adage that "you can engage in whatever behavior you get away with, and even if you're caught, it's OK to evade accountability if you can get away with that"; a constitutional crisis looms if Congress does not hold all officers with full responsibility to a standard of full accountability. Responsibility without accountability "according to law" undermines the core foundation of the Constitution, the principle known as the Rule of Law (as opposed to the rule of men), without which our

Constitution is no more than a piece of paper. By definition, the Rule of Law cannot be influenced by public opinion, whether through public opinion polls or otherwise.

The U.S. Armed Forces now have a more fundamental challenge to leadership training than simply instilling character traits adverse to lying, cheating, and stealing: How do we instill in young leaders the moral courage to admit when they are wrong and to accept accountability for poor choices? Personal example by senior leaders, up to and including the Commander in Chief, is an essential starting point—and risk to personal ambitions is no excuse for any officer of the U.S. Armed Forces to fail in this regard.

I urge Congress to consider the high standards of personal conduct it has set for leaders of the American military, and to hold the Commander in Chief accountable to *at least* those standards—for the good order and discipline of the U.S. Armed Forces and for the survival of the American Rule of Law.

Mr. BUYER. I note that Admiral Moorer, the former Chairman of the Joint Chiefs, wrote, “The President is the Commander in Chief. Although he does not wear a military uniform, he is a military leader.” He also goes on to say, “I urge Congress to hold the Commander in Chief accountable not only for the good order and discipline of the U.S. Armed Forces, but also more fundamentally for the survival of the American rule of law. When a military leader chooses to engage”—I suppose when he said “military leader,” he is also meaning the Commander in Chief. “When a military leader chooses to engage in dishonorable conduct, he should either resign or is removed from any position of responsibility, i.e. cashiered by those to whom he is accountable.” He goes on to say, “When troops know a leader is not being held accountable for dishonorable conduct, the coercive effect is devastating on the good order and discipline of the Armed Forces.”

I have some questions I would like to ask of you, Admiral and General, and I appreciate your testimony here and your candor. You have made a contribution.

Admiral, at the Naval Academy—and these would be yes or no questions—at the Naval Academy, do midshipmen learn that the President is the Commander in Chief of the military and that the President’s picture is present on every ship stationed throughout the military in that capacity of the chain of command?

Mr. EDNEY. That is correct.

Mr. BUYER. Admiral, do you agree that integrity, honesty and ethics are required traits of a military leader?

Mr. EDNEY. That is correct.

Mr. BUYER. Admiral, as the ethics professor at the Naval Academy, do you teach your midshipmen that they must have a strong moral character in order to be an effective military leader?

Mr. EDNEY. That is correct.

Mr. BUYER. Admiral, is it for that reason that the Naval Academy and all the service academies, to include the service of the military colleges, have honor codes that state individuals in essence will not lie, cheat or steal, nor tolerate those who do?

Mr. EDNEY. That is correct. We have a different toleration clause, but the purpose is the same in our concept that the Academy says you must identify all truth, act on the truth and do what is right. But you are right.

Mr. BUYER. Admiral, do you also teach the midshipmen at the Naval Academy that good leaders must set the example for the sailors and marines under their command?

Mr. EDNEY. That is correct.

Mr. BUYER. Admiral, would you say that it is essential that those sailors and marines trust those in the chain of command in order for a unit to be effective?

Mr. EDNEY. That is correct. Trust and confidence is earned. But you are right.

Mr. BUYER. It is earned. Isn't it also true, though, that trust and confidence is reposed in the commission that is granted unto an officer by the President of the United States?

Mr. EDNEY. That is correct. It is in the oath of office.

Mr. BUYER. It is reposed.

Mr. EDNEY. It is reposed. That is correct.

Mr. BUYER. General, would you agree with that?

Mr. CARNEY. The President reposes special trust and confidence in the patriotism, valor and fidelity of the officer he is commissioning.

Mr. BUYER. So the President does that in the commissioning oath. So he grants that repose authority under the commissioning?

Mr. CARNEY. That is true.

Mr. BUYER. So it comes from the President as the Commander in Chief?

Mr. CARNEY. Correct.

Mr. BUYER. General Carney, is it not true that those at the top of the chain of command, in particular commanders, set the tone of the military organization?

Mr. CARNEY. Yes, sir.

Mr. BUYER. General, is it true that if the commander sets a poor example, there is a detrimental effect on the morale and discipline of the force?

Mr. CARNEY. Yes, sir.

Mr. BUYER. Regardless of the size of that force, whether it is a division commander all the way down to a platoon commander?

Mr. CARNEY. The lower the commander, the more visible is the impact, but high-level commanders are also impactful.

Mr. BUYER. General, would you say that it would be devastating to a unit's morale if the commander disciplined an individual for an action that the commander himself was accused of?

Mr. CARNEY. Yes, sir.

Mr. BUYER. General, although the President is not a member of the armed services, do the President's actions constitute the appearance of a double standard between the Commander in Chief and his military forces?

Mr. CARNEY. The President is held accountable to the Constitution and to the very difficult challenges which you face to remove him by the law of impeachment. That is different than the law that Congress gave the military in the form of the Uniform Code of Military Justice.

Mr. HYDE. The gentleman's time has expired.

The gentleman from New Jersey Mr. Rothman.

Mr. ROTHMAN. Thank you, Mr. Chairman, and I appreciate the answer of the last witness. It is a constitutional decision that we have to make here on the Judiciary Committee whether the President committed an act of treason, bribery or other high crime or misdemeanor; not whether the President's behavior was deceitful,

wrongful, immoral, but whether he engaged in treason, bribery or other high crimes and misdemeanors.

Some have talked about our upholding the rule of law. Throughout my lifetime—as an adult lawyer and a former Surrogate Court judge, I believe in the rule of law. But this President will not get any double standard. He can always be sued criminally for his conduct. So that would uphold the rule of law and show that the President is not above any other American. He can be prosecuted criminally and held criminally responsible for his conduct.

I am the father of two kids, and I tell my kids that lying violates the Ten Commandments. Adultery by the President violated the Ten Commandments. It is wrong, it is morally wrong, and I have said publicly it should be condemned. It was wrong when the President waved his finger and didn't tell the truth about his relationship with Ms. Lewinsky, and he should be punished, let alone for his having an affair with an intern in the White House. So he can be censured, rebuked, reprimanded for his not telling the truth to the American people, and we can teach our kids that lying has negative consequences, and we can uphold the rule of law.

What we have to decide, though, is whether the President, according to Mr. Starr, committed perjury, obstruction of justice or abuse of power. That is our job. Now, the charges by Mr. Starr, he talked about them, he wrote us a 450-page report, 17 boxes of information, and gave a speech before us for 2½ hours. The President's counsel responded with two rebuttals. So we have the prosecutor, if you will, giving his opening statement twice, in writing and orally, and then we had the President's counsel filing two written responses addressing every one of the charges of perjury, obstruction of justice, or abuse of power.

So how do we decide who is telling the truth? How do we decide where is the clear and convincing evidence that one side is right or not? Who bears the burden of proof? I always thought as an American familiar with our notion of fairness and due process, it was the prosecution that bore the burden of proof, to prove before the defendant had to defend and prove his or her innocence, if you will.

Professor Dershowitz, you say that there was no perjury before the grand jury. Why do you feel that the President did not commit perjury before the grand jury?

Mr. DERSHOWITZ. Perjury is a very technical and difficult offense to prove, and it ought to be. The difference between the rule of law and the rule of human beings is precisely the technicalities of the rules. The President was advised by an excellent lawyer, David Kendall. At this point, unlike in the previous situation, he told his attorney everything presumably. There were no secrets, and the answers were carefully crafted. I have looked at the answers. They seem at certain points to be less than completely and totally forthcoming, and the President acknowledged that he was not going to be forthcoming about the details and specifics of his sexual conduct.

Mr. ROTHMAN. Why isn't it perjury?

Mr. DERSHOWITZ. Because it was not literally false, at least not literally false in any way that I have seen evidence to demonstrate beyond a reasonable doubt.

Mr. ROTHMAN. Professor, if I may, now we have got a distinguished legal scholar saying there was no perjury, we have got Mr. Starr making charges, the President's lawyer responding, everything in writing. We don't have a single solitary fact witness upon whom Mr. Starr relied in making his case. Not a single solitary fact witness has been brought before this committee, and we are left with dueling papers and professors, the majority of whom say either don't impeach or there was no perjury, or if there was perjury, perhaps it is too much to threaten the security of the Nation to have an impeachment. So who bears the burden of proof?

Mr. DERSHOWITZ. I think on impeachment there is a very heavy burden on the proponents of impeachment. It is not like indictment.

And there is another thing that is very wrong. You hear from people both on this committee and elsewhere that the President has acknowledged this, has conceded this. I heard today the President admitted he lied. I challenge anybody to find any statement where the President concedes he lied. Indeed that is one of the criticisms made of the President, that he never conceded he lied. One cannot take this case as a *nolo contendere* or on the pleadings take every statement made by the President and his lawyers and say, aha, there is a concession of impeachable conduct.

Mr. ROTHMAN. In the Kendall report, Kendall refutes every single charge by Mr. Starr, so I don't see how there could be an admission. I for one am looking forward to finding out what the truth is. Since I have heard from all the lawyers, I want to hear from witnesses.

Mr. HYDE. The gentleman's time has expired.

Mr. CHABOT. Mr. Chabot, would you defer questioning?

Mr. CHABOT. I would be happy to.

Mr. HYDE. Would you think—try to think maybe over the dinner hour how you can mislead without lying? Maybe body language. Anyway, thank you.

Mr. CHABOT. Thank you, Mr. Chairman. The gentleman from Wisconsin—

Mr. ROTHMAN. Point of inquiry, Mr. Chairman.

Mr. CHABOT. Let me finish.

Mr. ROTHMAN. Were you addressing the question to one of the panelists?

Mr. HYDE. To Mr. Chabot. I do that occasionally. We talk.

Mr. ROTHMAN. Because I thought if you were asking the panelists, you would give them the opportunity to respond. Mr. Chairman, I thought if you were addressing the panelists, you would give them an opportunity to respond.

Mr. CHABOT. I assume we will be getting the full 5 minutes, Mr. Chairman?

Mr. HYDE. Yes.

Mr. CHABOT. Thank you, Mr. Chairman.

The gentleman from Wisconsin, and he is not with us now, but early on he mentioned something to the effect that he thought the President had carried on behavior which was inappropriate and deserved to be punished, but not necessarily impeached, because he said that impeachment, if it went over to the Senate, would drag

out for a year, and the country couldn't stand that turmoil, or something to that effect.

And that is exactly what they said about this committee. They said if we took this up, we had to limit the scope of this impeachment, the matters that we took up, and also the time, because they said this would drag on for a year or perhaps even 2 years. The Chairman was determined not to let that happen, to move forward in an expeditious manner, which we have done, and it is quite likely that this matter will be wrapped up this year.

I think that if the Senate carried this forward in an appropriate and expeditious manner, they could wrap it up one way or the other in a relatively short period of time. So I don't think this would necessarily drag on for a year or 2 years as some have alleged.

In addition to that, there are many, particularly on the other side of the aisle and a few on ours, although not on this committee, I don't think, that are looking for censure as a way out. They believe that the President should be punished, but they don't think that he should be impeached or removed from office. As we all know, constitutionally if the House impeaches, it goes to the Senate, and they ultimately don't have to remove the President from office. That is for the Senate to determine.

A lot of folks look at the polls. I don't look at the polls, but a lot of folks do look at the polls. They say that the public doesn't want this President to be impeached, although they do want him to be punished. Now, if the President is impeached and not removed from office, that will certainly be a mark on his record and one justifiably received, assuming that the facts alleged against this President are true. So I think moving toward censure at this juncture is inappropriate and not for the House to determine. If the Senate wants to consider censure, then that is up to them to determine.

We have also heard it said by a panelist this afternoon, in fact a couple of panelists, that perjury happens in courtrooms all the time, police commit perjury. It has been compared to a traffic offense. It was also said that people are never really charged or punished in this country for the type of perjury that the President allegedly carried out. Yet we had two women before us this morning on an earlier panel who clearly showed that perjury oftentimes is punished, and punished very severely in this country. Those two women certainly were. In addition to that, there are 113 other Americans who are behind bars or on some sort of home release or whatever, but being punished by the Federal courts because they committed perjury—they committed perjury in a Federal courtroom. And we have thousands of people in this country who are suffering criminal penalties because they committed perjury in a State courtroom. So people are punished for it.

I wanted to—Judge Tjoflat is now gone for the day, I assume. Let me shift over to General Carney and Admiral Edney, if I could ask you a quick question here.

At one point in the *Jones* case, the President had argued that he was immune from suit because he was Commander in Chief and should in effect be considered an Active Duty officer and should not be subject to suit at that time. If that particular argument had carried the day and the President were now subject to the Military

Code of Justice, what types of penalties could he face for the charges of perjury or adultery or obstruction of justice? Either the admiral or the general?

General CARNEY. The Uniform Code of Military Justice, for which he is *not* subject, has a perjury article and a false official statement article, and it has what is called a general article, 133, conduct unbecoming an officer, from which an officer will be charged with lying whether it is under oath or not. So there would be a number—if I were in the similar situation and, say, commanding the 82nd Airborne Division, there would probably be five specifications to the various charges against me.

Mr. CHABOT. Thank you, General.

Mr. HYDE. The gentleman's time has expired.

The gentleman from North Carolina—

Mr. CHABOT. I think the admiral also, Mr. Chairman—

Mr. HYDE. I am sorry, Admiral.

Mr. EDNEY. I just wanted to make the point, first of all, I don't agree that you can make that assumption, that the President is under a different law and he doesn't come under UCMJ, but when you come under UCMJ, because of the importance of command and trust and confidence in command, the first act under UCMJ is to remove the officer from the position of command because you have lost that trust and confidence, because you cannot leave that person suspect out there in command. Then you do the investigation.

