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Nothing but the Truth: A Solution to the Current Inadequacies of the Federal Perjury Statutes

George W. Aycock III

Notes

NOTHING BUT THE TRUTH: A SOLUTION TO THE CURRENT INADEQUACIES OF THE FEDERAL PERJURY STATUTES

It is annoying to be honest to no purpose.[1]
Ovid

I. INTRODUCTION

Perjury is a flagrant affront to the basic concepts of judicial proceedings.[2] The fairness of the forum and the substantive justness of the law cannot overcome the debilitating effects of false testimony. Indeed, no other crime frustrates the judicial process' overriding goal, the attainment of truth, more than perjury.

The social interest in the integrity of sworn statements in judicial proceedings is well-recognized.[3] Because many perjury law concepts remain unchanged, perjury's history is a living memorial to its past.[4] Perjury was limited to false oaths in judicial proceedings under the common law.[5] Penalties

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1. 2 OVID, EX PONTO, ch. 3 (translation of *gratis paenitet esse probum*).

2. Cate Gillen et al., Project, *Sixth Survey of White Collar Crime: Perjury*, 28 AM. CRIM. L. REV. 619 (1991). Perjury is a witness' knowingly false assertion as to a matter of fact, opinion, belief, or knowledge, in a judicial proceeding upon oath that is material to the issue of inquiry. BLACK'S LAW DICTIONARY 1139 (6th ed. 1990).

3. *See generally* ROLLIN M. PERKINS, CRIMINAL LAW 453 (1969) (giving a history of perjury).

4. Stephen J. Arlington, Comment, *An Analysis of New York's Perjury Law*, 40 ALB. L. REV. 198, 199 (1975).

5. SIR EDWARD COKE, THIRD INSTITUTE 163 (1797) [hereinafter THIRD INSTITUTE]; 4 WILLIAM BLACKSTONE, COMMENTARIES *137 [hereinafter COMMENTARIES].

It has been said, "Blackstone to the contrary notwithstanding, the perjury of witnesses was not punishable at common law." Charles P. Curtis, Jr. & Richard C. Curtis, *The Story of a Notion in the Law of Criminal Contempt*, 41 HARV. L. REV. 51, 59 (1927). The Curtis' based this statement on a misinterpretation of a quotation from Stephen. 3 SIR JAMES FITZJAMES STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 241 (1883). Stephen's reference is to common law "in early times." *Id.* at 243. Stephen mentions that the Star Chamber considered a 1487 statute (3 Hen. 7 c.1) to have "authorized them to punish perjury." *Id.* at 244. This statute punished the offense as a crime. Stephen adds, "The present law upon this subject . . . originated entirely as far as I can judge in the decisions by Court of Star Chamber." *Id.* at 245.

for a convicted perjurer ranged from cutting out the tongue to death.[6]

Presently, sections 1621 and 1623 of Title 18 of the United States Code define perjury before federal tribunals.[7] Section 1621 codifies common law perjury[8] and encompasses statements made under oath "before a competent tribunal, officer, or person."[9] Congress enacted section 1623 in 1970 as part of the Organized Crime Control Act,[10] to encompass false statements made in proceedings before, or ancillary to, a United States court or grand jury.[11] The most significant difference between these statutes is that a retraction bars section 1623 prosecution, but not section 1621 prosecution.[12] A retraction defense's existence may influence prosecutors to apply section 1621 to avoid successful defenses to perjury charges. The goal of section 1623's limited retraction defense is to encourage truthful testimony "by permitting [the witness] voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so."[13] The differences in the statutes, however, defeat this goal.

Specifically, the problem is that witnesses are charged with perjury under section 1621—the general perjury statute—when a retraction exists, but section 1623—the formal proceedings perjury statute—when a retraction does not exist.[14] Consequently, a perjurer may be prosecuted under section 1621 despite Congress' desire to encourage truthful testimony by providing section 1623's defense.[15] Thus, the current statutory scheme frustrates Congress' express goals because a potentially penitent perjurer will be hesitant to retract a false declaration made before a court or grand jury knowing section 1621 prosecution exists.

An example demonstrates the inadequacies of the federal perjury statutes. Suppose the prosecutor asks a witness in a federal grand jury indictment if the witness knows the defendant under investigation. The declarant knowingly and willfully denies knowing the accused, whose character is at issue in the

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6. *See* COMMENTARIES, *supra* note 5, *132 (citing THIRD INSTITUTE, *supra* note 5, at 163).

7. 18 U.S.C. § 1622 addresses subordination of perjury, but is beyond this note's scope.

8. 18 U.S.C. § 1621 (1988). Section 1621 has remained virtually unchanged since the first perjury statute was passed in 1790. *See* Act of April 30, 1790, ch. 9, § 18, 1 Stat. 116 (1790).

9. 18 U.S.C. § 1621 (1988).

10. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IV, 84 Stat. 927. Legislative history indicates that § 1623 was intended to ameliorate § 1621's obstacles, and thereby enhance the reliability before federal courts. *See* H.R. REP. NO. 91-1549, 91st Cong., 2d Sess. 33 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4023-24 [hereinafter HOUSE REPORT].

11. 18 U.S.C. § 1623 (1988).

12. 18 U.S.C. § 1623(d) provides a limited retraction defense. 18 U.S.C. § 1621 omits a retraction defense.

13. *See* HOUSE REPORT, *supra* note 10, at 48.

14. *See* United States v. Kahn, 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

15. *Id.*

proceedings.

Before the prosecutor asks another question, the declarant voluntarily retracts the prior testimony because she recognized the accused's name and face from when they attended elementary school together. The proceedings continue without incident following this retraction. After resolving the defendant's case, the prosecutor indicts the declarant on perjury charges although the voluntary retraction was harmless to the proceedings. Thus, the prosecutor manipulates the statutes by charging the declarant with section 1621 perjury.

This manipulation perverts legislative intent. Legislative history indicates that Congress' primary objective was to encourage truthful testimony by permitting a witness to correct a false statement without incurring the risk of prosecution.[16] The Second Circuit has recognized that although Congress constitutionally could have given the prosecutor such broad discretion, legislative history indicates otherwise.[17]

The Sixth Circuit has even gone so far as to assume, without deciding, that section 1623's retraction defense applies to section 1621 prosecutions.[18] Nevertheless, courts are unable to prevent this circumvention of congressional intent because of the wording of the statutes. Consequently, Congress should enact a single perjury statute that includes a retraction defense. A single statute would solve the current inadequacies of the federal perjury statutes and adhere to Congress' intent.

