UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, et al.,	)	
Plaintiffs,	)	**Case No: 03-2006 (EGS)**
v.	)	
FELD ENTERTAINMENT, INC.,	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT FELD ENTERTAINMENT, INC.'S MOTION FOR ENTITLEMENT TO ATTORNEYS' FEES

EXHIBIT 26

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

Serial No. 67

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

53-247 WASHINGTON : 1998

For sale by the U.S. Government Printing Office
Superintendent of Documents, Congressional Sales Office, Washington, DC 20402

COMMITTEE ON THE JUDICIARY

HENRY J. HYDE, Illinois, *Chairman*

F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
GEORGE W. GEKAS, Pennsylvania
HOWARD COBLE, North Carolina
LAMAR S. SMITH, Texas
ELTON GALLEGLY, California
CHARLES T. CANADY, Florida
BOB INGLIS, South Carolina
BOB GOODLATTE, Virginia
STEPHEN E. BUYER, Indiana
ED BRYANT, Tennessee
STEVE CHABOT, Ohio
BOB BARR, Georgia
WILLIAM L. JENKINS, Tennessee
ASA HUTCHINSON, Arkansas
EDWARD A. PEASE, Indiana
CHRISTOPHER B. CANNON, Utah
JAMES E. ROGAN, California
LINDSEY O. GRAHAM, South Carolina
MARY BONO, California

JOHN CONYERS, JR., Michigan
BARNEY FRANK, Massachusetts
CHARLES E. SCHUMER, New York
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
JERROLD NADLER, New York
ROBERT C. SCOTT, Virginia
MELVIN L. WATT, North Carolina
ZOE LOFGREN, California
SHEILA JACKSON LEE, Texas
MAXINE WATERS, California
MARTIN T. MEEHAN, Massachusetts
WILLIAM D. DELAHUNT, Massachusetts
ROBERT WEXLER, Florida
STEVEN R. ROTHMAN, New Jersey
THOMAS M. BARRETT, Wisconsin

MAJORITY STAFF

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*
PAUL J. MCNULTY, *Director of Communications-Chief Counsel*
JOSEPH H. GIBSON, *Chief Counsel*
RICK FILKINS, *Counsel*
SHAREE M. FREEMAN, *Counsel*
PETER J. LEVINSON, *Counsel*
JOHN F. MAUTZ, IV, *Counsel*
WILLIAM E. MOSCHELLA, *Counsel*
STEPHEN PINKOS, *Counsel*

GEORGE M. FISHMAN, *Chief Counsel*
MITCH GLAZIER, *Chief Counsel*
JOHN H. LADD, *Chief Counsel*
RAYMOND V. SMIETANKA, *Chief Counsel*
LAURA ANN BAXTER, *Counsel*
DANIEL J. BRYANT, *Counsel*
CATHLEEN A. CLEAVER, *Counsel*
VINCE GARLOCK, *Counsel*
JAMES W. HARPER, *Counsel*
SUSAN JENSEN–CONKLIN, *Counsel*
DEBRA K. LAMAN, *Counsel*
BLAINE S. MERRITT, *Counsel*
NICOLE R. NASON, *Counsel*
GLENN R. SCHMITT, *Counsel*
JIM Y. WILON, *Counsel*
DAVID P. SCHIPPERS, *Chief Investigative Counsel*
SUSAN BOGART, *Investigative Counsel*
ROBERT S. HOOVER, *Counsel*
JOHN C. KOCORAS, *Counsel*
BERLE S. LITTMANN, *Investigator*
STEPHEN P. LYNCH, *Professional Staff Member*
CHARLES F. MARINO, *Counsel*
JEFFREY J. PAVLETIC, *Investigative Counsel*
THOMAS M. SCHIPPERS, *Investigative Counsel*
ALBERT F. TRACY, *Investigator*
PETER J. WACKS, *Investigator*
DIANA L. WOZNICKI, *Investigator*

MINORITY STAFF

JULIAN EPSTEIN, *Minority Chief Counsel-Staff Director*

PERRY H. APELBAUM, *Minority General Counsel*
DAVID G. LACHMANN, *Counsel*
CYNTHIA A. R. MARTIN, *Counsel*
HENRY MONIZ, *Counsel*
STEPHANIE J. PETERS, *Counsel*
SAMARA T. RYDER, *Counsel*
BRIAN P. WOOLFOLK, *Counsel*
ABBE D. LOWELL, *Minority Chief Investigative Counsel*
SAMPAK P. GARG, *Investigative Counsel*
STEVEN F. REICH, *Investigative Counsel*
DEBORAH L. RHODE, *Investigative Counsel*
KEVIN M. SIMPSON, *Investigative Counsel*
LIS W. WIEHL, *Investigative Counsel*

CONTENTS

HEARING

OPENING STATEMENT

WITNESSES

LETTERS, STATEMENTS, ETC., SUBMITTED FOR THE HEARING

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-

---

[14] Stuart Taylor, Jr., *For the Record*, AMERICAN LAWYER, Oct. 1995, at 72.
[15] Irving Younger, *The Perjury Routine*, THE NATION, May 8, 1967, at 596–97.
[16] Elaine Sciolino, *On the Question of Pardons, Dole has Taken Both Sides*, THE NEW YORK TIMES, 16 Oct. 1996, at A15.
[17] Eric 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 its 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 doctors'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 "Somophylline 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