

December 9, 1998

**TESTIMONY OF RICHARD J. DAVIS  
BEFORE  
THE HOUSE JUDICIARY COMMITTEE  
CONCERNING ISSUES RELATING  
TO THE POTENTIAL IMPEACHMENT OF PRESIDENT CLINTON**

Mr. Chairman, Mr. Conyers, Members of the  
Committee:

I appear here today to discuss issues relating to proposed Articles of Impeachment relating to perjury and obstruction of justice. I do so with the perspective of someone who has been a lawyer for nearly 30 years, who was privileged to serve as a federal prosecutor and as an Assistant Treasury Secretary for Enforcement and Operations during the Carter administration, and who experienced the issues revolving around Watergate as a Task Force Leader in the Watergate Special Prosecution Force. Indeed, as a member of that office I was the principal prosecutor in two perjury prosecutions, one involving testimony by Dwight Chapin before a grand jury and another involving testimony by Howard Edwin Reinecke before the Senate Judiciary Committee.

Before addressing the issues relating to perjury and obstruction of justice, I think it would be appropriate briefly to set forth a perspective on the impeachment process. While you have heard testimony from others on

these issues, a brief summary of my views would, I believe, be useful because they relate in part to some of the specific issues I will address.

To state the obvious, impeachment is, and must be, reserved for the most serious of wrongful acts because its effect is to begin the process to remove from office a person elected to the Presidency by the people at large. For the public, therefore, to view this disturbing of their decision as legitimate the wrongful conduct alleged first needs to be of an unquestionably serious enough nature and to clearly constitute a "high crime or misdemeanor." Second, the proof that the President committed such misconduct needs to be clear and unequivocal. Indeed, while I will discuss today standards applied to criminal prosecutions, the evidentiary burden for impeachment, which creates the basis for a trial in the Senate -- with all the potential for disruption of the processes of government that such a trial would entail -- should be heavier than the burden involved in deciding to bring a prosecution.

In 1974, all of these conditions were met. As to the core charge -- the repeated obstruction of a federal criminal investigation into the break-in of the headquarters of the opposition political party by a White House-created group of clandestine operatives which had previously

burglarized the office of the psychiatrist of a political opponent -- there was no doubt as to the seriousness of what had been done, and there were no meaningful credibility issues since the President could be heard on tape participating in criminal conduct. And most important, the public accepted that the situation justified the President's removal from office. There thus was no sense that Gerald Ford's ascension to the Presidency was in any way illegitimate, and this was true even though he was an appointed, rather than an elected, Vice President.

With this background, let me turn to my assigned topic -- the standards for prosecution in perjury and obstruction of justice cases, and how these standards apply to the instant matter.

There can be no doubt that the decision as to whether to prosecute a particular individual is an extraordinarily serious matter. It forever changes the life of that individual, and can have material collateral effects on family, friends, business colleagues and, in some special circumstances, the public at large. Good prosecutors thus approach the decision as to whether to prosecute with a genuine seriousness, carefully analyzing the facts and law, and setting aside personal feelings about the person under investigation.

Speaking generally, as reflected in the Department of Justice's Manual for United States Attorney's Offices, the initial question for any prosecutor is, can the case be won at trial. See § 9-27.220 of U.S. Attorney's Manual. Simply stated, no prosecutor should bring a case if he or she does not believe that, based on the facts and the law, it is more likely than not that they will prevail at trial. Cases that are likely to be lost cannot be brought simply to make a point or to express a sense of moral outrage, however justified such a sense of outrage might be. You have to truly believe you will win the case. I would respectfully suggest that this same principal should guide the House of Representatives as it determines to, in effect, make the decision as to whether to commence a "prosecution" by impeaching the President.

In the context of a perjury investigation, there are some specific considerations which are present when deciding whether such a case can be won.

First, it is virtually unheard of to bring a perjury prosecution based solely on the conflicting testimony of two people. Indeed, pursuant to the long standing common law two witness rule, applicable to prosecutions under 18 USC § 1621, perjury convictions premised solely on the uncorroborated testimony of a single

witness are precluded. While this rule, as a formal matter, does not apply to false statement prosecutions pursuant to 18 USC § 1623, even under that statute, because of the extreme difficulty of prevailing at trial, prosecutors are reluctant to bring single witness perjury cases. The inherent problems in bringing such a case are compounded to the extent that any credibility issues exist as to the Government's sole witness.

Second, questions and answers are often imprecise. Questions sometimes are vague or use too narrowly defined terms, and interrogators frequently ask compound or inarticulate questions, and fail to follow up imprecise answers. Witnesses often meander through an answer, wandering around a question, but never really answering it. In a perjury case where the precise language of a question and answer are so relevant, this makes perjury prosecutions difficult, because the prosecutor must establish that the witness understood the question, intended to give a false, not simply an evasive, answer and, in fact, did so. The problem of establishing such intentional falsity is compounded in civil cases by the reality that lawyers routinely counsel their clients to answer only the question asked, not to volunteer and not to help out an inarticulate questioner.