So the process is totally different, and the requirement for speed and action to maintain trust and confidence is essential to the military. That is why we act the way we do.

Mr. HYDE. The gentleman from North Carolina, Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman. I will start by just assuring all the witnesses that I am not being punished by going last on this side. And the Chairman is not punishing me. It was actually at my request that I went last. For those who might be worried, I wanted to make sure that the Chairman got the benefit of that, also.

I actually had intended to ask a couple of questions to Judge Tjoflat, but since he has left, perhaps I can ask these questions to Judge Higginbotham and Mr. Rosen.

Is there a difference between lying under oath and perjury?

Mr. HIGGINBOTHAM. Yes.

Mr. WATT. If so, could you tell me what that difference is?

Mr. HIGGINBOTHAM. It is my recollection that Congress amended the statute because they thought that there were some issues which were not incorporated in the perjury standard. I would be pleased to send you a note on it. But for an impeachment proceeding, unless you tell me that someone was lying and did not take the oath, it would not make a difference whether it would be lying under oath or perjury in terms of your making a judgment on impeachment.

Mr. WATT. Mr. Rosen.

Mr. ROSEN. There is a clear difference between lying under oath and perjury. All sorts of things that all of us would acknowledge are lies don't rise to the level of perjury unless they are both intentional and material. And the President claims in regard to all of the allegations against him that although he may have engaged in

what we might call a lie or we might call a misstatement, none of his lies rise to the technical level of perjury because they were not intentional; that is to say, he believed they were true when he told them, and they were not material to the cases at hand.

Mr. WATT. Let me go to the second part of that, not the knowledge that he was lying, but the materiality of the misstatement. Can you tell me a little bit about what materiality means in the definition of perjury?

Mr. ROSEN. Materiality means that the lie had to have been important enough that there was some possibility that it had a chance of affecting the proceeding in which it was told. That is to say, an irrelevant lie, a question that was asked about some embarrassing matter that couldn't possibly have affected the proceeding, wouldn't have been material.

Reasonable people can certainly disagree about whether the misstatement or lie told in the Jones deposition was or was not material. The judge, when she ruled the evidence inadmissible, said it didn't go to the core issue of the case. At the same time she did say that it might be relevant. So one could argue the case either way.

It is important, though, to stress that in convicting people of perjury, jurors tend to give people the benefit of the doubt and don't convict in close cases where the materiality is open to question.

Mr. WATT. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. HYDE. I thank the gentleman.

The gentleman from Georgia, Mr. Barr.

Mr. BARR. Thank you, Mr. Chairman.

Mr. Chairman, I have been taking some time this afternoon during some of the other questioning and testimony and refreshing my recollection, which in this instance is remarkably good, of certain provisions of the U.S. Criminal Code, title 18. I have looked over the various provisions on obstruction, false declarations before a grand jury, perjury, and frankly, Mr. Chairman, I don't find any gradations there. I don't find any context there. I find Federal criminal statutes that the American public and the two witnesses here earlier today who have been convicted of those offenses understand a lot better than some of the folks on this panel.

When I first heard from this panel, other than beginning with Judge Tjoflat, I was somewhat depressed, because what we seem to be hearing from many of the witnesses is perjury may be perjury, obstruction may be obstruction, but you have to look at the context. You have to look at whether it was really a serious offense. You have to look at whether or not a person won an election by 49.3 percent or 49.2 to determine whether or not it is really—that was one of the points, Professor Dershowitz, that was made by one of the other witnesses. They harkened back to the percentage by which the President had won the election, not a majority, but a plurality, as if that apparently figures in whether or not it is impeachable to commit perjury or not.

But I am not depressed, Mr. Chairman, and the reason I am not depressed is there really are, I think, two Americas, and there is a real America out there, and I think our military witnesses understand that, and the two witnesses earlier today understood that,

and Judge Tjoflat understands that. It is that America that I have great faith in, because it is that America that understands what perjury is. It is that America that understands that there are not gradations of perjury when we are talking about the President of the United States of America going before a Federal judge or a Federal grand jury. They understand, for example, that indeed, as reflected in the sentencing guidelines themselves, it is indeed more serious for sentencing purposes if you have a person in a position of public trust than if you have an average citizen. Now, some on this panel may argue that the President is not in a position of public trust. I think that clearly the sentencing guidelines contemplate that.

And here again, the American public, the real America out there, understands that there ought to be a very high standard for our public officials. The same America out there that understood when I was called upon as a U.S. attorney to prosecute a sitting Republican Member of Congress who served on this very panel back in the 1980's for doing precisely what the President of the United States now has done, and that is to impede, obstruct and lie before a Federal grand jury, I prosecuted him, because down in Georgia, in the Northern District of Georgia, we understand that there are not gradations of perjury, there are not gradations of obstruction of justice, there are not gradations in contextual concerns that come into play whether or not to prosecute a Member of Congress or the President of the United States for committing those acts.

Also the reason I am not depressed, Mr. Chairman, is in the real world out there, people understand the Constitution, and they understand—not like some of our law professors today—they understand that the primary focus of the Constitution as given to us by our Founding Fathers for abuse of office, which is not so vague a term as to be unintelligible to any President despite some of the testimony here today, they understand that the way the Constitution is crafted, the primary mechanism for dealing with abuse of office is impeachment. It is not prosecution for a criminal offense. That is precisely why the first point at which abuse of office by a President and a Vice President and other high officials comes up is in the context of impeachment, and then the Constitution goes on to provide that that shall not prohibit essentially prosecution.

So despite the fact that some of our law professors here today think that this matter should all be handled by the courts, and the Constitution should just be shoved aside, real America understands that the Constitution is there for a reason, that it does mean something, the same as our title 18 of the Criminal Code means something in terms of defining with tremendous clarity perjury, obstruction of justice and tampering with and interfering with the work of a grand jury.

Mr. Chairman, even though at the beginning of this panel I was somewhat depressed at what we were hearing, I am heartened by the fact that I don't think these views represent the clarity and the rationality and the common sense with which the real America views these matters.

Mr. DERSHOWITZ. May I respond 30 seconds to what I perceive to have been a personal attack? First of all, whenever I hear the

word “real Americans,” that sounds to me like a code word for racism, a code word for bigotry and a code word for anti-Semitism.

Mr. BARR. That is absurd. He ought to be ashamed. That is the silliest thing I have ever heard.

Mr. DERSHOWITZ. When I hear you describe me as something other than a real American, shame on you. We may have a disagreement about the merits of these issues, but I would no more impugn your Americanism than you should impugn mine, sir.

Mr. BARR. You are being silly, Professor. You are being absolutely silly.

Mr. HIGGINBOTHAM. May I respond, Mr. Chairman?

Mr. HYDE. Yes, indeed. Far be it from me to not have anyone respond. Go right ahead.

Mr. HIGGINBOTHAM. I take profound disagreement with Congressman Barr’s categorization of the real America, which he apparently understands with such fine discernment, and to which those of us who teach at universities are oblivious. You know, we have students, and they teach us something. My father was a laborer. My mother was a domestic. And I climbed up the ladder. And I did not come to where I am through some magical wand, so that I am willing to match you any hour any day in terms of the perception of the real America.

Now, let me put this in perspective, because I cited some statistics, and apparently that is not relevant to the real America. On page 7, I gave the fact that President Clinton got 379 electoral votes and 47,401,054 popular votes. I cited that because when you do an impeachment, when you do an impeachment, you remove someone, Congressman Barr, who got elected by the real America. And it is the pernicious consequences on which that could happen.

Let me give you an example as a Federal judge. In the Sixth Circuit, Tennessee, Michigan, Ohio, Kentucky, from the day when President Reagan got in to President Bush’s last day, there was never one African American appointed to those courts. And before them President Carter appointed blacks; after them President Clinton appointed blacks. Now, when you remove a President, you will be removing someone who may have some values which are as important as what you call perjury, and that is pluralism, the opportunity for people who are black to get into the system. There is still conflict whether some people accept what Roger Brooks Taney said in the Dred Scott case, that a black man had no rights which the white was bound to respect. That was values, and that was a real America. But Justice McLean and Justice Curtis dissented, so that we have in this country, when Dred Scott was decided, when Plessy was decided and in recent cases, a profound division in terms of pluralism and inclusion. And I think that there is a real America which President Clinton took in terms of fairness, and I would be delighted to debate this issue with you in far greater detail.

Mr. HYDE. Does the gentleman from Georgia wish 2 minutes to respond?

Mr. BARR. Thank you, Mr. Chairman.

My point would be, you know, all of that is fine and good. It is utterly irrelevant, the same as the silliness that Professor Dershowitz thinks that talking about a real America in terms of understanding certain concepts of the law, the Constitution, mili-

tary discipline, he thinks that, what was it, a racial issue or something, I don't know, it was so silly.

Mr. DERSHOWITZ. A code word.

Mr. BARR. But I think my concern, Mr. Chairman, is when we bring these sorts of things up and say simply because we have a President that we might remove from office for violating his oath of office or otherwise committing high crimes and misdemeanors, simply because of certain policies, then we get into constitutional and legal relativism that I would certainly think that a learned member of the bar and former member of the Federal judiciary would not stray into. Using as an excuse for not upholding the rule of law or the constitutional standards that we have simply because we have a President that might do certain things politically that we like I think is a very, very slippery slope, Mr. Chairman, and I thank you for letting me go into that.

Mr. HYDE. The gentleman from Florida, Mr. Wexler.

Mr. WEXLER. Thank you, Mr. Chairman.

I would just like to ask some short questions of General Carney, if I could, and then give the remainder of my time to Professor Dershowitz if he chooses to respond to the Chairman's question of Mr. Chabot.

General, I find as a part of this debate not just today, but the ongoing debate over the last year, the issue of morale in the military. While it may not be directly related to impeachment or directly related to the issues that this committee concerns itself with, I find that to be one of the most concerning issues, and the allegations that some make that the President's conduct has in some way, significant or otherwise, lowered the morale in the military. My experience in terms of speaking with people in the military in Florida, when you get right down to it, if there is, in fact, a morale problem, it seems to me from my conversations to stem more from budgetary shortfalls, more from a perceived—and I would agree—a perceived lack of increases in pay, things that really matter to the members of the military more than a specific reference to the behavior of the President.

I was wondering, one, if you might comment on that, and, two, what I also hear from admittedly junior officers and the enlisted personnel in terms of this portrayed double standard of law, what I hear from enlisted personnel regarding the adultery policy is—and I don't know if this is quantifiably correct, but they certainly seem to suggest, at least a number of them that I have talked to, that there is a double standard; that the court-martial program is much more quickly used with respect to enlisted personnel as it is with respect to, and I think the word is red flag officers.

I was wondering if you might speak to that. How many red flag officers have been court-martialed for adultery, say, in the last 40 years? The people in the military that I have talked to, admittedly, again, not the high officers, but the personnel people, seem to think there is a double standard.

Mr. CARNEY. Congressman, I was the deputy chief of staff of personnel. I never heard the term "red flag officers." But I do understand your meaning. I am not aware of a double standard by any stretch of the imagination. What the enlisted people that you are

talking to probably don't understand is what happens to senior officers is not very well known to them.

Secondly, to your first point, yes, indeed, there is a morale problem. I know Congressman Buyer knows it well. There is a 13 to 15 percent gap in military pay. There is a retirement system change that was voted in in 1986 that midcareer officers and enlisted soldiers find to be obnoxious. There is an increase in deployments that have occurred in these past 6 years in the face of a 40 percent reduction of force structure, and a whole bunch of other problems.

Now, is there a problem caused by the President's conduct? I don't have any idea. It would, in my view, be a violation of Article 88 if the military were to even conceive of taking such a poll. And so I doubt seriously that anybody can really respond to what you have said.

Mr. WEXLER. Thank you. I appreciate that.

If I could, Mr. Chairman, I would like to give Professor Dershowitz an opportunity to respond to your earlier question.

Mr. DERSHOWITZ. Chairman Hyde, you asked what the difference is between perjury and misleading testimony. The answer is *Bronston v. United States*.

Mr. HYDE. That isn't what I asked.

Mr. DERSHOWITZ. What was the question?

Mr. HYDE. I asked how you can mislead without lying.

Mr. DERSHOWITZ. How you can mislead without lying?

Mr. HYDE. Yes.

Mr. DERSHOWITZ. The Supreme Court took the following case. A Mr. Bronston was asked whether or not he has ever had a Swiss bank account. He responded by misleading, by saying the company had an account there. In fact, he had an account there.

The Supreme Court said that petitioner's answers were shrewdly calculated to evade. Yet they were not lies. They were literally the truth with a clear subjective intent to mislead.

Now, you and I wouldn't deal with our families that way. I wouldn't deal with my students that way. It is wrong to do it that way. But the difference between lying and perjury is whether or not something is a literal truth. A misleading literal truth is not perjury. The President acknowledged in his testimony that he intended to deny information to the Paula Jones lawyers, but he did not intend to commit perjury.

Mr. HYDE. I am not talking to upbraid you. He says he misled people, but he didn't lie.

Mr. DERSHOWITZ. That is right.

Mr. HYDE. I am having trouble reconciling how you mislead without lying.

Mr. DERSHOWITZ. If you tell a literal truth that you understand will mislead, that is misleading without literally lying.

Mr. HYDE. I can see that if you want to soften it around the edges, but the person who continues to evade telling you the whole truth and nothing but the truth I would call a liar.

Mr. DERSHOWITZ. I think that is a fair assessment. I think it is a fair appraisal to say in colloquial talk a person who continually misleads is somebody that we would generally regard as a liar. But there is a difference between moral talk and legal talk, and that is the difference between the rule of law and the rule of people.

Under the rule of law, that does not constitute technical lying. It does not constitute the crime of perjury.

Mr. HYDE. Thank you.

Who is next? Mr. Hutchinson.

Mr. HUTCHINSON. Thank you, Mr. Chairman.

Professor Dershowitz, if I understand your testimony, you have concluded that if the President lied under oath in the Paula Jones deposition, that would not be an impeachable offense. Is that correct?

Mr. DERSHOWITZ. That is right.

Mr. HUTCHINSON. These aren't complicated questions. They aren't trick questions. But then you got to the grand jury testimony. I believe you concluded in your judgment that he did not commit perjury—

Mr. DERSHOWITZ. That is right.

Mr. HUTCHINSON [continuing]. In the grand jury testimony. But if one were to conclude that the President committed perjury in the grand jury testimony, would you agree that it is a fair consideration and a fair debate as to whether that rises to the level of an impeachable offense?

Mr. DERSHOWITZ. I think that is a very fair question. I think reasonable people could disagree about that if the origins of it were an attempt to prevent embarrassing questions from coming up. I think if you had a President that clearly sat down and made a deliberate, calculated decision to try to commit perjury to a grand jury that was investigating his criminal conduct, you could reasonably include that within the category of impeachable offenses.

Mr. HUTCHINSON. Thank you, Professor. I appreciate that. And I think that is consistent with the essays that you wrote contemporaneously and really preceding the President's grand jury testimony. You along with others were sounding alarms to the President, "Make sure you tell the truth."

Mr. DERSHOWITZ. No, no, make sure you don't commit perjury is what we said. I obviously would have preferred for him to tell the truth, the whole truth.

Mr. HUTCHINSON. I just want to read some of the language that you used at the time in July of 1998. You stated that his testimony promises to be the single most important act in his Presidency. He must tell the truth, whatever the truth may be.

Mr. DERSHOWITZ. That is right.

Mr. HUTCHINSON. And then continuing on, you also wrote in August of 1998, again preceding the President's testimony before the grand jury, that there is nothing the President had done so far, that would get him impeached because it all occurred in the context of a civil suit that has been dismissed. But if he were now to deny any sexual involvement with Lewinsky during his grand jury testimony, and if that testimony were to be proved false, you remember what you said then?

Mr. DERSHOWITZ. He would be impeached.

Mr. HUTCHINSON. You said, he might well lose his Presidency.

Mr. DERSHOWITZ. And I think if, in fact, he had denied any sexual contact with Monica Lewinsky at that point and the DNA evidence had then come forth afterward and proved that he was categorically lying about something which was then the subject of a

grand jury investigation, and lied in so dramatic a way, yes, I agree with that. But he didn't do that.

Mr. HUTCHINSON. Reclaiming the time, I think your testimony is that if he perjured himself before the grand jury, that might well constitute an impeachable offense.

Let me move on to Professor Rosen. You talked about the criminal sanction. A number of people have made the point that the President could face sanctions and accountability because he is subject to criminal prosecution. Is this really something that you think is an option? First of all, would it not be the independent counsel, Kenneth Starr, that would pursue a prosecution of the President of the United States for perjury?

Mr. ROSEN. It might well be. The independent counsel has shown an imperviousness to public opinion before, so it is quite conceivable that he might bring a perjury prosecution if you decide not to impeach.

Mr. HUTCHINSON. But it is his call. What you are saying and others are saying, Mr. Rosen, is that the President should be punished. If we really want accountability, what are the best odds here? What is best for the country? Should he be punished by Kenneth Starr, waiting 2 years for him to be prosecuted until the year 2001? Or is it better for the Congress of the United States to deal with this issue now?

Mr. ROSEN. Congressman, the crucial question, the wonderful question that you have posed to the country in these hearings is how can we subject the President of the United States to the same rule of law that was imposed on those witnesses that we heard from this morning? The answer is the ordinary rule of law. It should be up to a prosecutor, like Kenneth Starr, to decide to prosecute or not, and he would be subject to the same constraints of prosecutorial discretion.

Mr. HUTCHINSON. Which is really an escape hatch because as Professor Dershowitz said, he will not be indicted after he leaves office.

That is your opinion, is it not, Professor?

Mr. DERSHOWITZ. Absolutely.

Mr. HUTCHINSON. And is that your opinion, Professor Rosen?

Mr. ROSEN. It is not my opinion. I would not presume to predict the calculations of the independent counsel Kenneth Starr, who might well indict the President.

Mr. HUTCHINSON. I think everybody in the country would say that we punted on this issue, it was a punt on third down, if we do not deal with the issue that is before this committee.

Mr. HYDE. The gentleman's time has expired.

The gentleman from Indiana, Mr. Pease.

Mr. PEASE. Thank you, Mr. Chairman.

I find myself, as I often do at the end of the day, with all of the things that I intended to ask having been addressed by those who are brighter than I. I do want to thank the witnesses for being with us. I do want to express my regret that at times there were personal statements made by both members of this committee and by members of the panel. I find that unfortunate. But I am grateful for the information that was provided, the expertise that was shared and the time that you spent with us.

Having said that, I want to yield the balance of my time to my colleague from Indiana Mr. Buyer.

Mr. BUYER. I thank the gentleman for yielding to me.

I wear another hat here in Congress. I chair the Military Personnel Subcommittee of the National Security Committee. And, General Carney, that is where you and I have had a good working relationship. I appreciate your candor here today.

The message of military personnel is, I believe, that they do look to the Commander in Chief to set the high standard of moral and ethical behavior. They look all the way up that chain of command to the President as Commander in Chief. And the military—I think it is proper for the American people to demand of the military the highest standard and to lead by example. Adherence to high moral standards is the fabric of good order and discipline. Both of you have testified to that today, and I concur with you. When military leaders, to include the Commander in Chief, fall short of this idea, then there is confusion and disruption in the ranks. And today many do see a double standard.

I am out there. I have been with the Marines. I have been with the Third Fleet before they sailed. There is a disruption. There is confusion. But the great thing is, the message I can say to America is that we have a professional military, and we do have an adherence to civilian control. And, General Carney, I agree with your answer to Mr. Wexler. They are professional, and they will respond, and they are the greatest military in the world.

And it is very difficult for us to measure this issue about morale. I think Mr. Wexler asked very good questions about morale, because it is multifaceted at the moment, but it would be wrong for us not to ask that difficult question about what is the impact on the force, is it detrimental, what is its impact upon readiness when the force is disgruntled when the Commander in Chief is then held to a different standard or a lower standard than that which he demands of his own service.

I want to be informative here to my colleagues about the issue of exemplary conduct. And that moves to this question about should the President as Commander in Chief be held to the same standards of those he leads within the military. You see, the Founding Fathers were concerned about the ethical standards of the military leaders. It was John Adams that included in the first naval regulations language that called for naval officers to have high moral and ethical standards. Admiral Moorer in his statement included that reference. This language was codified for naval officers by Congress in 1956.

When I conducted the review after the Aberdeen sexual misconduct incidents, I learned so clearly about the importance of the chain of command because there are those that sought to weaken the chain of command. And when you look at the Goldwater-Nickles law, it goes from that lowly recruit all the way through the Secretary of Defense, the national command authority, it drops right at the Commander in Chief.

So what did we do? We then said in 1997 if, in fact, the exemplary conduct language applies to the Navy, then we said apply it to the Air Force and the Army, and the Congress did that in 1997, and the President signed that into law. I then said, you know, but

it is not done yet. We then need to say it applies to the national command authority as set out in law.

That is what we have here. The Navy, Army and Air Force have exemplary conduct language. What I did is—what this says is that it calls for the officers to show themselves a good example of virtue, honor and patriotism, and to subordinate themselves to those ideals, and to guard against and to put an end to all dissolute and immoral practices, and to correct all persons who are guilty of them.

You see, there is frustration and confusion in the military, because I have traveled to a number of the military installations both in the United States and overseas. I have heard the questions from the military personnel on the behavior of the Commander in Chief. As a Member of Congress and as a military officer myself, I find these questions disturbing.

The services are recruiting young people across the Nation. At boot camp they are infusing the young people with moral values of honor, courage and commitment. They are teaching self-restraint, discipline and self-sacrifice. Our military leaders are required to provide a good example to these young recruits. Yet when they look up the chain of command, they see a double standard at the top.

That is why I sought to include this exemplary conduct language to apply to the Secretary of Defense and the President, who is Commander in Chief. I have no interest in placing these two civilians under the Uniform Code of Military Justice. This was included in the defense bill, but the Senate would not go along with it. So what we have is a sense of the Congress resolution.

See, the Congress has already spoken on this issue and said that we believe that the President as Commander in Chief should be held to this high exemplary conduct language that I read here.

I thank the gentleman from Indiana for yielding to me on this point, because the language that we are asking the President to abide by is very simple, and that is that the President and the Secretary of Defense are to show themselves a good example of virtue, honor and patriotism, and to subordinate themselves to those ideals; to be vigilant in respecting the conduct of all persons who are placed under their command; to guard against and put an end to all dissolute and immoral practices; and to correct, according to laws and regulations in the Armed Forces, all persons who are guilty of them; and to take all necessary and proper measures under the laws, regulations and customs of the Armed Forces to promote, to safeguard the morale, the physical well-being and the general welfare of the officers and the enlisted persons under their command or charge.

It is not in law, but I will come back in the next Congress to try to make this law so that everyone understands and will know what standard will everyone be applied to. Thank you.

Mr. HYDE. I thank the gentleman.

The distinguished gentleman from Utah, Mr. Cannon.

Mr. CANNON. Thank you, Mr. Chairman.

I would like to, first of all, apologize to the panel for having interrupted on a couple of occasions to try and keep the 5-minute rule at least within the 20-minute parameters.

Mr. HYDE. I accept the chastisement.

Mr. CANNON. It was actually an apology. But we will see about the next hearing when the Minority has its time again.

Let me just make a couple of points since I had some questions for the two judges who have left us, Judge Wiggins and Judge Tjoflat. In the first place let me point out that I think when we talk about gradations of perjury, we are often really talking about gradations of proof or evidence. And where we have clear proof, there should not be much reason not to proceed in any case of perjury.

Secondly, Mr. Rosen pointed out that we don't know what the President's state of mind was, he hasn't told us what his intent was, but let me point out that all perjurers say that they were not intentionally lying or consciously lying. One of the remarkable things about our two witnesses earlier today was after having been caught, after having gone through the process, they appeared rather repentant.

Now, let me turn to Judge Wiggins' idea of a million-dollar penalty. That million dollars, of course, is a great deal of money, and I suppose it is meant there to express something about the seriousness of the President's perjury. But it occurs to me that to impose such a penalty either becomes an ex post facto bill or a bill of attainder on the one hand, both contrary to the Constitution, or on the other hand the President comes forward and agrees that that kind of penalty should be imposed upon him. In doing so, it seems to me breaks down the barriers between the branches of government. I think it is a great constitutional sin, and that is why I am deeply opposed to the idea of censure or censure plus or censure with pain.

Let me just point out that I have at this time a deep concern about our constitutional system. As part of that concern, I have great fear and concern for our military, and so I appreciate General Carney and Admiral Edney joining us today. If I might just ask the two of you a few questions.

In the first place, does by his behavior, this President, pose a danger to our country?

Mr. CARNEY. No, sir.

Mr. CANNON. Admiral.

Mr. EDNEY. No. Let me give you a specific. I just got a direct communication from the Chief of Naval Operations. He came back with the troops in the Gulf and the marines in the Gulf telling how highly committed they were.

It goes to what Ms. Lee was talking about. It is not a single issue. Nobody should mistake that the morale of the Armed Forces of the United States is such that they will fight, and they will do their job better than anyone else. What we have said, which has been a little bit, is that all of this collectively, you are seeing indications in the American Armed Forces through recruitment and retention that says morale is not as high as it should be, and there are multiple factors, one of which is immeasurable but is out there, this conflict that Congressman Buyer was talking about.

Mr. CANNON. Thank you. You actually answered really to the core of what I am concerned about. You have a large turnover every year, about a fifth or a quarter. If I understood, General, what you said earlier, 500,000 people need to be recruited per year. Over the next couple of years that means we are going to recruit

500,000, a million people. Do we have difficulty inculcating into those new recruits the value system when morale is a problem?

Mr. CARNEY. We have all the time. They come from a variety of walks of life. The Army, for example, just added 1 full week of basic training, moving from 8 to 9 in order to free up some time to do, among other things, the inculcation of our value system and those seven Army values that I discussed.

Now—and the people who are not joining us because of this controversy, I have no idea. I suspect that there are some—there are bigger issues right now in the employment position that causes recruiting difficulties in the services.

Mr. CANNON. You mentioned the controversy. I take it you mean the President's conduct.

Mr. CARNEY. Yes, sir.

Mr. EDNEY. Let me say, sir, that the issue is much more complex. We have been charged by the Congress to do a very difficult thing, and that is the total integration of men and women in our military who must live in very confined spaces while conducting very difficult missions with young 18- to 23-year-olds. And so the standards are understood. What we are talking about is the growth and maturity of these young Americans under difficult living conditions. Of them I don't want anyone to think it is easy, and the challenge on the commanding officers out there is an extremely challenging one. So it is much broader than the one individual.

Mr. CANNON. But in a very difficult environment, I take it from the thrust of your testimony that the President's actions have made that more difficult?

Mr. CARNEY. It has not helped. Yes, that is correct.

Mr. CANNON. Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. HYDE. I thank the gentleman.

The gentleman from California, Mr. Rogan.

Mr. ROGAN. Thank you, Mr. Chairman.

First, I want to commend all of the remaining members of our panel for their staying power, and I want to express to each and every one of you my profound appreciation and respect for all of your presentations and for what you have brought to this particular committee.

I guess, in fairness, Professor Dershowitz, I have to single you out just for one moment, because I want to assure you that we have no hard feelings. I know that you raised a few hackles here with some of my Republican colleagues with controversial comments about their motivations, but I want you to know that I personally found them to be very therapeutic. Because up until you made that observation, the only reason I had for not having attended Harvard was my grade point average. [Laughter.]