This Note addresses the inadequacies inherent in the federal perjury statutes caused by the availability of a retraction defense in section 1623 perjury prosecutions and the unavailability of a defense in section 1621 prosecutions. In Section II, this Note briefly analyzes the recent history of perjury prosecutions.[19] This analysis demonstrates the increasing availability of retraction defenses and reveals the legislative intent behind the statutes. In Section III, this Note analyzes the current status of the federal perjury statutes and examines the elements, differences, and defenses of each statute.[20]

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16. *See* S. REP. NO. 91-617, 91st Cong., 1st Sess. 33, 150 (1969) [hereinafter SENATE REPORT]; HOUSE REPORT, *supra* note 10, at 47-48.

17. *See infra* notes 40-45 and accompanying text. The Second Circuit "admitted great skepticism about the second half of the government's argument. While perhaps Congress constitutionally could have placed such wide discretion in the prosecutor, we find no clear indication that it meant to do so here." United States v. Kahn, 472 F.2d 272, 283 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

18. *See* United States v. Tucker, 586 F.2d 845 (6th Cir. 1978) (available on LEXIS, Genfed library) (assuming that a retraction defense may be appropriate under § 1621).

19. *See infra* notes 23-45 and accompanying text.

20. *See infra* notes 46-170 and accompanying text.

This Note, in Section IV, scrutinizes the problematic areas of the perjury statutes. This analysis concludes that the perjury statutes discourage truthful testimony, thereby frustrating the entire judicial process' goals.[21] Section IV also reveals how prosecutors use the statutes to circumvent legislative intent. Finally, this Note, in Section V, offers a single statute that remedies these problematic areas.[22] The model statute solves these problems because declarants will be more willing to correct false declarations with honest testimony knowing a conditional defense is available.

II. AN HISTORICAL ANALYSIS OF PERJURED TESTIMONY

A. Supreme Court Precedent

The first case that the United States Supreme Court decided regarding the availability of a retraction defense concerned the common law perjury statute. In *United States v. Norris*,[23] Senator George W. Norris was charged with violating the general perjury statute.[24] The issue was whether retraction neutralizes previous false testimony so that a perjury witness may be exculpated.[25] The Court held that the crime is complete regardless of

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21. *See infra* notes 171-206 and accompanying text.

22. *See infra* notes 207-15 and accompanying text.

23. 300 U.S. 564 (1937).

24. United States v. Norris, 300 U.S. 564, 570 (1937). Senator Norris was charged under what is now 18 U.S.C. § 1621, but what was then 18 U.S.C. § 231. *Id.* at 570 n.4. He denied, during a congressional investigation, receiving financial backing for his political campaign. *Id.* at 569-70. He gave the following testimony before a committee empowered to investigate campaign expenditures:

> Q. Now what assurance did you have of financial support and backing?
> A. None whatsoever.
> Q. In your campaign?
> A. None whatsoever.
> . . .
> Q. Did you ever get any assurance from anybody that they would help you—Republican, Democrat, independents, or anybody say they would help finance your campaign?
> A. No, sir.
> . . .
> Q. Did you receive any money from anybody in the campaign?
> A. I did not.

Id. at 568-70. The following day, after a witness testified to the contrary, Senator Norris admitted "that he had received $500 and $50 and that what he was saying was not true." *Id.* at 570-71.

25. *Id.* at 568. In addressing this issue the Court sought to settle an important question. *Id.* *See* Seymour v. United States, 77 F.2d 577, 582 (8th Cir. 1935); Johnsen v. United States, 41 F.2d 44, 46 (9th Cir. 1930); *Ex parte* Keizo Shibata, 35 F.2d 636 (9th Cir. 1929); *Ex parte* Chin Chan On, 32 F.2d 828 (W.D. Wa. 1929); Loubriel v. United States, 9 F.2d 807, 808 (2d Cir. 1926).

subsequent retraction once a false statement is made under oath.[26] Senator

26. *Norris*, 300 U.S. at 574-76. The Court stated that "[d]eliberate material falsification under oath constitutes perjury, and the crime is complete when a witness' statement has once been made." *Id.* at 574. The Court rejected the defense for fear that a retraction defense might encourage a witness to swear falsely. *Id.* The Court reasoned that a retraction defense ignores the requirement that the witness initially disclose the truth. *Id.*

The Court subsequently adhered to the two witness rule in *Weiler v. United States*, 323 U.S. 606 (1945). Two independent sources must attest to a statement's falsity in § 1621 prosecutions. The two sources may be either two witnesses, or one witness and any independent corroborative source, including the defendant's conduct, or documents ascribed by the defendant. *See* United States v. Maultasch, 596 F.2d 19, 25 (2d Cir. 1979) (explaining that two-witness rule is satisfied where two witnesses testify as to two different transactions); United States v. Diggs, 560 F.2d 266, 270 (7th Cir.) (noting that evidence of three witnesses was corroborated by fourth witness), *cert. denied*, 434 U.S. 925 (1977); *see also*, United States v. DeLeon, 474 F.2d 790, 792 (5th Cir.) (noting that police officer's testimony and traffic ticket satisfied rule), *cert. denied*, 414 U.S. 853 (1973). *Cf.* United States v. Wood, 39 U.S. (14 Pet.) 430 (1840) (convicting defendant of perjury for swearing to invoice's truth that was shown false by defendant's letters and invoice book); Allen v. United States, 194 F. 664, 668 (4th Cir. 1912) (explaining that where no witness testified directly on falsity and defendant made so signed statement, perjury conviction reversed); United States v. Spaeth, 152 F. Supp. 216, 219 (N.D. Ohio 1957) (noting that altered dates in defendant's appointment book and on client's medical card sufficiently corroborated evidence), *aff'd* 254 F.2d 924 (6th Cir.), *cert. denied*, 358 U.S. 83 (1958).

The corroborative source need not be sufficient in itself to prove perjury, but must suffice when combined with the witness' testimony. *See* United States v. Howard, 445 F.2d 821, 822 (9th Cir. 1971) (reversing defendant's conviction because corroborative evidence insufficient to substantiate witness' testimony). The corroborative source must have independent probative value, and must be inconsistent with the accused's innocence. *See* United States v. Forrest, 639 F.2d 1224, 1226 (5th Cir. 1988) (explaining that evidence must be of quality to assure guilty verdict solidly founded); United States v. Freedman, 445 F.2d 1220, 1226 (2d Cir. 1971) (noting that evidence devoid of meaning without witness' testimony and thus should not have been submitted to a jury as corroborative); *see also* Cuesta v. United States, 230 F.2d 704, 707 (5th Cir. 1956) (requiring corroboration of defendant's false statement admission for perjury conviction).

Two sources who are both witnesses need not corroborate one another. *See* United States v. Maultasch, 596 F.2d at 25-26 (explaining that independent witness' testimony regarding separate transaction sufficiently shows falsity of defendant's statements to SEC under two-witness rule). *Compare* United States v. Weiner, 479 F.2d 923, 928 (2d Cir. 1973) (explaining that when defendant denied any transaction, two witnesses' testimony on separate transactions satisfied two-witness rule) *with* United States v. Freedman, 445 F.2d at 1225-26 (noting that conviction on one transaction reversed when witness testified as to two transactions but only one corroborated).

The prosecution must prove the statement's falsity and that its falsity is susceptible to proof. 18 U.S.C. §§ 1621, 1623 (1988); *see also* United States v. Howard, 445 F.2d 821, 822 (explaining that government must supply evidence corroborative of direct evidence of defendant's perjury); Kolaski v. United States, 362 F.2d 847, 848 (5th Cir. 1966) (noting that perjurious statement's truth or falsity must be open to proof).

In *Weiler*, the trial judge refused to charge that falsity must be proved by either two witnesses or by one witness and corroborating circumstances. Weiler v. United States, 323 U.S. 606, 607-08 (1945). The Court of Appeals affirmed reasoning that the trial court should determine whether the necessary corroboration was supplied. *Id.* at 608. The Supreme Court noted that other circuits had held that charges similar to the one requested in *Weiler* should be given. *Id.* *See* Allen v. United States, 194 F. 664, 668 (4th Cir. 1912).

However, the Supreme Court reversed the decision of the Court of Appeals, holding that

Norris would have also been guilty of perjury had section 1623's retraction defense been available because his retraction did not occur until after it was obvious the falsity would be exposed. Thus, the Supreme Court's only ruling on retraction defenses involved perjury that failed to meet section 1623's limited retraction requirements.

B. Treatment of Unsettled Aspects of Perjury in the Lower Federal Courts

Although the Supreme Court has not decided a case regarding section 1623's retraction defense, the lower federal courts have struggled with the difficult issues created by the two statutes. In *United States v. Kahn*,[27] the defendant was convicted, inter alia, of section 1621 perjury for false grand jury testimonies.[28] The defendant argued that he should have been prosecuted under section 1623,[29] because a statute aimed at specific conduct prevails over a generally applicable statute.[30] The government argued, however, that because

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corroboration questions are for the jury. *Weiler*, 323 U.S. at 610. The Court reasoned that this result encompasses the two witness rule's purpose: to bar a jury from convicting for perjury on a single witness' uncorroborated oath. *Id.* at 611. The two witness rule's justification was stated as follows:

> Since equally honest witnesses may well have different recollections of the same event, we cannot reject as wholly unreasonable the notion that a conviction for perjury ought not to rest entirely upon an oath against an oath. The rule may originally have stemmed from quite different reasoning, but implicit in its evolution has been the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted.

Id. at 609.

27. 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

28. United States v. Kahn, 472 F.2d 272, 282-83 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

29. *Id.*

30. The defendant relied on cases holding that prosecutions are improperly brought under the general statute when special statutes applied. *Id.* at 283. *See* Kepner v. United States, 195 U.S. 100, 125 (1904). Cases the defendant cited specifically found perjury prosecutions improperly brought under the general statute when special perjury statutes were available. *See* Shelton v. United States, 165 F.2d 241, 244 (D.C. Cir. 1947). The defendant claimed that § 1623 would have barred prosecution. United States v. Kahn, 472 F.2d 272, 283 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

The court found that because, like *Norris*, it had become manifest that the defendant's falsity would be exposed, the defendant was not prejudiced, even if the government named the wrong statute. *Id.* at 283-84. The court reasoned that because the substantive elements were the same under either statute, the defendant got his due, if not more, on the evidence. *Id.* at 283. The court supported its finding with numerous cases. *See* United States v. Hutcheson, 312 U.S. 219, 229 (1941); United States v. Nixon, 235 U.S. 231 (1914); Williams v. United States, 168 U.S. 382 (1897); United States v. Calabro, 467 F.2d 973, 981 (2d Cir. 1972); United States v. Clizer, 464 F.2d 121, 124-25 (9th Cir. 1972); United States v. Galgano, 281 F.2d 908, 910-11 (2d Cir. 1960), *cert. denied sub nom*, Carminati v. United States, 366 U.S. 960 (1961); United States v. McKnight, 253 F.2d 817, 820 (2d Cir. 1958). The court further reasoned, because § 1623(d) states that an admission of a prior declaration's falsity "shall bar prosecution," retraction defense's availability should be raised before trial and then judicially disposed of. United States v. Kahn, 472 F.2d 272,

section 1623 supplements, not supplants, section 1621, a defendant with a successful section 1623(d) defense could be prosecuted for section 1621 perjury.[31] Leaving the issue unresolved, the court was concerned with "the prospect of the government employing section 1621 when . . . a retraction exists, and section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."[32]

In *United States v. Swainson*,[33] the defendant was charged with section 1621 perjury although the offense occurred before a grand jury.[34] The defendant argued that the section 1621 charge abused prosecutorial discretion because it denied section 1623's retraction defense.[35] The Sixth Circuit, like the Second Circuit in *Kahn*,[36] upheld the conviction because he would have been convicted under either section of the statute.[37] The Sixth Circuit, in *United States v. Tucker*,[38] went one step further in assuming, without deciding, that a retraction defense may be appropriate under section 1621, just as it would

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273 n.9 (2d Cir.), *cert. denied*, 411 U.S. 98 (1973).

31. *Kahn*, 472 F.2d at 283. The court questioned, however, whether Congress intended to give prosecutors such wide discretion in choosing the charge and level of proof needed to convict. *Id.*

32. *Id.*

33. 548 F.2d 657 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977).

34. United States v. Swainson, 548 F.2d 657, 659-60 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977).

35. *Id.* at 663. The court, however, did not decide the issue because it was brought in a post-trial motion. *Id.* The court's decision rested on Federal Rule of Criminal Procedure 12(b)'s provisions: "(1) Defenses and objections based on defects in the institution of the prosecution; or (2) Defenses and objections based on defects in the indictment . . . must be raised prior to trial." *Id.* Because the facts concerning the defendant's two appearances before the grand jury were known before trial, the defendant must timely assert that the prosecution was barred by reason of his alleged retraction. *Id.*

The defendant also argued that § 1623's legislative history requires prosecution under its terms, rather than § 1621, when possible. *Id.* The defendant contended that § 1621 concerns perjury generally, whereas § 1623 is limited to perjury in connection with court or grand jury proceedings, indicating Congress' intent to use § 1623 for allegedly false statements to a grand jury. *Id.* The court rejected the claim that § 1623's plain language shows Congress' intent to apply it to all grand jury proceedings. *Id.* The court noted that Congress did not repeal § 1621 when it enacted § 1623, and did not specify that § 1623 became the exclusive basis for perjury prosecutions involving grand jury proceedings. *Id.*

36. *See* United States v. Kahn, 472 F.2d 272, 283-84 (2d Cir.) (noting that it had become manifest that the falsity would be exposed, so § 1623(d)'s defense was unavailable to the defendant even if he would have been charged under that statute), *cert. denied*, 411 U.S. 982 (1973).

37. The defendant contended he would have been immune to § 1623(d)'s prosecution. United States v. Swainson, 548 F.2d 657, 663 (6th Cir.), *cert denied*, 431 U.S. 937 (1977). The defendant relied on his second grand jury appearance as a bar to § 1623's prosecution. *Id.* The court reasoned that, nevertheless, § 1623(d) would not have precluded perjury prosecution because when the retraction was made, it was manifest that such falsity would be exposed. *Id.* (citing United States v. Kahn, 472 F.2d 272, 283-84; *cert. denied*, 411 U.S. 982 (1973)).

38. 586 F.2d 845 (6th Cir. 1978) (available on LEXIS, Genfed library), *cert. denied*, 441 U.S. 982 (1979).

be under section 1623.[39]

In *United States v. Moore*,[40] the District of Columbia Circuit, through Judge Spottswood Robinson, emphasized that the overriding goal of the federal perjury statutes is to encourage truthful testimony.[41] Judge Robinson concluded that Congress wanted to induce truthful testimony by permitting a witness to voluntarily correct a false statement without incurring the risk of prosecution.[42] Although federal courts have struggled with the problems created by these statutes, state statutes have eliminated such problems by adopting single perjury statutes.

C. *Treatment of Perjury Statutes by the* Model Penal Code *and State Legislatures*

The *Model Penal Code* concludes that a declarant is not guilty of perjury if he retracts a statement during the proceeding, before it became manifest that the falsification would be exposed, and before it affected the proceeding.[43]

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39. United States v. Tucker, 586 F.2d 845 (6th Cir. 1978) (available on LEXIS, Genfed library), *cert. denied*, 441 U.S. 922 (1979). The defendant was convicted of § 1621's knowingly giving a false statement under oath with the intent to deceive. *Id.* The defendant's primary argument was § 1623's retraction defense applies to § 1621 perjury. *Id.* The court, as in *Kahn* and *Swainson*, did not decide the issue because the retraction occurred under a threat that the falsity would be exposed. *Id.*

40. 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

41. United States v. Moore, 613 F.2d 1029, 1041-43 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

42. *Id.* at 1041 (citing SENATE REPORT, *supra* note 16, at 150; HOUSE REPORT, *supra* note 10, at 47-48).

43. Article 241.1 states:

> (1) *Offense defined.* A person is guilty of perjury, a felony of the third degree, 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 does not believe it to be true.
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> (2) *Materiality.* Falsification is material, regardless of the admissibility of the statement under the rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.
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> (3) *Irregularities No Defense.* It is not a defense to prosecution under this Section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.
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> (4) *Retraction.* No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

Numerous states have adopted retraction defenses similar to the *Model Penal Code*.[44] Aware of the increasing statutory recognition of retraction defenses and the benefits of such defenses, Congress enacted section 1623 and based the retraction defense on the New York perjury statute.[45]

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(5) *Inconsistent Statements.* Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such cases it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(6) *Corroboration.* No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.

MODEL PENAL CODE § 241.1 (1980).

44. *See generally* Anthony Salzman, *Recantation of Perjured Testimony*, 67 J. CRIM. L. & CRIMINOLOGY 273 (1976) (arguing that more states should enact a retraction defense). Delaware, Maine, and New York adopted § 241.1(4)'s retraction defense almost verbatim: "It is an affirmative defense that the [accused] retracted [the falsification] in the course of the . . . proceeding in which it was made, . . . before . . . it became manifest that [the falsification] was or would be exposed." DEL. CODE ANN. tit. 11, § 1232 (1987); ME. REV. STAT. ANN. tit. 17-A, § 451(3) (West 1983); N.Y. PENAL LAW § 210.25 (McKinney 1988). Missouri also agreed that encouraging retraction is sufficiently desirable to justify the risk of encouraging perjury initially and followed the approach taken by the *Model Penal Code* and by Colorado, New York, Michigan, Alaska, Montana, and Texas. *See* MO. ANN. STAT. § 575.040, Comment to 1973 Proposed Code, at 177 (Vernon 1979).

Similarly, North Dakota provides:

It is a defense . . . that the actor retracted the falsification in the course of the official proceeding or matter in which it was made, if in fact he did so before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding or the matter.

N.D. CENT. CODE § 12.1-11-04(3) (1985). Washington provides that "[s]tatements made in separate hearings at separate stages of the same trial, administrative, or other official proceeding shall be treated as if made in the course of the same proceeding." WASH. REV. CODE ANN. § 9A.72.060 (West 1988).

Colorado and New Jersey provide an affirmative defense if the retraction occurs during the proceeding, but there is no requirement that retraction occur before it is clear that the falsehood was or would be discovered. N.J. REV. STAT. ANN. § 2C:28-1(d) (West 1982); COLO. REV. STAT. ANN. § 18-8-508 (West 1989). Oregon requires (i) the defense prove the retraction was voluntary and (ii) that it occur before the proceeding's subject matter is submitted to the ultimate trier of fact. OR. REV. STAT. § 162.105(1) (1990).

45. *See* N.Y. PENAL LAW § 210.25 (McKinney 1988).

III. THE CURRENT STATUS OF THE PERJURY STATUTES

Sections 1621[46] and 1623[47] of Title 18 of the United States Code[48] are designed to facilitate efficient criminal investigation unhampered by impediments of witness self-interest.[49] Section 1621 codifies common law perjury[50] and covers any statement made before a competent tribunal, officer, or person,[51] whereas section 1623 covers false declarations during a court or grand jury proceeding.[52] Before addressing the differences between the federal perjury

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46. 18 U.S.C. § 1621 (1988) 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 or certify truly . . . 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 provided by law, be fined not more than $2000 or imprisoned not more than five years, or both . . . .

Id.

47. 18 U.S.C. § 1623 (1988) in pertinent part provides:

> Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any material declaration or makes or uses any other information, . . . or other material, knowing the same to contain any false declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both . . . .

Id.

48. Section 1622 addresses perjury subordination and is beyond this note's scope. Succinctly, "[t]o constitute subordination of perjury . . . the party must procure the commission of the perjury by inciting, or persuading the witness to commit the crime. Perjury must have been actually committed . . . . " United States v. Petite, 147 F. Supp. 791, 793 (D. Md. 1957); *see also* Tedesco v. Mishkin, 629 F. Supp. 1474 (S.D.N.Y. 1986) (explaining that lawyer suborned by not advising witness against testifying falsely after hearing proposed false testimony). Inherent in this note's conclusion, that §§ 1621 and 1623 should be combined into one federal perjury statute, is the recognition that § 1622 should remain a separate, distinct statute.

49. United States v. Williams, 341 U.S. 58, 68 (1951); *see* United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979) (explaining that 18 U.S.C. § 1623's central purpose is encouraging truthful testimony before a court and grand jury), *cert. denied*, 446 U.S. 954 (1980). Both sections were amended in 1976 to cover 28 U.S.C. § 1746's permitted unsworn declarations. Under § 1746, certain statements that generally must be supported by an oath may be supported, "with like force and effect," by the declarant's statement that such matter is true under penalty of perjury. 28 U.S.C. § 1746 (1988). *See* Dickinson v. Wainwright, 626 F.2d 1184, 1186 (5th Cir. 1980) (noting that habeas corpus petition statement that "I declare under penalty of perjury that the foregoing is true and correct" satisfies oath requirement).

50. *See* Act of April 30, 1790, *supra* note 8. Section 1621 remains virtually unchanged since the first perjury statute's 1790 passage.

51. 18 U.S.C. § 1621 (1988).

52. *See* 18 U.S.C. § 1623 (1988). Sufficient formality must exist before § 1623 applies. The Supreme Court has construed the formality requirement strictly, holding that statements in contests less formal than depositions are not made in formal, ancillary proceedings. *See* Dunn v. United States, 442 U.S. 100, 111-12 (1979) (explaining that sworn statement with attorney not within § 1623's requirements). The *Dunn* Court relied on statements in both the House and Senate Reports specifying pretrial depositions as the sole example of an ancillary proceeding. *See* HOUSE REPORT,

statutes and the problematic areas of each, it is important to understand how each statute operates. Additionally, certain procedural issues,[53] as well as the enforcement of the perjury statutes,[54] are not addressed at length because of their slight effect on the current problems caused by the federal perjury statutes.

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supra note 10, at 48; SENATE REPORT, *supra* note 16, at 145. *See also* United States v. Krogh, 366 F. Supp. 1255, 1256 (D.D.C. 1973) (explaining that sworn deposition in Assistant Attorney General's Office ancillary to Watergate grand jury was sufficiently formal).

The 1970 Organized Crime Control Act's legislative history intended to ameliorate some of § 1621's obstacles confronting perjury prosecution, and thereby enhance reliable testimony before federal courts. HOUSE REPORT, *supra* note 10, at 48. The Act's purpose was to eradicate organized crime by strengthening the legal tools of the evidence-gathering process by establishing new penal provisions, and providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime. *Statement of President-Elect Edward L. Wright before House Judiciary Committee,* 9 AM. CRIM. L. Q. 71 (1970).

53. For example, a perjury indictment will not be dismissed when the testimony's falsity becomes manifest unless the testimony is immaterial to the case. *See* United States v. Claiborne, 765 F.2d 784, 792 (9th Cir. 1985) (failing to dismiss indictment where alleged perjury pertained to counts dismissed before trial and immaterial to defendant's indictment on other counts). The same judge may preside over the proceeding where the defendant initially committed perjury and the perjury trial. *See* United States v. Parker, 742 F.2d 127, 128 (4th Cir.) (explaining that judge is permitted to preside over both motion for new trial and subsequent trial for perjury allegedly committed during motion), *cert. denied,* 469 U.S. 1076 (1984). Appellate courts review jury verdicts de novo. *See* United States v. Sainz, 772 F.2d 559, 562 (9th Cir. 1985) (explaining that appellate court decides de novo whether jury could conclude beyond reasonable doubt that both declarant and government similarly understood question and that declarant's answer was false); United States v. DeCoito, 764 F.2d 690, 693 (9th Cir. 1985).

Appellate courts will leave the jury's decision undisturbed if it is based on a finding that the defendant knew the statement was false. *See* United States v. Lighte, 782 F.2d 367, 372-73 (2d Cir. 1986) (reviewing court will not disturb jury decision if jury has been properly charged; defendant cannot be convicted for making false statement by mistake or inadvertence).

The reviewing court will not disturb the jury's determination where the jury relied on a particular theory the evidence validly supported, despite the jury's reliance on another theory that is insufficient to support a conviction. *See* United States v. Larranaga, 787 F.2d 489, 498 (10th Cir. 1986) (upholding conviction because jury placed main emphasis on primary, valid theory).

54. The Federal Bureau of Investigation has primary responsibility for investigating perjury committed before federal tribunals. *See* UNITED STATES ATTORNEY'S MANUAL, § 9-69.230, at 6 (1978). The Secret Service, the Internal Revenue Service, the Immigration and Naturalization Service, the Bureau of Alcohol, Tobacco and Firearms, and the Postal Inspection Service investigate perjury arising from a matter under investigation by those agencies. *Id.* The section of the Justice Department with responsibility for the substantive matter under investigation also has supervisory jurisdiction over perjury committed during the investigation. *Id.* § 9-69.240, at 7.

When the subject matter is unidentified, the Criminal Division's General Crimes Section has supervisory jurisdiction. *Id.* United States Attorneys are directed to notify the General Crimes Section in perjury cases involving exceptional circumstances, especially when a question of statutory construction is involved. *Id.* Moreover, each district's United States Attorney has discretion to direct further investigation of an alleged false statement. *Id.* Prior authorization for prosecution from Department of Justice's Criminal Division is not required, except regarding congressional matters. *Id.*

A. Elements of the Offense

A section 1621 perjury conviction requires that four substantive elements be proven.[55] First, the declarant must take an oath to testify truthfully. Second, the declarant's willful false statement must be contrary to the oath. Third, the declarant must believe that the statement is false. Fourth, there must be a relationship between the statement and a material fact.[56] Section 1623[57] maintains the same materiality and oath requirements as section 1621; however, section 1623 defines intent as knowledge, rather than willfulness.[58] This difference means that a section 1621 declarant must *willfully* offer testimony that the declarant believes is false, but a section 1623 witness must *knowingly* present

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55. Recommended federal criminal jury instructions for 18 U.S.C. § 1621 charges are:

The elements of perjury are:

1. On or about [insert date] the defendant took an oath to testify truthfully before the [insert tribunal]; and

2. The defendant deliberately gave testimony that was false with the intent to deceive the [insert tribunal].

If you decide that the government proved each element beyond a reasonable doubt, then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

JOSEPHINE R. POTUTO ET AL., FEDERAL CRIMINAL JURY INSTRUCTIONS, PART SIX, II-463 (1991).

56. 18 U.S.C. § 1621 (1988). *See* United States v. Hvass, 355 U.S. 570, 574 (1958) (explaining that statement made pursuant to oath authorized by district court satisfies § 1621 requirement that United States law authorize oath); United States v. Cross, 638 F.2d 1375, 1378 (5th Cir. 1981) (reversing conviction because of insufficient evidence to determine which statement was false when only one of two inconsistent statements made under oath); United Fed'n of Postal Clerks v. Blount, 325 F. Supp. 879, 881 n.1 (D.D.C.) (noting that willful perjury punished under § 1621 when oath is required), *aff'd*, 404 U.S. 802 (1971).

57. The following are 18 U.S.C. § 1623 model jury instructions:

The elements of making a false statement before a (court) (grand jury) are:

1. On or about [insert date] the defendant took an oath to testify truthfully before the [insert tribunal]; and

2. While under oath the defendant (made the following statement) (used the following record or document) [insert the statement or describe the record or document); and

3. The (statement) (record or document) was false; and

4. The defendant knew when (he) (she) (made the statement) (gave the document or record) to the [insert tribunal] that is was false and (he) (she) (made the statement) (gave the document or record) without disclosing that it was false.

If you decide that the government proved each element beyond a reasonable doubt, then you must find the defendant guilty. Otherwise, you must find the defendant not guilty.

POTUTO, *supra* note 55, at II-471.

58. *See* United States v. Anderson, 798 F.2d 919, 928-29 (7th Cir. 1986) (explaining that specific intent to impede justice's administration through false statement not required by § 1623); United States v. Watson, 623 F.2d 1198, 1206-07 (7th Cir. 1980) (noting that knowledge of false declaration satisfies § 1623); United States v. Roche, No. 91-595-13, 1992 U.S. Dist. LEXIS 9062, at *7 (E.D. Pa. June 9, 1992) (deciding that § 1623 does not require specific intent to commit the offense, knowledge by the declarant that the statement was false is sufficient).

false testimony.[59]

1. The Oath Requirement

Whether the defendant took an oath is rarely an issue because it is easily proven.[60] Section 1621 oaths must occur before a competent tribunal, officer, or person.[61] Grand juries[62] and congressional committees,[63] for example, constitute competent tribunals.[64] Section 1621 violations can also occur outside

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59. Gillen et al., *supra* note 2, at 623. Both §§ 1621's and 1623's elements of prosecution do not have to be separate; rather, they may be interrelated. *See* Sands v. Cunningham, 617 F. Supp. 1551, 1555-56 (D.N.H. 1985) (noting that evidence pertaining to materiality may intertwine with evidence relevant to falsity).

60. The indictment need only aver that the defendant was duly sworn; it is unnecessary to include the oath's details. United States v. Debrow, 346 U.S. 374 (1953). The oath element is present if a specific rule requires the oath when a statute generally authorizes rule making. United States v. Hvass, 355 U.S. 570 (1958). Nonetheless, proof that the statements were made under oath is an essential element for conviction under either § 1621 or § 1623.

Evidence that a defendant was duly sworn in at a court proceeding sufficiently proves either section's oath requirement. *See* United States v. Arias, 575 F.2d 253, 254 (9th Cir. 1978) (deciding that a defendant duly sworn in at a court proceeding proves the oath element). Not every knowingly false statement under oath, however, is perjurious. *See* United States v. Freedman, 445 F.2d 1220, 1226 (2d Cir. 1971) (treating every false statement under oath as perjury, per se, would eliminate materiality requirement).

No particular formalities are required for a valid oath, as long as it was in the presence of one authorized to administer it, and the oath-maker realized its gravity and significance. *See* United States v. Yoshida, 727 F.2d 822, 823 (9th Cir. 1983) (deeming oath given by notary public proper). Official trial transcripts prove the testimony was given under oath, and they are admissible as Federal Rules of Evidence 803(5) or 803(8) hearsay exceptions. *See* United States v. Arias, 575 F.2d at 254-55 (noting that official trial transcript sufficiently shows oath was taken).

The right to question an oath's sufficiency is waived unless timely objection is made. *Id.* at 254 (deciding transcript's recital that declarant has been duly sworn sufficiently establishes oath's validity absent timely objection at trial); Vuckson v. United States, 354 F.2d 918, 921-22 (9th Cir. 1966) (noting that there is a strong presumption that testimony before a grand jury was given under oath, absent a failure to move for acquittal on the grounds that there was insufficient proof of testimony under oath).

61. 18 U.S.C. § 1621 (1988).

62. *See* United States v. Swainson, 548 F.2d 657 (6th Cir.) (explaining that the grand jury is a competent tribunal for perjury prosecution's purposes), *cert. denied*, 431 U.S. 937 (1977).

63. *See* United States v. Haldeman, 559 F.2d 31, 91 n.161 (D.C. Cir. 1976) (explaining that the Senate Select Committee on Presidential Campaign Activity and the House Judiciary Committee are competent tribunals for perjury prosecution's purposes), *cert. denied*, 431 U.S. 933 (1977).

64. A grand jury must have subject matter and personal jurisdiction to qualify as a competent tribunal. United States v. Williams, 341 U.S. 58, 66 (1950). *See also* United States v. Swainson, 548 F.2d 657, 664 (6th Cir. 1977) (describing circumstances when grand jury constitutes competent tribunal); United States v. Caron, 551 F. Supp. 662, 666 (E.D. Va. 1982) (following *Williams*), *aff'd*, 722 F.2d 739 (4th Cir. 1983); *cf.* United States v. Reinecke, 524 F.2d 435, 437 (D.C. Cir. 1975) (explaining that where tribunal's competency is in question, prosecution bears burden of proving competency).

The declarant is unprotected from perjury prosecution if the grand jury is flawed, because

formal judicial or congressional settings,[65] so long as the prosecution establishes the oath giver's identity, competency, and authority.[66]

Unlike section 1621, section 1623 oaths may only be administered during a proceeding before or ancillary to a United States court or grand jury.[67] Under section 1623, proof that the statement occurred before an appropriate authority, and that the individual taking the oath was cognizant of its implications, sufficiently fulfills section 1623's requirements.[68] Because section 1623 prosecutions are confined to statements during court and grand jury proceedings, courts may infer that the defendant testified under oath.[69]

2. The Requisite Intent

A perjury prosecution's second element is the declarant's willful or knowing subscription to a false statement under oath.[70] A person who gives

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flaws in formation do not render the grand jury incompetent. *See* United States v. Caron, 551 F. Supp. at 666-67 (holding question as to grand jury's seating irrelevant; prosecution proper where defendant made false statements to grand jury).

65. *See supra* note 51 and accompanying text.

66. *See* United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983). A competent tribunal has subject matter jurisdiction and authority to render judgment on the particular indictment. United States v. Williams, 341 U.S. 58, 66 (1951).

67. 18 U.S.C. § 1623 (1988). Unlike § 1621, § 1623 does not require the government to prove who administered the oath, or whether that person was competent or authorized to administer it. *See* United States v. Molinares, 700 F.2d 647, 651 (11th Cir. 1983) (noting that § 1623 merely requires government to prove knowingly false statement made before court was under oath at time of statement).

68. 18 U.S.C. § 1623 (1988).

69. *See* United States v. Molinares, 700 F. 2d 647, 651 n.6 (11th Cir. 1983) (explaining that Congress may have reasoned that § 1621's additional requirements were inappropriate to § 1623 proceedings; § 1623 proceedings taking place before a court or grand jury implies the defendant testified under oath); Vuckson v. United States, 354 F.2d 918, 921 (9th Cir. 1966), *cert. denied*, 384 U.S. 991 (1966).

Additionally, questions regarding an oath's sufficiency are waived unless promptly objected to. *See* United States v. Arias, 575 F.2d 253, 254 (9th Cir. 1978) (holding that a perjury prosecution at previous trial was barred); Vuckson v. United States, 354 F.2d at 921-22 (noting where no motion for acquittal on ground of oath's insufficiency, validity strongly presumed).

Also, under § 1623, a defectively empaneled grand jury neither renders the oath void nor the court or grand jury incompetent. *See* United States v. Caron, 551 F. Supp. 662, 665 (noting that a perjury charge is valid when committed before jury that violated the 1968 Jury Selection and Service Act), *aff'd*, 772 F.2d 739 (4th Cir. 1983).

70. Section 1623 requires only *knowledge* while § 1621 dictates a specific *willful* intent. 18 U.S.C. §§ 1621, 1623 (1988); *see* United States v. Fornaro, 894 F.2d 508, 512 (2d Cir. 1990) (explaining that willfulness, in addition to knowledge, not a necessary § 1623 element); United States v. Goguen, 723 F. 2d 1012, 1020 (1st Cir. 1983) (noting that simple knowledge required under § 1623, but § 1621 requires willful deception); United States v. Watson, 623 F. 2d 1198, 1207 (7th Cir. 1980) (deciding § 1621 violations require willfulness, but § 1623 violations require only knowledge); *see also* United States v. Martellano, 675 F. 2d 940, 942 (7th Cir. 1982) (explaining

a literally accurate, technically responsive, or legally truthful answer cannot be convicted of perjury, despite knowingly deceiving the questioner.[71] The questioner must ask facially unambiguous questions.[72] Where ambiguity exists on the questioner's part, the fact finder decides whether the declarant answered

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that knowingly false answers concerning material facts violate § 1623); United States v. Crippen, 570 F.2d 535, 537 (5th Cir. 1978) (noting defendant's knowledge of statement's falsity is essence of false swearing crime), *cert. denied*, 439 U.S. 1069 (1979); United States v. Brontson, 453 F.2d 555, 560 (2d Cir. 1971) (deciding defendant's knowledge of statement's falsity at time given essential), *rev'd on other grounds*, 409 U.S. 352 (1973).

Congress made § 1623's mens rea "knowingly" instead of "willfully" to ease the prosecution's burden. IA LEANARD B. SAND ET AL., MODERN FEDERAL JURY INSTRUCTIONS II 48.02, at 48-30 to -31 (1992).

71. *E.g.*, United States v. Tonelli, 577 F.2d 194, 198 (3d Cir. 1978) (explaining that perjury indictment failed because it did not specify manner defendant falsely replied); *see also* United States v. Makris, 483 F.2d 1082, 1084 (5th Cir. 1973) (reversing perjury conviction because defendant gave apparently correct response; prosecution failed to prove otherwise), *cert. denied*, 415 U.S. 914 (1974). The declarant's attempt to correct a statement may indicate that the defendant did not intend any misrepresentation. *See, e.g.*, United States v. Norris, 300 U.S. 564, 576 (1937) (noting willingness to correct misstatement may show perjurious intent's absence); United States v. Kahn, 472 F.2d 272, 284 (2d Cir. 1973) (deciding where evidence sufficient for perjury, retraction may show intent's absence), *cert. denied*, 411 U.S. 982 (1973); Beckanstin v. United States, 232 F.2d 1, 4 (5th Cir. 1956) (noting willingness to correct misstatement not defense, but many negate intent); United States v. Denison, 508 F. Supp. 1255, 1256 (M.D. La. 1981) (deciding prosecution barred only if perjury has not substantially affected proceeding and not become manifest).

Later testimony must show that the original testimony constituted an incomplete or mistaken answer. *See* United States v. Norris, 300 U.S. at 576 (noting that innocent mistake's correction or earlier answer's elaboration may show perjurious intent's absence); Beckanstin v. United States, 232 F.2d at 4 (explaining that willingness to correct mistake helps negate existence of willful intent to swear falsely); United States v. Geller, 154 F. Supp. 727, 731 (S.D.N.Y. 1957) (deciding that declarant must make retraction promptly with no likelihood declarant recanted because officials discovered perjury).

A perjury conviction may be barred where the declarant's answer is susceptible to multiple interpretations. *See* United States v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986) (explaining that conviction will not stand where intent to falsify cannot be determined from ambiguous questions); United States v. Bell, 623 F.2d 1132, 1135-36 (5th Cir. 1980) (noting that testimony insufficient to sustain conviction because defendant's negative response, despite its factual falsity, was legally correct answer); United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967) (deciding that evidence insufficient to support conviction where defendant's answer regarding whether she had "been on trips with Max" was susceptible to two interpretations).

72. *See* United States v. Lighte, 782 F. 2d 367, 374 (2d Cir. 1986) (explaining that perjury conviction may not stand on particular interpretation questioner places on answer); United States v. Sainz, 772 F.2d 559, 564 (9th Cir. 1985) (noting that declarant's testimony cannot be perjurious when declarant made to guess at question's meaning); United States v. Corbin, 734 F.2d 643, 654 (11th Cir. 1984) (questioning cannot be vague or ill-defined); United States v. Tonelli, 577 F.2d 194, 199-200 (3d Cir. 1978) (deciding prosecutor's question whether accused "handled" checks too ambiguous; accused could justifiably infer "handled" meant "touched").

falsely.[73] The test is whether the question, as the declarant objectively understood it, is falsely answered.[74]

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73. *See* United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983) (explaining jury must decide whether defendant committed perjury where there are multiple interpretations of ambiguous questions); United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980) (noting jury decides defendant's understanding of question).

If declarant's statement is ambiguous, the prosecutor must prove the declarant understood that the question had the particular meaning that rendered the answer false. *See, e.g.*, United States v. Maultasch, 596 F.2d 19, 26-27 (2d Cir. 1979) (explaining that question not specifically mentioning certain accounts unambiguous where accounts unlikely to have "skipped appellant's mind"); United States v. Wall, 371 F.2d 398, 399-400 (6th Cir. 1967) (noting that fact finder's first duty is determining which interpretation accused used, before determining veracity); Beckanstin v. United States, 232 F.2d 1, 4 (5th Cir. 1956) (determining that accused's false statement regarding graduating from M.I.T. excusable because accused had not grasped form of question).

A defendant who successfully proves she misunderstood the question may not be convicted under § 1621 or § 1623. *See, e.g.*, Beckanstin v. United States, 232 F.2d at 2-4 (explaining that declarant acquitted notwithstanding false statement, because court changed line of questioning before declarant could correct error, and because declarant's attorney claimed error was trivial); United States v. Rose, 215 F.2d 617, 622-23 (3d Cir. 1954) (noting absence of intent to deceive negates corrupt motive); United States v. Clifford, 426 F. Supp. 696, 706 (E.D.N.Y. 1976) (deciding that there can be no perjury prosecution if question's intent is ambiguous when asked); United States v. Ceccerelli, 350 F. Supp. 475, 478 (W.D. Pa. 1972) (holding questions about whether accused "met with" certain individuals on "regular" basis unambiguous in context asked); United States v. Sweig, 316 F. Supp. 1148, 1164 (S.D.N.Y. 1970) (explaining that unresponsive answer reflecting misunderstanding rather than perjury may not defeat indictment, but may affect whether case should go to jury).

Likewise, the fact finder must determine, by an objective test, whether the declarant's ambiguous answer is false. *See* United States v. Lighte, 782 F.2d 367, 373 (2d Cir. 1986) (explaining that jury best determines defendant's meaning); United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983) (noting that jury best decides whether defendant's ambiguous answer regarding identification of stamps was false); United States v. Bell, 623 F.2d 1132, 1136 (5th Cir. 1980) (holding that jury decides defendant's understanding of question).

74. *See* United States v. Lighte, 782 F.2d 367, 372 (2d Cir. 1986). A declarant seeking to avoid perjury conviction will naturally allege "understanding" a question in a manner that the answer, based on this "understanding," was truthful. In either situation, the fact finder should discern the meaning given the question and the answer's veracity within the context of the entire line of questioning. *Id.* at 373 (explaining that jury may look at entire line of questioning concerning knowledge of trust account to determine if declarant answered falsely.) Extrinsic evidence may also be considered. *Id.*

The Supreme Court held that § 1621 "does not make it a [crime] for a witness to wilfully state a material matter that implies any material matter that he does not believe to be true." Brontson v. United States, 409 U.S. 352, 357-58 (1973). In explaining its holding the court reasoned:

> A jury should not be permitted to engage in conjecture of whether any unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether he does not believe his answer to be true.

Id. at 358-60.

Carelessness, honest mistake, inadvertence, misunderstanding, or neglect in falsely answering preclude a perjury conviction, because the witness lacks knowing deceit in these circumstances. *See, e.g.*, United States v. Reveron Martinez, 836 F.2d 684, 689 (1st Cir. 1988) (explaining that mere

3. The Falsity Element

Falsity is perjury's most basic element. Whether the declarant made the false statement in reply to a question or offered it voluntarily is irrelevant.[75] The perjury indictment need not ascertain the actual truth. Instead, the prosecution need only assert that certain statements were false.[76] In *Brontson v. United States*,[77] the United States Supreme Court held that a perjury conviction could not be based on unresponsive testimony deemed untrue by

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mistake is insufficient ground on which to base perjury conviction); United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982) (noting that false answer given because of honest mistake, carelessness, neglect, or misunderstanding does not constitute false swearing); United States v. Kehoe, 562 F.2d 65, 69 (1st Cir. 1977) (deciding that false answer given because of inadvertence, honest mistake, carelessness, neglect, or misunderstanding is not perjury); United States v. Sweig, 316 F.Supp. 1148, 1164 (S.D.N.Y. 1970) (holding that nonresponsive answer may reflect misunderstanding rather than perjury).

Perjury conviction in such situations is contrary to the common law view, adopted by the Supreme Court, that perjury's punishment should not be so harsh as to discourage potential witnesses from coming forward and testifying. Brontson v. United States, 409 U.S. at 359-60. