

Statement of Ronald K. Noble*

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Mr. Chairman, Mr. Ranking Member and Members of the Committee:

I am honored to appear before you today. I will discuss the factors ordinarily considered by federal prosecutors and federal agents in deciding whether to investigate, indict and prosecute allegations of violations of federal criminal law. I submit that a federal prosecutor ordinarily would not prosecute a case against a private citizen based on the facts set forth in the Starr referral. My experience, which forms the basis of my testimony, is as follows: I have served as an Assistant U.S. Attorney; a Chief of Staff and Deputy Assistant Attorney General in the Justice Department's Criminal Division during the Reagan and Bush Administrations; an Under Secretary of the Treasury for Enforcement in the Clinton Administration; and I am a professor at the New York University School of Law where I teach a course in Evidence.

I. DOJ Guidelines : Principles of Federal Prosecution¹

When investigating a possible violation of the law, every federal prosecutor must take heed of the guidelines by the Department of Justice ("DOJ"). DOJ Guidelines recognize that a criminal prosecution "entails profound consequences for the accused and the family of the accused whether or not a conviction ultimately results."ⁱⁱ Career federal prosecutors recognize that "Federal law enforcement resources and Federal judicial resources are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists." Federal prosecutors are told to consider the nature and seriousness of the offense as well as available taxpayer resources. Often these resources are scarce and influence the decision to proceed or not to proceed. Federal prosecutors "may properly weigh such questions as whether the violation is technical or relatively inconsequential in nature and what the public attitude is toward prosecution under the circumstances of the case."ⁱⁱⁱ

What will happen to public confidence in the rule of law if no prosecution is brought or if a prosecution results in an acquittal? Even before the Clinton-Lewinsky matter arose, DOJ Guidelines intimated that prosecutors should pause before bringing a prosecution where "the public may be indifferent, or even opposed, to enforcement of the controlling statute whether on substantive grounds, or because of a history of non-enforcement, or because the offense involves essentially a minor matter of private concern, and the victim is not interested in having it pursued."^{iv}

Yet, public sentiment against an otherwise worthy prosecution should not discourage prosecutors from bringing charges simply because a biased and prejudiced public is against prosecution. "For example, in a civil rights case or a case involving an extremely popular political figure, it might be clear that the evidence of guilt—viewed objectively by an unbiased factfinder—would be sufficient to

obtain and sustain a conviction, yet the prosecutor might reasonably doubt whether the jury would convict. In such a case, despite his/her negative assessment of the likelihood of a guilty verdict (based on factors extraneous to an objective view of the law and the facts), the prosecutor may properly conclude that it is necessary and desirable to commence or recommend prosecution and allow the criminal process to operate in accordance with its principles.^{IV} During the civil rights era, many prosecutions were brought against people for locally popular, but no less heinous, crimes against blacks.^{VI} However, prosecutors should not bring charges based on public sentiment in favor of prosecution when a decision to prosecute "cannot be supported on other grounds" deemed legitimate by the prosecutor.^{VII}

II. Reasonable Likelihood of Conviction:

DOJ prosecutors are discouraged from pursuing criminal prosecutions simply because probable cause exists. Because probable cause "can be met in a given case does not automatically warrant prosecution; further investigation may be warranted, and the prosecutor should still take into account all relevant considerations . . . in deciding upon his/her course of action."^{VIII} Prosecutors are admonished not to "recommend in an indictment charges that they cannot reasonably expect to prove beyond a reasonable doubt by legally sufficient evidence at trial." It is one of the most important criteria that prosecutors must consider. Prosecutions should never be brought where probable cause does not exist, and "both as a matter of fundamental fairness and in the interest of the efficient administration of justice no prosecution should be initiated against any person unless the government believes that the "person will be found guilty by an unbiased trier of fact."

III. Allegation of Perjury with regard to Private, Lawful, Extramarital Consensual Sexual Conduct:

Federal prosecutors and federal agents as a rule ought to stay out of the private sexual lives of consenting adults.

Neither Federal prosecutors nor Federal investigators consider it a priority to investigate allegations of perjury in connection with the lawful, extramarital, consensual, private, sexual conduct of citizens. In my view this is a good thing. From a proactive perspective, who among us would want the federal government to initiate sting operations against private citizens to see if we lie about extramarital affairs or the nature of our sexual conduct? Imagine a rule that required all federal job applicants to answer the following question under oath: "Because we are concerned about our employees being blackmailed about unusual or inappropriate sexual conduct and because we want to know whether you would be at risk, please name every person with whom you have had sexual intercourse and other sexual contact during your life."

Such a question would naturally lead to allegations of perjured responses. Irrespective of constitutional challenges, from a public policy standpoint most Americans would object to federal prosecutors and federal agents investigating and prosecuting those cases that came to our attention. Could we trust our government to make fair, equitable and restrained decisions about how much to investigate any one of these allegations? The potential for abuse and violation of our right to privacy would be great. Indeed, assigning federal agents to interview witnesses, install wiretaps and insert bugs to learn about the private, legal, sexual conduct of U.S. citizens would concern us all. But aggressive prosecutors and agents would do exactly that to make cases against those citizens where prosecutions would garner publicity and thereby act as a deterrent.

IV. Allegations of Perjury against a Party in a Civil Deposition in a Federal Lawsuit:

As a general matter, federal prosecutors are not asked to bring federal criminal charges against individuals who allegedly perjure themselves in connection with civil lawsuits. As a rule, Federal prosecutors on their own do not seek to bring criminal charges against people who perjure themselves in connection with civil depositions. This would open a floodgate of referrals. Parties by definition are biased, and it would be difficult to discount the potential bias. By their nature civil lawsuits have remedies built into the system. Lying litigants can be exposed as such and lose their lawsuits. The judge overseeing the lawsuit is in the best position to receive evidence about false statements, deceitful conduct and even perjured testimony. She can sanction violating litigants by initiating civil or criminal contempt proceedings. Notwithstanding the reasons generally, there are 10 good reasons taken in combination which support the view that a career federal prosecutor, asked to investigate allegations like those in the Clinton-Lewinsky matter, would not pursue federal criminal prosecution to the indictment or trial stage.

1. The alleged perjury occurred in a civil deposition and concerned private, lawful, sexual conduct between consenting adults.
2. The alleged perjured testimony was deemed inadmissible by the trial judge.
3. That evidence arguably was dismissed as immaterial by the trial judge.
4. In any event the alleged perjured testimony was at most marginally relevant.
5. The alleged perjured testimony did not affect the outcome of the case.
6. The parties settled, and the court dismissed the underlying civil lawsuit.
7. The settlement of the suit prevented the appellate court from ruling on the disclosure and on the materiality of the alleged perjured testimony.
8. The theoretically harmed party knew of the alleged perjury prior to settlement.
9. Alleged political enemies of the defendant funded the plaintiff's suit. (A concern of bias.)
10. A federal government informant conspired with one of the civil litigants to trap the alleged perjurer into perjuring himself. (A concern of bias.)

Given the above considerations, most federal prosecutors would not want to use taxpayer dollars, federal agents and sensitive federal investigative resources to uncover the most intimate and embarrassing details of the private sexual lives of consenting adults when there is a great risk of bias and when there is a judge in a position to address the alleged criminal conduct.

V. Allegations of Criminal Wrongdoing Against the President of the United States:

The judgment that a career prosecutor might make about an ordinary person might be very well affected by the knowledge that the alleged perjury was committed by the President. Even the most experienced, fair-minded prosecutor will find it difficult not to pursue allegations of criminal misconduct against the President. The interests in targeting, threatening or in harming the President can be explained in part by the power and visibility of his office. Even a prosecutor with exceptional judgment might be tempted by the challenge of bringing down a President. A prosecutor with unchecked power, unlimited resources and only one target might find the temptation even stronger.

It is difficult to think of a failsafe structure that could protect anyone from allegations of bias in the decision to prosecute or not to prosecute the President. Not the Attorney General, the Independent Counsel, the Justice Department, the FBI, the Secret Service, the Federal Judiciary, the Congress, the Bar, and the Academy can escape some person or act in their background that could create a conflict or an appearance of a conflict. No one for or against prosecution would be safe from attack on the merits or from false personal attacks.

For this reason, a prosecutor or a committee assigned such a case must strive to be objective - knowing that criticism of bias will be unavoidable. In the prosecutorial context, a 13 to 10 vote by

the Grand Jury constitutes enough votes to proceed, but reflects that there must be a serious problem with some aspect of the case. Similarly, a vote for impeachment based on a party line vote or near party line vote is a signal that something is wrong with the case and that the case may not be worth pursuing. This is particularly true where the overwhelming majority of Americans appear to be well informed about the allegations and unbiased as a group, yet they do not want this President impeached. While indictments and impeachment proceedings are different, they carry at least two similarities: One, most of us know it when we see the clear cases for criminal conviction and impeachment. Two, public confidence in the rule of law and our system of government would suffer if we regularly indicted cases or impeached Presidents only to have juries or the Senate vote to acquit.

In closing, I believe that the Justice Department got it right and Independent Counsel Donald Smaltz got it wrong. Indictments and impeachments that result in acquittal ought to be avoided where possible. No prosecutor would be permitted to bring a prosecution where she believed that there was no chance that an unbiased jury would convict. Almost no one in this country believes that the U.S. Senate will convict the President on any potential article of impeachment. Members of Congress should consider the impact that a long and no doubt sensationalized trial will have on the country – especially a trial that will not result in a conviction. In the end, I am confident that you will give the weighty responsibility that you must discharge serious consideration. A vote against impeachment need not be viewed as a vote against punishment. As Professor Steve Saltzburg noted, Judge Susan Webber Wright retains jurisdiction over the case wherein the allegedly perjured testimony occurred. She can hold civil or criminal contempt hearings. Of all the arbiters of justice in this matter, she is perceived as being the least biased. She can punish the President for false and misleading conduct – even if it does not rise to the level of perjury or obstruction of justice. Trust her to mete out the appropriate punishment.

¹ The DOJ Guidelines are just that. Guidelines! They articulate principles, not requirements. They are crafted with the real world in mind – a world with changing priorities and circumstances. Among other things, the U.S. Attorney's Manual guides prosecutors in deciding whether to initiate or decline federal charges. Prosecutors are given the following factors to consider: "Federal law enforcement priorities; the nature and the seriousness of the offense; The deterrent effect of prosecution; the person's culpability in connection with the offense; the person's history with respect to criminal activity; the person's willingness to cooperate in the investigation; the probable sentence or other consequences if the person is convicted."

² Id. at 9-27.001

³ Id. at 9-27.220 2. Nature and Seriousness of Offense

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id. at 9-27.200