A couple of observations, if I may. I have to be candid. I was a little taken aback today by the constant references to Defense Secretary Weinberger, and I noted in all seriousness, Professor Dershowitz, your comment that if the committee was actually serious about pursuing perjury issues, we would be looking at the potential perjury of Defense Secretary Weinberger. I don't know if that was offered more for rhetorical flourish, but I will confess to

you that I am certainly not an expert on that subject. I was not a Member of Congress at the time.

I do know that the President of the United States, for right or for wrong, has the constitutional power to pardon an individual, and I don't think there would be any argument on that fact. I also know that a President has no constitutional prerogative to commit perjury.

What I found interesting about the Weinberger suggestion was reviewing the Los Angeles Times article from December 25th, 1992, that reported on Mr. Weinberger's pardon. The Los Angeles Times interviewed various people about how they felt over Mr. Weinberger's potential perjury being pardoned by President Bush. And one of the people they interviewed expressed his grave concern about that pardon, and when they asked him why, he said it signaled that if you are a high government official, then you are above the law.

That quotation was from the President-elect of the United States, Bill Clinton. And so here we come full circle to this concept of the rule of law, the defense of which now haunts the members of this committee night and day.

And I wish I were articulate enough to try to express my feelings on the subject appropriately. I am not. However, this very morning in the morning newspaper was a very commendable commentary by Paul Greenberg. If I may, I want to read a few passages from it.

He said, "In the end, the whole great structure of the law begins to totter when men come to see it not as a guide or restraint but just as a series of obstacles to evade. Remove the basis of law, like the search for truth that once made perjury a serious charge, and any individual law may be got around, too. Crimes are minimized, and if prosecutors cannot be ignored, they can always be demonized, one after the other. Whether they involve campaign contributions or obstruction of justice, great matters or small, individual laws are got around, and soon enough, the idea of law itself will be shrugged off or explained away. No wonder Americans come to assume that we are ruled by the polls, or the election results, or the spirit of the times, or the most persuasive personalities. The rule of law becomes a platitude reserved for ceremonial occasions, a quaint concept that all repeat, but no one may believe."

Mr. Chairman, in closing, that is the idea that troubles me the most, both as a member of this committee and, more importantly, as a citizen of this country: destroying the sanctity of the rule of law. I hope that will not be the legacy of this Congress, now or ever.

I yield back the balance of my time.

Mr. HYDE. I want to thank the gentleman, and I want to announce, as we are getting down to our very finest members, that some day soon we will have a hearing and I will start the questioning at that end, and that end, but don't hold me to when that will be, but I will. I will. I pledge I will.

Mr. Lindsey Graham.

Mr. GRAHAM. Thank you, Mr. Chairman.

One thing I have learned is that 5 minutes is not as short as it seems sometimes, and I will try not to abuse it.

We have an Admiral and a General, an Army and a Navy guy, right? I don't mean to be disrespectful. I am an Air Force guy. We are going to read the Air Force Academy Honor Code to you. We will not lie, steal or cheat nor tolerate among us anyone who does. Furthermore, our resolve to do my duty honorably, so help me God.

That is what Air Force Academy folks have to swear to. This tolerating among us anyone who does, is that true for the Army and Navy academies?

Mr. CARNEY. That is true for West Point.

Mr. EDNEY. The Naval Academy does not have a no toleration clause.

Mr. GRAHAM. Okay. It seems to me we are saying it is just as bad to go about it and do nothing as it is to do it yourself. That seems to be what they are saying. Do you agree with that concept?

Mr. EDNEY. That is correct. A no toleration clause does not allow you to do nothing. It says that there are—each situation has a series of circumstances, you must evaluate it, but you must take action.

Mr. GRAHAM. And that is what I am trying to do. I am trying—I know about it, and I know I can't do nothing, but I don't know what to do. I have been here all day, and I feel guilty about suggesting that he tell the truth. Maybe it is my problem, not his. But I am trying to find a way so that we will be judged well 30 years from now.

I really believe 25 years after the Richard Nixon case most people believe he got what he deserved, and I would like to think that if I had been in Congress then, no offense to the judge there, that if I had seen everything that transpired, as a Republican I would have said, you should lose your job, President Nixon, for covering up things that are probably far worse than the underlying event. And I am trying to make sure that I don't impose a standard on the President that is going to get us in trouble down the road, because he is not a military officer, per se.

Let me just tell you this: As a junior officer probably in your command, that if you got stopped by the MP on the base and you lied about how fast you were going and you were doing 55 and you said you were doing 49, you would lose your job. In that environment, as a former judge advocate who prosecuted people and defended people in the military, we really do take stuff very seriously that would be trivial anywhere else. But I don't want to put that standard on the President. I just don't think we need to do that in politics, whether it is right or wrong.

My problem is I believe in my heart, Professor Dershowitz, that when you told him, be careful at the grand jury, this is getting really serious now, that he wasn't careful. And I really believe in my heart that when he was in the Paula Jones deposition, that he left the deposition and he went back to his office and he went to the Secretary and he planted in her mind several stories he knew to be false. And if I am setting—and I am a lawyer and I love the law, and I want to go back to the law, maybe sooner rather than later as long as this thing keeps going, but it would really bother me as a lawyer to know the other side was messing with the witnesses and was trying to hide the evidence to hurt my client. But

now I have to judge whether or not the President should be subject to being impeached and losing his job for things like that.

History is going to judge us one way or the other. All I can tell you is I can't articulate, as my friend from California said, well enough, but I know in my heart it is not right for me, Lindsey Graham, to believe the President committed grand jury perjury and not subject him to being able to lose his job through a trial in the Senate. I know that is not right for me, based on the way I was brought up and based on who I am. And I am a sinner, and I have made my fair share of mistakes. I can live with me, and that is the standard for all of us at the end of the day.

Now, I have said something today that I could live with. If the President would do what I think is the right thing, and that is come forward and admit to the obvious—most people believe he lied under oath. If he would show the character traits to admit to what I think is clear from the record, I would treat him differently, knowing as a lawyer, now, that might subject him to some consequences down the road.

But I believe in this situation, it is not about me, it is not about him, but it is about us, and we are political leaders. We are not military officers. Some would say we have a higher standard. I don't want to argue with you about that. But I know this: That the us, Bill Clinton and Lindsey Graham, need to set a tone that brings out the best in the American people, for they are basically very good.

And when I said today that I wanted the President to come forward and do what I think is the right thing, I know there are some consequences to him, but they are minimal for the good it would do this Nation. And I appreciate all of you coming here today. At the end of the day, all your advice will be welcomed, but we have got to do what we can live with.

Thank you very much, Mr. Chairman.

Mr. HYDE. Thank you, Mr. Graham.

And Mary Bono is our last questioner, and far from our least questioner. Ms. Bono.

Ms. BONO. Thank you, Mr. Chairman.

I would first like to thank all of the witnesses for appearing here today, for your insight and certainly most of all for your patience. As one who speaks last, I know how patience can be trying at times like this.

But I am particularly interested in the statements of Admiral Edney and General Carney. I have great respect for the men and women of our Armed Forces who sacrifice so much to ensure our freedom.

Admiral Edney mentioned how he spent Thanksgiving with his grandchildren at the parade. It made me think about my Thanksgiving, and I had the opportunity to spend it with my parents. My father was a waistgunner in a B-17. He flew 19 missions over Germany, and I am very proud of that fact.

It made me realize that, I guess, the admiration that I have not only for him but for all of our service members and have that instilled in me, the example set by my father. You know, he has a great sense of commitment, and he dutifully followed his oath to defend this Nation. I am hopeful my children will also gain the

strong sense of commitment and honor from him. Sometimes I worry about the mixed message they are receiving based on the conduct of the President and his lack of faith to his oath of office and his oath before the court.

Disillusionment with the President was certainly something that I was made aware of a great deal a little while ago back home on Veterans Day. I spent the day at a parade in Palm Springs, and I was lucky enough to have General Clifford Stanley from 29 Palms Marine Air Combat Center also in attendance.

I think some of the concerns I heard that day, though, are nicely summed up by Admiral Thomas Moore, former Chairman of the Joint Chiefs of Staff, in testimony submitted to the committee today. I would simply appreciate it if Admiral Edney and General Carney would comment on the following statement of Admiral Moore.

“The U.S. Armed Forces now have a more fundamental challenge to leadership training than simply instilling character traits adverse to lying, cheating and stealing. How do we instill in young leaders the moral courage to admit when they are wrong and to accept accountability for poor choices? Personal example by senior leaders up to and including the commander in chief is an essential starting point, and a risk to personal ambitions is no excuse for any officer of the U.S. Armed Forces to fail in this regard.”

Would either of you comment on that?

Mr. EDNEY. My comment is that it is made more difficult when we have examples like we are discussing today, but there is no question that the young people coming into the military are being taught to do what is right to analyze and come up with the whole truth and act in accordance with the truth. They are being taught to avoid obfuscation. They are being taught to avoid litigious answers and do what is straight and right.

Because it is the troops that you cannot blow smoke at. The troops understand what is right. They know right from wrong, and they know when they see their leaders do wrong and not be held accountable that there is something wrong.

And so we are working on all of those issues, and I can say to you from my exposure to the young military, both officer and enlisted, that the future is in good hands because they have good quality, and you have every right to be proud of them, and they are analyzing the message, and they are understanding it.

Does that mean it is not difficult? Does that mean that you will not get strong differences when you want to talk about it around the table? You will get some of the same swings that you have been talking here.

Mr. CARNEY. I am not concerned about the troops. We teach integrity because it is good to be honorable men and women, but we also, as I stated in my opening remarks, we teach it because of the battlefield component, that false reports on the battlefield can cause lost battles and unnecessary casualties.

Troops understand that. They also probably understand that the commander in chief was not committing us to battle when he allegedly made these errors. I think they can understand that. And I think that indeed, the way it is being taught today, the value system will be easily understood.

Mrs. BONO. Thank you very much.

Mr. HYDE. I thank the gentlelady.

I wanted to say before I adjourn the committee how really grateful I am for you folks who have spent all day, and it has been a long one and a difficult one. Even when you disagreed with us, which is most of the time, you helped us. You are here because you are darn good citizens, and you want to contribute to this awful task we are grappling with, and you have made a great contribution. You are all heroic, and I thank you.

This committee stands—

Ms. JACKSON LEE. Mr. Chairman, I have just a point of inquiry, please.

Mr. HYDE. Yes.

Ms. JACKSON LEE. Might you give us some idea of the future hearings, oversight hearings or meetings of this committee? It might be very helpful to many of us.

Mr. HYDE. I don't have that information, but as soon as it is formulated, you will be communicated with by the most direct route.

Ms. JACKSON LEE. Thank you, Mr. Chairman. You might expect to see us next week, I imagine.

Mr. HYDE. I think next week will be a big week in our lives.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

Mr. HYDE. Thank you. The committee stands adjourned.

[Whereupon, at 6:45 p.m., the committee adjourned.]

A P P E N D I X

MATERIAL SUBMITTED FOR THE HEARING

STATEMENT OF SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE
STATE OF TEXAS

I would like to thank Chairman Hyde and Ranking Member Conyers for this opportunity to speak on this important subject.

Charles Dickens' *Great Expectations* offers guidance in these troubling times: "Take nothing on its looks; take everything on evidence. There's no better rule."

Today, we will hear testimony from several individuals about perjury, the rule of law and the consequences of perjury on the judicial system. "Equal justice under the law"; this proverb hangs above the entrance to our Nation's highest court. America is a nation of laws. The Constitution is the supreme law of the land and no one, including the President, is above the law nor beneath the law.

Likewise, no one should be hailed before a tribunal to answer allegations that are not supported by substantial and credible evidence or threatened with a potential prosecution for perjury because of the questioner's deficiency.

The United States Code Title 18 section 1621 defines perjury as

Whoever having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . is guilty of perjury.

18 U.S.C. 1621. The American Law Institute Model Penal Code, section 241.1, states,

A person is guilty of perjury if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when *the statement is material and he [the declarant] does not believe it to be true.*

Black's law dictionary defines perjury as

. . . *the willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being material to the issue or point of inquiry and known to such witness to be false.*

It is axiomatic, that perjury requires a (1) volitional act on the part of the declarant (2) about a material matter in the case. Perjury is a specific intent crime. It requires that the declarant *willfully and contrary to such oath subscribe to a material matter which the declarant does not believe to be true.* More importantly, because perjury requires a specific intent on the part of the declarant, the law provides several defenses to perjury.

Allow me to explain why truth is a defense to perjury. Assume, an individual believes that his next door neighbor has found his green vase. Rather than call the police he enters his friend's home and removes the green vase. Subsequently, he is charged with burglary. At the trial, the defendant testifies in his own defense. During cross-examination, the prosecutor asks, "Isn't it true that you broke into the victim's house and stolen his green vase?" The defendant replies, "No, I did not steal his green vase." The prosecutor then asks, "Isn't true that the police found the victim's green vase in your possession?" Again, the defendant replies, "No, that is not

true.” Finally, the prosecutor states, “You realize that you are under oath?” The declarant states, “Yes, I know that I am under oath.” “More importantly, you are aware that you can be prosecuted for perjury?” “Yes, I am aware of that.”

Assume that the jury finds the defendant not guilty. Nevertheless, the prosecutor elects to file charges against the defendant for perjury pursuant to 18 U.S.C. 1621.

Under this scenario, the defendant cannot be prosecuted for perjury, if *he truly believes that he “spoke the truth”* about the green vase. The defendant is not guilty of perjury because although his testimony is freely and voluntarily given, he does not manifest the requisite mental state necessary for perjury, a specific intent crime. Restated, perjury requires that the defendant (1) set out to deceive and (2) know that statements he utters are untrue.

It is a universally accepted truth in criminal law that an individual must have a guilty mind at the time the wrongful deed is committed. Therefore, the defendant’s true belief about the ownership of the vase and his responses to the prosecutor’s questions would not support a perjury conviction. The defendant’s belief negates the intent element of perjury.

