

Testimony of Alan M. Dershowitz

House of Representatives Judiciary Committee

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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 responsibilities 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 statement 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 framework 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 United States Court of Appeals for 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 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.

1. Jerome Frank, *Courts On Trial* 85 (1949).
2. Many such defendants now have years added on to their sentences under the federal guidelines, which add points for perjury at trial.
3. Joseph D. McNamara, *Has the Drug War Created an Officer Liars' Club?* *Los Angeles Times*, Feb. 11, 1996, at M1.
4. From Mark Curriden, *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, *Testilying: 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.")
5. Richard H. Underwood, *Perjury: An Anthology*, 13 *Ariz. J. Int'l & Comp. L.* 307, 379 (1996).
6. *See, 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).
7. *See, e.g.*, Underwood, *id.* at 223 and accompanying note 37.
8. *See* 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).
9. *See* 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).
10. Commission 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.
11. Mollen Report, *supra* note 10, at 41.

12. Mollen Report, *supra* note 10, at 42.

13. Boston Globe, November 15, 1995, at 1.

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.

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