This does not mean, of course, that simply by claiming, "I did not understand the question" the witness can, or must, be acquitted. Indeed, in the Chapin case, for example, the Court and jury rejected his after the fact claim that he did not understand the meaning of the word "distribute" when he denied knowing that Donald Segretti had distributed campaign literature of any kind.

Third, prosecutors often need to assess the veracity of an "I don't recall" answer. Like other answers, such a response can be true or false, but it is a heavy burden to prove that a witness truly remembered the fact at issue. The ability to do so will often depend on the nature of the fact at issue. Precise times of meetings, names of people one has met, and details of conversations and sequences of events -- even if fairly recent -- are often difficult to remember. Forgetting a dramatic event is, however, more difficult to justify. For example, testimony that the witness did not remember if he met John Doe may well be true if the evidence is only that John Doe was one of four people at a dinner party two months ago, but is of much more doubtful veracity if there is proof that John Doe gave the witness a \$50,000 bribe at that dinner.

The ability to win at trial is not, however, the only consideration guiding the decision whether to

prosecute. The Department of Justice guidelines, for example, identify a number of reasons for not proceeding with a prosecution. These include federal law enforcement priorities (in the real world of non-independent counsel it is not rational to investigate all levels and types of wrongdoing), the nature and seriousness of the offense, the impact of the offense on any victim, whether there has been restitution, deterrence, and the criminal history of the accused.

While I will not review these considerations in detail, application of these principles is one reason why prosecutions of individuals for lying in civil depositions is extremely rare. While in isolated instances such cases have been brought, criminal prosecutions have generally not been used to police veracity in the civil justice system.

Before turning to the application of these principles to the facts at hand, I should say that in my work at the Watergate Special Prosecutor's Office I was involved in applying these principles in extraordinarily high profile cases. While we successfully prosecuted a number of matters, we also declined to proceed in a number of close cases. We did so, even in circumstances where we believed, in our hearts, that a witness had deliberately lied under oath or committed some other wrongful act, but

simply concluded that we were not sufficiently certain that we would prevail at trial.

It is not my intention to review all of the facts which might bear on a prosecution decision, as well as potentially upon the judgment of the House as to whether to proceed to impeach the President. I would like, however, to review some of the major factual issues which I believe would shape what a prosecution decision would be.

I will begin with the issue of whether from the perspective of a prosecutor there exists a prosecutable case for perjury in front of the grand jury. The answer is clearly no. The President acknowledged to the Grand Jury the existence of an improper intimate relationship with Monica Lewinsky, but argued with the prosecutors questioning him that his acknowledged conduct was not a sexual relationship as he understood the definition of that term being used in the Jones deposition. Engaging in such a debate -- whether wise or unwise politically -- simply does not form the basis for a perjury prosecution.

Indeed, in the end the entire basis for a grand jury perjury prosecution comes down to Monica Lewinsky's assertion that there was a reciprocal nature to their relationship in that the President touched her private parts with the intent to arouse or gratify her, and the

President's denial that he did so. Putting aside whether this is the type of difference of testimony which should justify an impeachment of a President, I do not believe that a case involving this kind of conflict between two witnesses would be brought by a prosecutor since it would not be won at trial.

A prosecutor would understand the problem created by the fact that both individuals had an incentive to lie -- the President to avoid acknowledging a false statement at his civil deposition and Ms. Lewinsky to avoid the demeaning nature of providing wholly unreciprocated sex. Indeed, this incentive existed when Ms. Lewinsky described the relationship to the confidants described in the Independent Counsel's referral. Equally as important, however, Mr. Starr has himself questioned the veracity of his one witness capable of contradicting the President -- Ms. Lewinsky -- by questioning her testimony about her interaction with his office, including whether she was asked secretly to tape record conversations with specific individuals, including Ms. Currie, Mr. Jordan and potentially the President. And, in any trial the Independent Counsel would also be arguing that other key portions of Ms. Lewinsky's testimony are false, including where she explicitly rejects the notion that she was asked to lie, and that assistance in her job

search was an inducement for her to do so. Thus at a trial Ms. Lewinsky's credibility would be subject to attack not only by the defense, but by the very prosecutor who seeks to rely on certain parts of her testimony. No, in the real world, whoever the putative defendant was, this is not a case that would be brought.

It also is extraordinarily unlikely that in ordinary circumstances a prosecutor would bring a prosecution for perjury in the President's civil deposition in the Jones case. First, while one can always find isolated contrary examples, with perjury prosecutions involving civil cases being rare, it would be even more unusual to see such a prosecution where the case had been dismissed on unrelated grounds and then settled, particularly where the settlement occurred after disclosure of the purported false testimony.

Second, perjury charges on peripheral issues are also uncommon; perjury prosecutions are generally filed where the false statement goes to the core of the matter under inquiry. Indeed, in order to prevail in a perjury prosecution the prosecutor must establish not only that the testimony was false, but that the purported false testimony was material, i.e., that it would tend to influence the decision in the matter where the testimony occurred or, as

some courts have held in the deposition context, that truthful testimony would lead to admissible evidence.