Now we turn to the issue at hand, the President’s statements to Paula Jones’ lawyers during his January 17, 1998, deposition. According to the Starr Referral, the President committed perjury when he responded to specific questions from the Jones lawyers about sexual relations with Monica Lewinsky. Sexual relations was defined as, “a person engages in ‘sexual relations’ when the person knowingly engages in or causes (1) contact with the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with *an intent to arouse or gratify the sexual desire of any person.*”

Utilizing this definition for his responses from the Jones lawyers during his deposition, the President explained to the grand jury about why he honestly believed that oral sex was not covered by the Jones definition of sexual relations.

Additionally, several of the questions asked by the Jones lawyers were vague, ambiguous and poorly drafted. As a result, the President answered the questions truthfully but without assisting the Jones lawyers.

Consequently, like the fictitious defendant in the burglary scenario, the President’s responses to the grand jury would not amount to perjury because he believed he “spoke the truth” about his relationship with Ms. Lewinsky within the context of the definition authorized by Judge Wright. Thus, a perjury charge should not stand nor go forward because the evidence is insufficient to support a valid perjury conviction.

Although the President lied to the American people when he stated, “I did not have sex with that woman,” this statement was not made under oath or in connection with a judicial proceeding. Certainly, we all agree that the President’s conduct was morally reprehensible and should not be tolerated in a civilized society; however, impeachment is not the proper remedy for the President’s behavior. Censure is an equitable solution because it allows the House to exercise its prosecutorial discretion and punish the President’s behavior.

More importantly and critical to my position is the fact that both Ms. Parsons and Ms. Battalino accepted guilty pleas in exchange for voluntary waivers of their Constitutional rights to confront witnesses and a jury trial. Additionally, Parsons and Battalino were both plaintiffs on the “offensive” and voluntarily seeking to shield the truth to further their own financial interest. Coach Parsons used perjurious testimony in her defamation suit against a periodical. Battalino falsified government documents in an effort to have her liability insurance extended to cover an impermissible event. President Clinton’s case is distinguishable from Parsons and Battalino because he is the target of the Starr investigation. Also, there is no substantial, independent, competent evidence to establish that the President answered any questions under oath falsely.

Another defense to perjury is materiality. The declarant’s statement must be material to the matter before the tribunal. The third defense to perjury arises where the questioner’s interrogatories are drafted in a manner that invites ambiguity. In the landmark case of *Bronston v. United States*, the U.S. Supreme Court stated,

It is the responsibility of the lawyer to probe . . . if a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination. . . . A potential prosecution for perjury is not the primary safeguard against errant testimony.

Under our adversarial system of jurisprudence, a defendant is not required to assist a plaintiff in bringing her suit to trial nor is a defendant required under the rules of civil procedure to volunteer specific information that the plaintiff has not requested. This is our system of jurisprudence that we have utilized for over 200 years. Although it has its flaws and disadvantages, it is the best system in free

world because it provides a mechanism for an orderly settlement of disputes using a rule of law. What is a rule of law? Black's law dictionary defines it as:

[A] legal principle, of general application, sanctioned by the recognition of authorities, and usually expressed in the form of a maxim or logical proposition. Called a "rule," because in doubtful or unforeseen cases it is a guide or norm for their decision.

The rule of law, sometimes called "the supremacy of law," provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.

Today, you will hear individuals suggest that we must follow the rule blindly and without discretion. In fact, some will suggest that we do not have the authority to seek an alternative solution to this national crisis. Others will sit and watch as our country's fabric continues to rip at the moral seam. It's time to rebuild. It's time to begin the healing process and get back to the business of the American people.

In January 1994 and again in 1996, I took the Congressional Oath of Office to support and defend the Constitution of the United States against all enemies, foreign and domestic. It was an obligation that I took freely and without any reservation. I am bound to faithfully discharge the duties of my office and uphold the Constitution. My oath to uphold the Constitution is not a theoretical affirmation but a real and palpable duty; it is not a partisan responsibility but an obligation to unify Americans throughout the country. It's time for unity; it's time for healing; and it's time to put America and her people first.

Out of the charred ashes of trickery, deceit and deception, truth will rise, rise and rise. Today, I have come to seek the truth, hear the truth and remove all barriers to truth because it's time for healing, it's time to move on and it's time to rebuild.

OFFICE OF THE INDEPENDENT COUNSEL

RESPONSES TO QUESTIONS POSED BY MEMBERS OF THE COMMITTEE ON THE JUDICIARY

OFFICE OF THE INDEPENDENT COUNSEL,
Washington, DC, December 11, 1998.

Hon. HENRY J. HYDE,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, DC.

Hon. JOHN CONYERS, JR.,
Ranking Minority Member,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN HYDE AND REPRESENTATIVE CONYERS: Thank you for your letter of December 8, which authorizes me to respond to certain written questions of individual Members. In preparing these answers I have, of necessity, relied upon the memory and work of many of my staff members. To a large degree these facts are outside my personal knowledge. Thus, to assist Congress as fully as this Office is capable, I have prepared these answers in consultation with every available attorney and investigator in the Office who has relevant information, and these answers represent the best collective understanding of the Office.

As I said during my testimony, my role in the current proceeding is a limited one, circumscribed by statute. My staff and I, in the course of carrying out our mandate from the Special Division, came upon "substantial and credible information . . . that may constitute grounds for an impeachment." Accordingly, as the Ethics in Government Act requires, we transmitted such information to the House.

While I am happy to explain the Referral and the investigative decisions that underlie it in response to questions, let me reiterate that I am not an advocate for any particular course of action. Congress alone must determine what action that evidence merits.

With that introduction, let me turn to the specific questions posed:

Questions from Representative Lofgren

1. *When did you first hear any information to the effect that a tape recording existed of a woman—any woman—who claimed to have had a sexual contact with President Clinton?*

In 1992, during the Presidential primary season, I became aware through media reports that Gennifer Flowers claimed to have had an affair with then-Governor Clinton and to possess tape recordings that, she claimed, related to contacts she had with then-Governor Clinton.

2. *In or about November 1997, did you discuss with any person the possibility that a tape recording might exist on which a woman claimed to have had sexual contact with President Clinton?*

I do not remember any such incident and do not believe any such incident occurred. More specifically:

A. To the extent your question might be taken as a reference to casual conversation about the Gennifer Flowers tapes, it is possible (though unlikely) that I had such discussions with friends and acquaintances in the time period mentioned. I would have no reason to and do not remember any such conversation.

B. To the extent your question might be taken as asking about tapes relating to some unidentified woman who was never subsequently identified, or was subsequently identified as someone other than Ms. Lewinsky, I do not remember any such conversation in November 1997 and I do not believe such a conversation occurred. In Spring 1998, the Office learned of, and I had conversations concerning, the possible existence of a tape recording in which a woman other than Monica Lewinsky stated that she was sexually assaulted by then-Arkansas Attorney General Clinton.

C. One private citizen has alleged to the FBI that a videotape exists of a dinner in McLean, Virginia sometime in November or December 1997 which was allegedly attended by me, my deputy Jackie M. Bennett Jr., Jonah Goldberg, Lucianne Goldberg, and Dale Young. Mr. Bennett and I both deny that such an event occurred.

D. Finally, your question might be taken as asking when I first learned of a tape recording of a woman who, though unidentified at the time, I later came to understand was Monica Lewinsky. I did not personally learn of the possible existence of such a tape until on or about January 12. As my testimony reflects,

a staff member in our Office has told me that he had heard of the possible existence of such a tape on January 8.

3. You “requested that [I] release the media” by “waiving any privilege or shield law” and “directing each and every member of [my] staff to waive any privilege.”

As I said during my testimony, in response to a question from Representative Waters, I believe the course you suggest would be unwise in light of the ongoing litigation on the matter. The litigation is, as the Committee knows, under seal. Because of the strictures of Rule 6(e) and the decision of the U.S. Court of Appeals for the District of Columbia Circuit, *see In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998), it would be inappropriate to comment further except to reiterate my testimony that the allegations against our Office are groundless. We are confident that the ultimate resolution will demonstrate that our Office conducted itself lawfully and appropriately.

Questions from Representative Conyers

1. . . . Please complete the process of “checking,” searching” or “double-checking” your recollection and answer the questions to which you either were unable to respond or provide qualified answer. Please also let us know if you would like to amend or supplement any of the answers you gave during your appearance as a result of your “checked,” “double-checked” or “searched” recollection.

Most of these instances are addressed in my specific responses in this letter to the additional questions posed by Members. To the limited extent that they are not addressed in this letter, I have reviewed the transcript of my testimony and have nothing to add to my revised answers.

2. (a) When did you first learn that Samuel Dash intended to resign his position as your office’s ethics adviser if you testified as you did on November 19?

Several weeks prior to my testimony before the Committee, Professor Dash informed me and another member of my staff that he intended to leave the Office by the end of the year because he thought the majority of the work of the Office had been completed and therefore his counsel was no longer needed.

Later, in the days leading to my testimony, I was told that Professor Dash had expressed concern to a few members of our staff about the tenor of my draft opening statement solely with regard to our discussion of the Referral. Professor Dash, who supported our written Referral, stated that he believed it was inappropriate to repeat in my opening statement our conclusions in the Referral. Professor Dash said that I could answer any questions about our conclusions and support those conclusions, but he felt I should not do so in my opening statement. Rather, Professor Dash recommended that in my opening statement I strongly defend the actions and investigative strategy of our Office because he believed we had acted professionally and ethically and that the attacks were misguided and unfair. I understood the strength of his concern and the possibility that it might cause him to resign.

We subsequently made several modifications to the opening statement that we believed were responsive to the thrust of Professor Dash’s concerns. For example, I repeatedly told this Committee that Congress, and not our Office, was responsible for the ultimate evaluation of the information presented. I hoped that the modifications we had made adequately addressed Professor Dash’s concerns.

I did not learn of Professor Dash’s actual resignation until I heard it on CNN on the morning of November 20. I was surprised by it. Later that morning, after the letter had already been made public, I received a copy of Professor Dash’s resignation letter that had been delivered to the security kiosk in the public lobby of our office building.

(b) If you learned of his intent to resign prior to the hearing, why did you fail to mention that fact when you invoked his name on several occasions during the hearing?

I invoked Professor Dash’s name in a wholly appropriate manner, reflecting his approval of how the Office has conducted itself. As Professor Dash himself emphasized in his letter of resignation, “I found that you conducted yourself with integrity and professionalism as did your staff of experienced federal prosecutors.” Thus, even as he left our Office over a principle he held strongly, Professor Dash endorsed the conduct of our Office—an endorsement I proudly invoked in my testimony.

(c) Did Mr. Dash write any memoranda, letters, or opinions to you concerning: (i) how to prepare and present a Referral to Congress under 28 U.S.C. 595(c); (ii) whether and how you should make any oral presentation to the Committee; and (iii) [t]he appropriateness of “off the record” or “background” contacts between members of your Office and the media?

Professor Dash publicly released a letter responsive to your request on November 20. All other memoranda, letters, and opinions provided by Professor Dash are in-

ternal, deliberative documents which under Department of Justice policy should not be provided to Congress.

3. *You stated during your appearance that you would be willing to provide the Committee with a complete list of private clients that you have represented since accepting the position of Independent Counsel. Please provide such listing.*

The list follows:

Abbott Laboratories	Lynde and Harry Bradley Foundation
Alliedsignal Inc.	Morgan Stanley, Dean Witter & Co.
Amer. Auto Mfg Assn/Assn Int'l	Motorola, Inc.
American Automobile Manufacturers Assn.	Nathan Lewin, Esq.
American Insurance Association	News America, Inc.
Amoco Corporation	Philip Morris Companies, Inc.
Apple Computer Incorporated	Ray Hays, G. Stokley, et al.
Associated Insurance Companies	Raytheon Missile Systems Company
Bell Atlantic Corporation	Ricky Andrews, Jim Bishop, et al.
Board of Trade, Chicago	Ronald S. Haft
Brown & Williamson Tobacco	Senate Select Committee on Ethics
Citisteel Inc.	Sisters of the Visitation of Georgetown
CMC Heartland Partners	Southwestern Bell Telephone Co.
E.I. Dupont de Nemours & Co.	State of Wisconsin
Eleanor M. Hesse	Suzuki Motor Corporation
General Motors Corporation	United Air Lines, Inc.
GKN plc	Victor Posner
Goodman Holdings/Anglo Irish	Vista Paint Corporation
GTE Corporation	Wharf Cable Limited
Hughes Space & Communications, Intl. Inc.	Wind Point Partners II

4. *When did you first learn that Richard Mellon Scaife or any entity associated with him was involved with Pepperdine University and/or the deanship offer that you previously accepted? Please describe the circumstances by which you were so appraised of his involvement.*

To my knowledge, Richard Mellon Scaife had no involvement whatsoever with Pepperdine University's offer of a deanship to me. My understanding is that Mr. Scaife and the Dean and Provost of Pepperdine University have all confirmed this fact. Mr. Scaife's financial contributions to Pepperdine have been a matter of public record, I believe, for many years. In January 1997, I received a large notebook from Pepperdine, which contained a March 1996 memorandum listing "The Sarah Scaife Foundation" as a benefactor of the Pepperdine School of Public Policy. It is perhaps worth noting that Mr. Scaife has reportedly funded groups that have published information highly critical of me and this Office for our work on the Vincent Foster investigation.

5. . . . *Did attorneys, agents or others working with or for your Office conduct interviews of Arkansas troopers or others in Arkansas in 1997 in which any questions concerning the President's involvement with women were asked? If so, how did such questions (not the interviews, but the questions into that subject) relate to any jurisdiction you had at the time? Please send the Committee any interview memoranda or notes of any such interviews.*

During the course of our investigation we have interviewed various current and former Arkansas State Troopers. The allegation and inference that the trooper interviews were an effort to conduct an investigation into rumors of extramarital affairs involving the President are false. We denied this allegation when it was first raised in June 1997 and deny it again today. We sought to determine whether Governor Clinton or Mrs. Clinton had confided in any associates about their dealings with the McDougals, Rose Law Firm and others.

At the end of May 1996, Jim and Susan McDougal and Governor Tucker were found guilty by a jury in Little Rock. Following his conviction, Jim McDougal began cooperating with this Office. In August 1996, he provided the Office with additional relevant facts and information. The Office sought to prove or disprove his testimony and information. In September 1996, Susan McDougal went into civil contempt rather than give testimony to the grand jury, thereby closing off one avenue of possible corroboration.

In connection with the Madison Guaranty Savings and Loan, Capital Management Services, and Whitewater investigations, the Office and its agents analyzed Governor Clinton's telephone message slips, appointment books, and trooper logs during relevant time periods. As noted above, we sought to determine whether Gov-

ernor Clinton or Mrs. Clinton had confided in any associates about their dealings with the McDougals, Rose Law Firm and others.

Armed with the new evidence from Jim McDougal and the information from the message slips, appointment books, and trooper logs, career prosecutors and experienced investigators determined—in accordance with standard investigative practice—that certain Arkansas Troopers should be interviewed. Some had previously been interviewed in February 1995 regarding matters within the Office's core jurisdiction, including contacts between the Clintons and the McDougals, as well as certain issues raised in the Resolution Trust Corporation's criminal referrals. Several experienced agents interviewed a number of troopers identified from the trooper logs for the relevant time frames. Between November 1996 and March 1997, we conducted interviews of 12 troopers. They were questioned about their knowledge of the Clintons' contacts with the McDougals and other persons relating to the Madison, Whitewater, and Capital Management Services transactions.

The troopers were also asked to identify persons (both men and women) whom President or Mrs. Clinton were close to and in whom they might have confided during the relevant time frames. The troopers who were interviewed identified persons whom they believed were close to either Governor Clinton or Mrs. Clinton.

Many of the troopers identified both men and women who were close associates of Governor and Mrs. Clinton. For example, the two troopers quoted in the June 1997 *Washington Post* article, Roger Perry and Ronald Anderson, identified men and women whom then-Governor Clinton and Mrs. Clinton might have been close to and confided in. Roger Perry identified 10 individuals close to then-Governor Clinton, 4 of whom were women. Ronald Anderson identified 14 associates of then-Governor Clinton, including 5 women.

Because the troopers interviewed were explicitly promised confidentiality, we must respectfully decline to furnish their interviews to the Committee. So too, consistent with Department of Justice policy, we must respectfully decline to make the rough notes of interviews available. We are prepared, of course, to discuss mechanisms by which the Committee can carry out its duties consistent with our pledges of confidentiality.

6. (a) *At Any time, have you talked to Richard Porter about any issues relating to the Paula Jones case?*

(b) *If so, please identify the date(s) of each such conversation and the precise content of the conversations.*

I have not spoken with Mr. Porter about any issues relating to the *Paula Jones* case. This is consistent with Mr. Porter's recollection—he has publicly stated that he has never spoken with me about the *Paula Jones* case. The only contact we have had that is at all related to your question was a voice-mail message I received from Mr. Porter in Spring 1998 in which he apologized to me that misinformation about his actions had been used unfairly to attack and embarrass me and the work of this Office.

7. (a) . . . *Please state whether anyone from, or working with, or associated with, your Office investigated (including asking any question, about or obtaining any document about) Ms. Steele's adoption of her child?*

(b) *If the answer to the foregoing question is "yes," please tell us what relevance that issue had to any issue under your jurisdiction; and*

(c) *Please respond to Ms. Steele's allegation that the issue of the legality of her son's adoption was raised by your Office in an attempt to pressure her to cooperate with your investigation.*

The investigation concerning Ms. Steele's involvement in the Kathleen Willey matter is pending. Department of Justice policy generally prohibits providing Congress with confidential material relating to an ongoing investigation. Thus we are not in a position to directly answer question 7(a) or 7(b) at this time. Having said that, the Office has not attempted to investigate whether the adoption is proper and legal. We have not obtained or attempted to obtain any documents concerning the adoption of her son from anyone, including any state, local, national, or foreign government or agency. The suggestion that this Office or anyone working on our behalf has attempted in any way to use Ms. Steele's son's adoption to pressure her to change her testimony is absolutely false. Like many other groundless allegations made against the Office, this allegation is one which we cannot fully factually respond to because of the pendency of an investigation. Our Office and the investigators, agents, and attorneys working on our behalf have conducted and continue to conduct a proper, thorough, and professional investigation.

8. . . . *[D]o you admit or deny that during the day or night of January 16, 1998, your associates or agents:*

I was not, of course, present at the Ritz Carlton. Many of these questions appear to rely on Ms. Lewinsky's perception of events as they unfolded that day. It is my

understanding, however, that Ms. Lewinsky was, understandably, upset and distraught when approached by this Office—not due to her treatment by this Office, but due to the gravity of the situation in which she had found herself. Ms. Lewinsky apparently interpreted this Office’s actions from the perspective of a very difficult and emotional day. By contrast, Chief Judge Norma Holloway Johnson has ruled, among other things, that:

- our Office did not violate Ms. Lewinsky’s right to counsel, because the right had not yet attached;
- our Office did not violate District of Columbia Rules of Professional Conduct by contacting Ms. Lewinsky because the interview occurred prior to indictment in a non-custodial setting; and
- our Office did not disrupt Ms. Lewinsky’s attorney-client relationship by preventing her from contacting Mr. Carter because she was given several unsupervised opportunities to contact anyone she chose, and an agent called Mr. Carter’s office to determine if he would be available if Ms. Lewinsky decided she wished to contact him.

The opinion, of course, speaks for itself.

(a) told Ms. Lewinsky that she could go to jail for 27 years (if you admit that they did, on what basis under what guidelines did they conclude that she could receive that type of sentence)

Deny. I was not at the Ritz Carlton. I am advised by the Office staff that, during the course of the discussion with Ms. Lewinsky, she was advised of the nature of the possible charges against her and what the maximum penalty would be for each offense. At no time was Ms. Lewinsky told what her actual sentence would be. I note that all of the applicable federal offenses carry maximum penalties in 5-year increments and, consequently, no possible combination of charges could carry a 27-year maximum penalty.

(b) threatened to prosecute Ms. Lewinsky’s mother

Deny. Again, I was not at the Ritz Carlton. I am advised that the Office did not threaten to prosecute Ms. Lewinsky’s mother. The Office staff told Ms. Lewinsky some of the facts and evidence known to the Office, including a reference to her mother’s apparent, though limited, knowledge of and involvement in the crimes under investigation.

(c) told Ms. Lewinsky that she would be less likely to receive immunity if she contacted her attorney

Deny. Once again, I was not at the Ritz Carlton. Ms. Lewinsky did *not* have an attorney for purposes of the criminal investigation. Our view was later confirmed when we learned of the terms of the “Engagement Agreement” between Francis D. Carter and Ms. Lewinsky which clearly limited Mr. Carter’s representation of Ms. Lewinsky to Ms. Lewinsky’s *Jones* deposition. We did discuss with a Department official the fact that Frank Carter represented her in connection with the *Jones* deposition and not in the criminal investigation and our understanding that we could ethically approach her in connection with our criminal investigation. Subsequently, Chief Judge Norma Holloway Johnson held, among other things, that our Office did not disrupt Ms. Lewinsky’s attorney-client relationship by preventing her from contacting Mr. Carter.

Second, Ms. Lewinsky was told that she was free to contact Mr. Carter and when she asked about the possibility of doing so we called Mr. Carter’s office on her behalf. Hotel records confirm this fact.

Third, we provided Ms. Lewinsky with the phone number of a legal aid or the public defender’s office and she was not told that she would risk jeopardizing a possible immunity agreement if she contacted an attorney there. She chose not to call that office. She later retained William Ginsburg to represent her in the criminal matter and we renewed the offer of immunity when he was retained. Ms. Lewinsky and Mr. Ginsburg declined the offer that evening, and we continued to discuss it with her attorneys over the course of the next several days. But the fact is that an immunity offer was made to her both before and after she had retained counsel.

We invited Ms. Lewinsky to cooperate with our investigation. We warned her, though, that any cooperation could be less effective if others (including Mr. Carter) knew she was cooperating. We also told her that she would receive a greater benefit for more effective cooperation.

(d) told Ms. Lewinsky that they wore not “comfortable” with William Ginsburg

Deny. I was not present at the Ritz Carlton. This is an apparently mistaken reference to the FBI report of interview concerning the meeting with Ms. Lewinsky. That report states “AIC Emmick . . . advised *Ginsburg* he was uncomfortable with the relationship between Ginsburg and Monica Lewinsky.” House Doc. 105–311, at 1380 (emphasis supplied) (capitalization removed). Thus, nobody from the Office ever told *Ms. Lewinsky* he or she was not “comfortable” with Mr. Ginsburg.

Mr. Emmick did advise Mr. Ginsburg that he was uncomfortable with the fact that, although Mr. Ginsburg claimed to represent Ms. Lewinsky, Mr. Ginsburg had never spoken to her at all on the subject; and that Mr. Ginsburg had, in fact, been hired by Ms. Lewinsky's father without consulting Ms. Lewinsky personally. Indeed, as the FBI report reflects, Ms. Lewinsky also was unsure initially if Mr. Ginsburg should represent her, because he was a medical malpractice attorney. Mr. Emmick therefore requested that Ms. Lewinsky and Mr. Ginsburg speak on the phone and that Ms. Lewinsky confirm that she was represented by Mr. Ginsburg. After speaking with Mr. Ginsburg, Ms. Lewinsky advised the Office that she had retained Mr. Ginsburg. Thereafter we conducted all further discussions with him or his associate and scrupulously honored their attorney-client relationship.

(e) when Ms. Lewinsky asked to speak with her mother, said words to the effect that she was 24, she was smart, and she did not need to talk to her mommy

Admit. Ms. Lewinsky was at all times treated courteously and professionally. According to my staff, Ms. Lewinsky was told that she was 24, she was smart, and she should not need to talk to her mother about cooperating with the investigation. Again, we advised Ms. Lewinsky that her cooperation with the Office, should she choose to cooperate, would be less beneficial to her if the fact of her cooperation became known. In the end, we waited more than 6 hours for Marcia Lewis to arrive from New York. When she arrived: we answered her question; Ms. Lewis and Ms. Lewinsky consulted privately; and they contacted Bernard Lewinsky to help Ms. Lewinsky find an attorney. When they left at the end of the evening both Ms. Lewinsky and her mother specifically thanked the Office staff for being so nice. *See* House Doc. 105-311, at 1380 (FBI Report of Interview with Monica Lewinsky); 105-316, at 2324 (testimony of Marcia Lewis).

9. When your agents and attorneys confronted Monica Lewinsky on January 16, 1998, according to her grand jury testimony, they told her that she had committed a crime by signing a false affidavit.

Our Office advised Ms. Lewinsky that, based on information available to us, we believed she had committed a number of offenses, including subornation of perjury, obstruction of justice, conspiracy, and perjury by signing a false affidavit. And, of course, as Ms. Lewinsky later admitted, the affidavit was false.

(a) Did your Office have a copy of Ms. Lewinsky's signed affidavit at the time?

Yes.

(b) If so, how did your Office acquire it? . . .

On January 15, we received a faxed copy from the business center located in the office building of James Moody, Linda Tripp's former attorney, which Mr. Moody routinely uses as his fax center. Mrs. Tripp told the Office on January 14 that she "believ[ed] that Lewinsky's affidavit was signed, sealed and delivered yesterday [i.e. on January 13]." House Doc. 105-316, at 3773. Thus, when we received the affidavit, we understood that it had been provided to us by Mr. Moody, who had received it in his capacity as Mrs. Tripp's attorney.

10. (a) Regardless whether you believe that any statements made to the media by you, or anyone working in your Office, or under your supervision, violated Rule 6(e) of the Federal Rules of Criminal Procedure, do you admit or deny that you, or anyone working in your Office, or under your supervision, supplied any information cited in any of the 24 reports for which Chief Judge Norma Holloway Johnson found prima facie violations of Rule 6(e) in her order dated September 24 [sic], 1998?

(b) If you admit that you, or anyone working in your Office, or under your supervision, supplied any such information, please identify the particular media stories to which your admission relates.

As I said in my testimony, this matter is under seal. With all respect, I believe it would be inappropriate to discuss the matter while the litigation is pending. Inasmuch as Representatives Conyers and Nadler have recently asked the Attorney General to remove me for cause for allegedly disclosing sealed materials, to now provide sealed information would be unwise.

11. Please provide the name and title of the individual who drove Linda Tripp home from the Ritz Carlton on January 16, 1998.

To my knowledge, no employee of the Office of Independent Counsel drove Linda Tripp home from the Ritz Carlton on January 16, 1998. One Office investigator recalls that Mrs. Tripp mentioned that her lawyer was going to pick her up at the Ritz Carlton, though we have no certain knowledge of who drove her home. Moreover, to my knowledge, no employee of the Office of Independent Counsel knew that she was going to meet that evening with the attorneys representing Paula Jones. Mrs. Tripp testified before the grand jury that she had not disclosed this to any Office employee:

Q. [D]id anybody at the Office of Independent Counsel or working for the Office of Independent Counsel know that you were going to meet with Paula Jones' attorneys?

A. No. It never came up. It was never addressed. It was never shared.

House Doc. 105-316, at 4356.

12. . . . *Isn't it true that your agents or attorneys discussed with Ms. Lewinsky that cooperating would include the possibility of taping conversations with Mr. Jordan, Ms. Currie or the President? If you claim those names were not discussed, is it your position that when Ms. Lewinsky testified about this matter, she was not being truthful?*

At no time during the meeting with Ms. Lewinsky was she asked to tape record a conversation with President Clinton or Vernon Jordan. Ms. Lewinsky was asked to cooperate. We described to her the investigation and identified some of the witnesses and subjects of the investigation, including President Clinton, Mr. Jordan, and Ms. Currie, and their roles. Ms. Lewinsky was told that cooperation would include debriefing, testimony, and, possibly, tape recording conversations with some witnesses and subjects. Ms. Lewinsky was told that we wanted to debrief her before deciding with whom, if anyone, she would be asked to tape record conversations. Although we hoped, when we approached Ms. Lewinsky, that the situation might eventually permit us to have Ms. Lewinsky tape record conversations with some individuals, including possibly Ms. Currie, we did not have any plan to have her tape record conversations with Mr. Jordan or President Clinton. Ms. Lewinsky may have reached an incorrect inference as to this Office's intentions based upon our general discussion of the possibility of tape recording conversations and our other general discussions about the nature of our investigation.

13. . . . *For each of the procedures that Ms. Lewinsky testified were used, please indicate whether your agents or attorneys advised any official of the Department of Justice, before hand, about each of the following:*

Generally, our discussions with the Department of Justice did not approach the high level of specificity suggested by your questions. Moreover, the factual and legal premises of many of the questions are wrong. With that introduction:

(a) *That Ms. Lewinsky would be taken to a hotel room*

We discussed with a Department official the plan that Ms. Lewinsky would be met, taken to a private location, spoken to by Office staff, and asked to cooperate. We are uncertain whether the specific location of a hotel room was mentioned.

(b) *That Ms. Lewinsky would be read her Miranda rights*

We believe we informed a Department official that we intended to advise Ms. Lewinsky of her rights, and to tell her that she was free to leave at any time. *Miranda* warnings were not required because, as Chief Judge Johnson found, Ms. Lewinsky was not in custody. At the Ritz Carlton, FBI agents assigned to the Office approached Ms. Lewinsky in the lobby, asked her to go upstairs, and told her she was not under arrest and was free to leave at any time. Later, in the hotel room, she was again told she was free to leave at any time. At one point, an agent attempted to read from a standard FBI Advice of Rights form, but Ms. Lewinsky became upset and the reading was discontinued.

(c) *That Ms. Lewinsky would be in that room or with your agents or attorneys for 10 or more hours*

No. As the FBI report of interview (and the recently unsealed documents from the litigation relating to the subpoena to Mr. Carter) make clear, the bulk of the time spent with Ms. Lewinsky was attributable to her own insistence that her mother be present; her mother's unwillingness to fly from New York to Washington; and her mother's unavoidable delay in arriving due to a train delay. Indeed, 6 hours passed between Ms. Lewinsky's call to her mother and Marcia Lewis's arrival. Over 2 more hours passed as our Office talked with Ms. Lewinsky, Ms. Lewis, Bernard Lewinsky, and Mr. Ginsburg, all with Ms. Lewinsky's approval. During the entire evening, Ms. Lewinsky was never questioned about her involvement in the matters under investigation. When they left at the end of the evening both Ms. Lewinsky and her mother specifically thanked the Office staff for being so nice. See House Doc. 105-311, at 1380 (FBI Report of Interview with Monica Lewinsky); 105-316, at 2324 (testimony of Marcia Lewis).

Thus, the specific amount of time that would be spent with Ms. Lewinsky was not discussed with the Department because it was unknown, and it was not anticipated that the meeting would extend for the length of time it did. Moreover, the factual premise of your question is incorrect as Ms. Lewinsky entered and exited the room on occasion unaccompanied.

(d) *That your agents or attorneys would tell Ms. Lewinsky that she could go to jail for 27 years*

No. The factual premise of your question is incorrect as discussed in my answer to question 8(a), which says: “[D]uring the course of the discussion with Ms. Lewinsky, she was advised of the nature of the possible charges against her and what the maximum penalty would be for each offense. At no time was Ms. Lewinsky told what her actual sentence would be.” Consequently, this issue was never discussed with the Department.

(e) That your agents or attorneys would discourage Ms. Lewinsky from talking with her attorney, Frank Carter

The factual premise of your question is incorrect, as discussed in my answer to question 8(c), which says: “Ms. Lewinsky did *not* have an attorney for purposes of the criminal investigation. Our view was later confirmed when we learned of the terms of the ‘Engagement Agreement’ between Francis D. Carter and Ms. Lewinsky which clearly limited Mr. Carter’s representation of Ms. Lewinsky to Ms. Lewinsky’s *Jones* deposition.” Subsequently, Chief Judge Norma Holloway Johnson held, among other things, that our Office did not disrupt Ms. Lewinsky’s attorney-client relationship by preventing her from contacting Mr. Carter.

As I also noted in my answer to question 8(c): “We invited Ms. Lewinsky to cooperate with our investigation. We warned her, though, that any cooperation could be less effective if others (including Mr. Carter) knew she was cooperating. We also told her that she would receive a greater benefit for more effective cooperation.”

We did discuss with a Department official the fact that Frank Carter represented her in connection with the *Jones* deposition and not in the criminal investigation; our understanding that we could ethically approach her in connection with our criminal investigation; and our concern that if information regarding our contact with Ms. Lewinsky became known, her ability to assist the investigation would be compromised.

(f) That if Mr. Lewinsky secured the representation of another attorney, your agents or attorneys would tell her that they were “uncomfortable” with that attorney

No. The factual premise of your question is incorrect as discussed in my answer to question 8(d), which says: “[T]his is an apparently mistaken reference to the FBI report of interview concerning the meeting with Ms. Lewinsky. That report states ‘AIC Emmick . . . advised *Ginsburg* he was uncomfortable with the relationship between *Ginsburg* and *Monica Lewinsky*.’ House Doc. 105–311, at 1380 (emphasis supplied) (capitalization removed). Thus, nobody from the Office ever told *Ms. Lewinsky* he or she was not ‘comfortable’ with Mr. *Ginsburg*.”

“Mr. Emmick did advise Mr. *Ginsburg* that he was uncomfortable with the fact that, although Mr. *Ginsburg* claimed to represent Ms. Lewinsky, Mr. *Ginsburg* had never spoken to her at all on the subject; and that Mr. *Ginsburg* had, in fact, been hired by Ms. Lewinsky’s father without consulting Ms. Lewinsky personally. Indeed, as the FBI report reflects, Ms. Lewinsky also was unsure initially if Mr. *Ginsburg* should represent her, because he was a medical malpractice attorney. Mr. Emmick therefore requested that Ms. Lewinsky and Mr. *Ginsburg* speak on the phone and that Ms. Lewinsky confirm that she was represented by Mr. *Ginsburg*. After speaking with Mr. *Ginsburg*, Ms. Lewinsky advised the Office that she had retained Mr. *Ginsburg*. Thereafter we conducted all further discussions with him or his associate and scrupulously honored their attorney-client relationship.”

Consequently this issue was never discussed with the Department.

(g) That your agents or attorneys would discourage her from calling her mother

Not specifically. We discussed with the Department our concern that, if information regarding Ms. Lewinsky’s cooperation became known, her ability to assist the investigation would be compromised. We did not specifically address the possibility that disclosure to Ms. Lewis could harm the investigation.

(h) That your agents or attorneys would raise the issue of immunity without having Ms. Lewinsky’s attorney present

As noted in our response to questions 8(c) and 13(e), Mr. Carter was *not* Ms. Lewinsky’s attorney for purposes of the criminal investigation. We discussed with the Department the propriety of approaching Ms. Lewinsky, notwithstanding Mr. Carter’s representation in the *Jones* matter. And the Department knew we would be seeking Ms. Lewinsky’s voluntary cooperation. We are uncertain whether the specific topic of immunity was discussed.

(i) That your agents or attorneys would raise the possibility of Ms. Lewinsky becoming a cooperating witness and explain to her that such cooperation included the possibility that she would be used to tape record conversations with other people, including possibly Ms. Currie, Mr. Jordan or the President

We did discuss with a Department attorney the Office’s decision to seek Ms. Lewinsky’s participation as a cooperating witness, including the possibility of tape recording generally. The factual premise is incorrect, as discussed in my answer to question 12, which says: “At no time during the meeting with Ms. Lewinsky was

she asked to tape record a conversation with President Clinton or Vernon Jordan. Ms. Lewinsky was asked to cooperate. We described to her the investigation and identified some of the witnesses and subjects of the investigation, including President Clinton, Mr. Jordan, and Ms. Currie, and their roles. Ms. Lewinsky was told that cooperation would include debriefing, testimony, and, possibly, tape recording conversations with some witnesses and subjects. Ms. Lewinsky was told that we wanted to debrief her before deciding with whom, if anyone, she would be asked to tape record conversations. Although we hoped, when we approached Ms. Lewinsky, that the situation might eventually permit us to have Ms. Lewinsky tape record conversations with some individuals, including possibly Ms. Currie, we did not have any plan to have her tape record conversations with Mr. Jordan or President Clinton. Ms. Lewinsky may have reached an incorrect inference as to this Office's intentions based upon our general discussion of the possibility of tape recording conversations and our other general discussions about the nature of our investigation."

14. . . . *Putting aside your personal opinion or position, isn't it true that:*

(a) "materiality" is a jury question

Yes. Materiality is a jury question. *United States v. Gaudin*, 515 U.S. 506 (1995).

(b) *a reasonable juror could vote against a conviction for perjury because he or she did not believe that the statements were material*

The question has been addressed, in part, by prior court rulings. On December 11, 1997 Judge Susan Webber Wright entered an order requiring President Clinton to answer certain questions relating to women such as Ms. Lewinsky, reflecting Judge Wright's views on the materiality of President Clinton's statements. The U.S. Court of Appeals for the District of Columbia Circuit has also ruled on the materiality of Ms. Lewinsky's affidavit in its opinion affirming the enforcement of the subpoena issued to Mr. Carter, holding that the statements in it were material.

15. *Please provide the date that your Office concluded that there was "no evidence that anyone higher than Mr. Livingstone or Mr. Marceca was in any way involved in ordering the files from the FBI." Please provide the Committee any declination or closing memoranda or other document which includes this conclusion.*

The question seems to imply that our assigned criminal jurisdiction in the FBI files matter focused on the President himself and that we at some point thereafter became aware that certain initial allegations against the President had been found to be untrue. But that is not an accurate description of the assigned jurisdiction or the progress of the subsequent investigation. The jurisdiction assigned to us by the Special Division, at the request of the Attorney General, focused on whether Anthony Marceca had violated federal criminal law. Unlike the Whitewater investigation (with respect to David Hale's allegation) or the Lewinsky investigation (with respect to evidence concerning Monica Lewinsky and the President), our initial jurisdiction in the FBI files matter did not arise out of any specific allegation against the President himself. At no point in the investigation did this Office receive evidence demonstrating that anyone higher than Mr. Livingstone or Mr. Marceca was involved.

After the impeachment inquiry began in the House of Representatives, we became aware that the Judiciary Committee was interested in whether this Office possessed additional evidence that "may constitute grounds for an impeachment" against the President. Our investigation into Mr. Marceca and related matters, including our understanding of the handling of the FBI files, had not produced any such evidence. As explained in my answer to question 17, it was appropriate to inform the Congress of that fact during my testimony on November 19. Providing any decisional memoranda relating to an ongoing criminal investigation would violate Department of Justice policy.

16. *Please provide the date that your office concluded that "We do not anticipate that any evidence gathered in that [Travel Office] investigation will be relevant to the Committee's current task. The President was not involved in our Travel Office investigation." Please provide the Committee any declination or closing memoranda or other document which includes this conclusion.*

As to the Travel Office matter, it is again important to understand the events that prompted the criminal investigation. The question implies that our initial criminal jurisdiction focused on the President himself and that we at some point thereafter became aware that certain initial allegations against the President had been found to be untrue. In fact, the jurisdiction assigned to us by the Special Division, at the request of the Attorney General, focused on whether David Watkins had made criminal false statements to the General Accounting Office. Statements made by Mrs. Clinton also became the subject of the criminal investigation. Our initial jurisdiction in the Travel Office matter, unlike certain other investigations conducted by

this Office, did not arise out of any specific allegation against the President himself. At no point in the investigation did this Office receive evidence showing that President Clinton was involved.

After the impeachment inquiry began in the House of Representatives, we became aware that the Judiciary Committee was interested in whether this Office possessed additional evidence that “may constitute grounds for an impeachment” against the President. Our investigation into statements made by Mr. Watkins and Mrs. Clinton, and into related matters, had not produced any such evidence. As explained in my answer to question 17, it was appropriate to inform the Congress of that fact during my testimony on November 19. Providing any decisional memoranda relating to an ongoing criminal investigation would violate Department of Justice policy.

17. Please identify the statutory authority which authorized you to make disclosures to the Committee concerning the status of the “Filegate” and “Travelgate” investigations in advance of the filing of a final report on these matters?

On July 7, 1998, the Special Division of the U.S. Court of Appeals for the District of Columbia Circuit issued an order authorizing disclosure of information to the House of Representatives that may constitute grounds for an impeachment. That order was issued pursuant to Section 595(c) of Title 28, which requires an independent counsel to provide information that “may constitute grounds for an impeachment” to the House of Representatives. House Resolution 581 authorized the impeachment inquiry. On October 2, 1998, the Committee had inquired of this Office whether we possessed information other than that contained in our September 9 Referral that “may constitute grounds for an impeachment.”

Finally, it bears note that on November 19 I did not reveal any particular testimony or the contents of any particular documents gathered during the FBI Files or Travel Office investigation. I was mindful of the need to try to protect the reputations of unindicted individuals and not to go into details of those investigations.

18. Please send the Committee all documents requested in Rep. Conyers’ November 16, 1998, document requests addressed to the custodian of records of your office.

As you know, we have already produced some documents responsive to Representative Conyers’ request dated November 16. We have previously expressed our concern with providing sensitive investigative documents to the Committee in violation of Department of Justice policy. In addition, the Committee’s December 8 request appears to only authorize answering questions. Nonetheless, we are prepared to discuss mechanisms by which the Committee can obtain non-sensitive documents and carry out its duties consistent with our responsibility to follow Department of Justice policies and to maintain the integrity of our investigation.

19. Please describe the status of any previous or ongoing investigations, actions or inquiries into possible misconduct, including conflicts of interest, leaking, and prosecutorial misconduct, by you, your office or any current or former employee or agent of your office in connection with the various investigations you have or are conducting as Independent Counsel. In your answer, identify which office or person is conducting the inquiry, when you first learned of its existence, and any conclusion reached. Please include any private or public actions as well as any ethics or state or local bar inquiries.

No court or ethics body has ever made a final determination that this Office, or any of its employees, has ever engaged in misconduct. To the extent ongoing and completed investigations have been made public, they are discussed below. To the extent they are not yet public—because of legal or ethical restrictions on their dissemination—I am obliged not to provide them to you. We are not interpreting your question to include the various allegations by criminal defendants and grand jury witnesses that have not resulted in investigations.

Francis A. Mandanici

According to Judge Susan Webber Wright, “[n]o one who has objectively considered the matter seriously disputes that Mr. Mandanici is on a personal crusade to discredit the Independent Counsel.” *In re Starr*, 986 F. Supp. 1159, 1161 (E.D. Ark. 1997) (*Starr II*); *accord id.* (“Mr. Mandanici’s vendetta against conservative forces and his objections to Mr. Starr’s involvement in the Whitewater investigation are many and long standing”) (quoting Judge Eisele). In carrying out his “vendetta,” Mr. Mandanici has filed numerous complaints against me.

In August 1996, Mr. Mandanici filed complaints against me in the U.S. Court of Appeals for the Eighth Circuit and the Supreme Court of the United States. Both alleged conflicts of interest on my part. The Supreme Court returned Mr. Mandanici’s papers as inadequate to support action by the Court. The Eighth Circuit took no action, *see In re Starr*, 986 F. Supp. 1144, 1146 (E.D. Ark. 1997) (*Starr I*), and denied a petition for rehearing en banc. Our Office learned of both complaints at or near the time they were filed.

In September 1996, Mr. Mandanici filed a complaint alleging conflicts of interest with the U.S. District Court for the Eastern District of Arkansas. The court forwarded the complaint to Attorney General Janet Reno. In October 1996, Mr. Mandanici filed a similar complaint with the Attorney General directly.¹ On February 7, 1997, Michael E. Shaheen, Jr., Counsel with the Office of Professional Responsibility of the Department of Justice, stated that the Department would take no action because the allegations, even if true, would not warrant my removal from office. *See id.* I believe that our Office learned of these complaints at or near the time they were filed.

In January 1997, Mr. Mandanici stated that he had filed a complaint with the U.S. District Court for the District of Columbia and that the court had taken no action. Our Office has found no record of this complaint, other than this reference. I do not remember having knowledge of the District Court complaint before January 1997 and am unsure if any such complaint was, in fact, filed.

In February 1997, Mr. Mandanici filed another complaint with the Attorney General, requesting that I be removed as Independent Counsel for conflicts of interest. On March 25, 1997, Mr. Shaheen again stated that the Department would take no action. I believe that our Office learned of this complaint at or near the time it was filed.

In March 1997, Mr. Mandanici renewed his conflicts of interest allegations with the Eastern District of Arkansas. In June 1997, Mr. Mandanici filed a complaint with the court alleging that our Office was guilty of grand jury leaks and prejudicial public statements. *See Starr II*, 986 F. Supp. at 1160. The district court dismissed both of these complaints, citing the Department's decisions, the absence of specific evidence, and Mr. Mandanici's "vendetta." *Id.* at 1161-62. The Eighth Circuit dismissed Mr. Mandanici's appeal for lack of jurisdiction. *See United States Debit of Justice v. Mandanici (In re Starr)*, 152 F.3d 741 (8th Cir. 1998). I believe that our Office learned of these complaints at or near the time they were filed.

In April 1998, Mr. Mandanici filed yet another conflicts of interest complaint with the Eastern District of Arkansas, this time concerning the investigation of the David Hale matters. In May 1998, the court dismissed this complaint as premature. Our Office learned of this complaint at or near the time it was filed.

Private Actions

In March 1996, Stephen A. Smith filed a lawsuit, *Smith v. Starr*, No. EJ96-1557, in the Chancery Court of Pulaski County, Arkansas, for making an allegedly false statement about his guilty plea. I removed this case to the U.S. District Court for the Eastern District of Arkansas on April 4. On May 16, Mr. Smith voluntarily dismissed the lawsuit. My Office learned of this lawsuit at or near the time it was filed.

In February 1998, James Forman filed a lawsuit, *Forman v. Starr*, Civ. No. 98-270, in the U.S. District Court for the District of Columbia, alleging that our Office used illegally created tapes. On February 4, 1998, Judge Hogan *sua sponte* dismissed the case for failure to state a claim on which relief can be granted. The U.S. Court of Appeals for the District of Columbia Circuit affirmed the decision of the district court on April 30, 1998. *See Forman v. Starr*, No. 98-5029, 1998 WL 316137 (D.C. Cir. Apr. 30, 1998) (per curiam) (unpublished). Our Office was ably represented by U.S. Attorney Wilma A. Lewis and her staff in this matter. Our Office learned of this lawsuit at or near the time it was filed.

Also in February 1998, David E. Kendall, acting on behalf of President Clinton, filed a motion in the U.S. District Court for the District of Columbia requesting that the court issue an order to show cause why our Office should not be held in contempt for leaking grand jury material. This motion was followed by two similar motions, and was joined by several other persons and entities. (Misc. Nos. 98-55, 98-177, 98-228). On June 19, 1998, Chief Judge Norma Holloway Johnson found that news reports presented by the movants established a *prime facie* violation of Federal Rule of Criminal Procedure 6(e), thus requiring our Office to come forward with evidence that we were not responsible for the alleged leaks of grand jury material. The finding of a *prima facie* violation is not a finding of misconduct, as the District of Columbia Circuit has adopted a broad approach, requiring the court to accept the words of each news report as true. On August 3, 1998, on writ of mandamus, the District of Columbia Circuit unanimously ordered that further proceedings by the district court or a Special Master be conducted *ex parte* and *in camera*. *See In re Sealed Case No. 98-3077*, 151 F.3d 1059 (D.C. Cir. 1998). On September 25, Judge

¹Mr. Mandanici had filed a similar complaint with the Attorney General in April 1996.

Johnson referred this matter to a Special Master.² We are cooperating with the Special Master's investigation and demonstrating that we did not violate Rule 6(e). That investigation is still pending. Our Office learned of Mr. Kendall's complaint at the time it was filed.

In August 1998, H.L. Watkins, Jr. filed a lawsuit, *Watkins v. Starr*, Civ. No. 98-2054, in the U.S. District Court for the District of Columbia, suing the Attorney General, Senator Orrin Hatch, and me for \$40 million for investigating the President. Judge Emmet G. Sullivan *sua sponte* dismissed the case with prejudice on October 1, 1998. Our Office learned of this lawsuit at or near the time it was filed.

In September 1998, Joseph Fischer filed a lawsuit, *Fisher v. Starr*, Civ. No. 98-2295, in the U.S. District Court for the District of Columbia, alleging that the Referral was improper and contrary to law and that the House of Representatives violated the law in releasing the Referral to the public. Our Office is ably represented by U.S. Attorney Lewis and her staff in this matter, which still is pending. Our Office learned of this lawsuit at or near the time it was filed.

In October 1998, Betty Muka filed a lawsuit, *Muka v. Rutherford Institute*, Civ. No. 98-2470, in the U.S. District Court for the District of Columbia, suing a vast number of persons, including all Members of Congress, for \$40 million. Among other things, she alleges that the Ethics in Government Act is unconstitutional and that our Office has committed various misdeeds. This action is still pending. Our Office learned of this lawsuit at or near the time it was filed.

In November 1998, Harold Beck filed a complaint with the Supreme Court alleging conflicts of interest on my part. The Supreme Court returned this complaint as inadequate to support action by the Court. Our Office learned of this complaint at or near the time it was filed.

Also in November 1998, Barry Weinstein filed a lawsuit, *Weinstein v. Hatch*, Civ. No. 98-8119, in the U.S. District Court for the Southern District of New York suing all lawyers who are Members of Congress and me, alleging that it is unconstitutional for lawyers to be Members of Congress. This lawsuit remains pending. Our Office learned of this lawsuit at or near the time it was filed.³

Other Matters

In April 1996, Senator J. Bennett Johnston asked the Special Division of the U.S. Court of Appeals for the District of Columbia Circuit to remove me for conflicts of interest. On April 30, 1996, the Special Division advised Senator Johnston that it lacked the power to remove independent counsels. Our Office learned of this complaint at or near the time it was filed.

Beginning in February 1998, this Office was engaged in litigation in the U.S. District Court for the District of Columbia over a grand jury subpoena issued to Francis D. Carter. (Misc. No. 98-68) In the course of this litigation, Mr. Carter and Monica S. Lewinsky made several allegations of misconduct by our Office. On April 28, 1998, Chief Judge Norma Holloway Johnson issued an opinion thoroughly addressing a variety of issues. The opinion speaks for itself. Our Office learned of Mr. Carter's and Ms. Lewinsky's allegations at the time they filed the pleadings containing those allegations.

It should be evident that there has been a great volume of unfounded complaints against our Office. We have searched this Office's records and I have searched my recollection. It is always possible, however, that some investigations, actions, or inquiries have escaped our attention.

Questions from Representative Hutchinson

Do you believe John Huang is a relevant witness to the referral you submitted to Congress on the issue of a pattern of conduct described in Pages 4-9 of the Referral?

It is my understanding that the Committee has decided not to pursue this line of inquiry. For that reason, and because of the sensitivity of this matter and out of deference to the Department of Justice's ongoing criminal investigation, we believe it would be unwise to express an opinion on this matter.

Questions from Representative Barr

[C]oncerning the applicability of 18 U.S.C. 201 [does this] constitute [] . . . substantial and credible evidence of impeachable offenses?

²Judge Johnson has sealed the name of the Special Master and, therefore, we are not permitted to reveal it to this Committee.

³It appears that Mr. Weinstein attempted to file this lawsuit in July but refused to pay the required filing fees. On November 9, 1998, the Supreme Court of the United States denied an application for injunctive relief allowing Mr. Weinstein to proceed without paying the fees. See *Weinstein v. Starr*, 119 S. Ct. 442 (1998) (mem.). Our Office was not aware of this aspect of the litigation until the Supreme Court ruled.

I believe that this question is now moot because the four articles of impeachment that are currently before the Committee do not include charges directly relating to bribery or 18 U.S.C. § 201.

[C]oncerning the Filegate case [have] any of the following persons . . . been interviewed by the Independent Counsel's Office and/or testified before a grand jury . . . : Mac McLarty, Terry Good, Linda Tripp, William Kennedy, and James Carville?

In connection with our FBI Files investigation, this Office questioned Mr. Good, Ms. Tripp, and Mr. Kennedy. We have questioned Mr. McLarty on matters unrelated to our FBI Files investigation and reviewed his civil testimony on the FBI Files matter. We have never interviewed Mr. Carville.

[W]hether or not . . . the Filegate matter involved any violation of the federal Privacy Act?

The jurisdiction of this Office does not extend to the prosecution of Class B or C misdemeanors or infractions. Therefore, violations of the Privacy Act, standing alone, are not within the jurisdiction assigned to this Office, as violations of the Act are misdemeanor infractions of federal law.

Questions from Representative Scott

Earlier today, at the Committee's request, we submitted a response to Representative Scott's questions. We now supplement that response:

Considering that the Federal Rules of Criminal Procedure authorize only the grand jury foreperson (or in his absence, the deputy foreperson) to swear a grand jury witness, under what authority, if any, do you assert that President Clinton was duly sworn by a Mr. Bernard J. Apperson of your office (Mr. Apperson was not a member of the grand jury) since Mr. Apperson had no authority to swear the witness?

The factual and legal premises of the question are both inaccurate. First, as reflected in both the official transcript and on videotape, the oath was administered by Elizabeth Eastman, Notary Public for the District of Columbia, a certified court reporter, duly authorized to administer oaths. 5 U.S.C. § 2903(c)(2). Second, although Rule 6(e) authorizes the foreperson of the grand jury to administer oaths, stating that they "shall have the power" to do so, the Rule does not restrict that authority to administer oaths to the foreperson.

We understand that the unofficial transcript published by the *Washington Post*, which erroneously reflected that the oath was administered by an employee of this Office, has since been corrected on the *Post's* website.

Since initially responding, I have been told of Representative Scott's statement during the hearings that Congress did not receive the "official" transcript of the President's testimony. Congress did receive the official transcript of the President's testimony on August 17, and that transcript clearly reflects that the oath was administered by Ms. Eastman. House Doc. 105-311, at 659 ("I, Elizabeth A. Eastman, the officer before whom the foregoing proceedings were taken, do hereby certify that the witness whose testimony appears in the foregoing was duly sworn by me . . .").

Representative Scott also mentioned *United States v. Prior*, 546 F.2d 1254 (5th Cir. 1977), but I believe he misconstrues the case, equating the argument of the defendant with the holding of the Court. The Court found that, as a factual matter, the jury was entitled to conclude that the defendant had been sworn in by the grand jury foreman. The Court nowhere addressed the legal issue raised by Representative Scott.

Moreover, the law is clear that "[n]o particular formalities are required for there to be a valid oath. It is sufficient that, in the presence of a person authorized to administer an oath, as was the notary herein, the affiant by an unequivocal act consciously takes on himself the obligation of an oath, and the person undertaking the oath understood that what was done is proper for the administration of the oath and all that is necessary to complete the act of swearing." *United States v. Yoshida*, 727 F.2d 822, 823 (9th Cir. 1983); accord *United States v. Chu*, 5 F.3d 1244, 1247-48 (9th Cir. 1993). Any suggestion that the oath administered to President Clinton was somehow invalid is, with all respect, simply wrong.

Respectfully,

KENNETH W. STARR,
Independent Counsel.