Here, the Jones case was about whether then Governor Clinton sought unwanted sexual favors from a state employee in Arkansas. Monica Lewinsky herself had nothing to do with the facts at issue in that suit. She did not know Paula Jones; she was not at that hotel room where Paula Jones alleged the misconduct occurred; she had no knowledge about what transpired. The deposition was about the Jones case; it was not part of a general investigation into the Monica Lewinsky affair.

Given the lack of connection between these two events, under the applicable rules of evidence, her purely consensual relationship with the President half a decade later would, I believe, not have even been admissible at any ultimate trial of the Jones case. While the Court allowed questioning in the civil deposition about this matter, the Judge did so under the broad standard used in discovery -- whether the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Indeed, while not dealing with the admissibility issue had there been no Independent Counsel inquiry, after the controversy about the President's relationship with Ms. Lewinsky arose, the Court considered this testimony sufficiently immaterial

so as to preclude testimony about it at the trial. The lack of materiality of the President's relationship with Monica Lewinsky then became even clearer when in dismissing the Jones case the court found that she had not demonstrated any tangible job effect arising from her alleged encounter with the then Governor.

Finally, the ability to prove the intentional making of false statements in the civil deposition is compounded by inexact questions, evasive and inconsistent answers, insufficient follow-up by the questioner and reliance by the examiner on a definition of sexual relations rather than asking about specific acts. But whatever the ability to meet the standard of proof on this issue as to any particular question, this simply is not a perjury case that would be brought. It involves difficult proof issues as to, at best, peripheral issues, where complete and truthful testimony would be of doubtful admissibility, in a settled civil case which had already been dismissed. This simply is not the stuff of a criminal prosecution.

Turning to the issues of obstruction of justice involving the Paula Jones case, a prosecutor analyzing the case would be affected by many of the same weaknesses that are discussed above -- insufficient proof and the reluctance in ordinary circumstances for a prosecutor to invoke

criminal sanctions in connection with conduct in a settled civil case. But there is one other factor which would also make prosecution of such a case extraordinarily unlikely -- the reality that the principal players in this drama, the President, Ms. Lewinsky and Ms. Currie, had relationships and motivations to act wholly unrelated to the Jones case. This seriously complicates the ability of a prosecutor to establish the intent to obstruct some official proceeding which is required to prevail in an obstruction of justice case.

Thus, for example, reasons why such a case would not be brought include:

-- the job search began before Ms. Lewinsky was on the witness list, and there is nothing surprising that someone who had an illicit relationship with a woman would, when it was over, want to help her get a job in another city.

-- Ms. Currie had her own relationship with Ms. Lewinsky.

-- people who have an illicit relationship often understand they will lie about it without regard to the existence of a litigation and, here, it appears that such an understanding was discussed prior to Ms. Lewinsky being identified as a potential witness.

-- the evidence as to the retrieval of the gifts is contradictory, with Mr. Currie and the President offering versions of the events which exculpate the President, and which differs from Ms. Lewinsky's testimony, and Ms. Lewinsky herself provided varying, and sometimes exculpatory, interpretations of these events.

-- the reality that at the time of the President's conversations with Ms. Currie in the immediate aftermath of his civil deposition, Ms. Currie was not a witness in any proceeding and, given the status of the Jones case, there was no reason to believe that she ever would be, and that the President was likely focusing on the potential public relations repercussions from his relationship.

In the end, therefore, I do not believe that a prosecutor would, or should, bring obstruction of justice charges based upon the available evidence.

Before concluding, I would like to make two closing observations. In August, 1974, prior to the pardon, the Watergate Special Prosecution Force commenced the extraordinarily difficult process of determining whether to indict then former President Nixon. In my own recommendation to Special Prosecutor Jaworski, I urged that

any decision be deferred to allow for a cooling off period and the opportunity for a more reflective decision. In analyzing the relevant factors which should ultimately affect such a decision, and proceeding on the belief not present here -- that adequate evidence existed to support the bringing of charges -- I articulated two primary, and competing, considerations which I believed it appropriate for us as prosecutors to consider. The first factor was to avoid a sense of a double standard by declining to prosecute a plainly guilty person because he had been President. The second was that prosecutors need not proceed with even provable charges if they conclude that important and valid societal benefits would be sacrificed by doing so. In the Nixon case such a benefit would be the desirability of putting the turmoil of the past years behind us so as to better be able to proceed with the country's business. I still believe it appropriate for those deciding whether to bring charges to consider these factors.

Finally, prosecutors often feel a sense of frustration if they cannot express their sense that a wrong has been committed by bringing charges. But not every wrong is a crime, and wrongful non-criminal conduct sometimes can be addressed without the commencing of any proceeding. Apart from issues of censure, we live in a democracy, and

one sanction that can be imposed is by the voters acting through the exercise of their right to vote. President Clinton lied to the American people, and if they believed it appropriate they were free to voice their disapproval by voting against his party in 1998, and remain free to do so in 2000, as occurred in 1974, when the Democrats secured major gains. The answer to every wrongful act is not the invocation of punitive legal processes.

This concludes my testimony. I appreciate the Committee's patience and will be happy to answer any questions you may have.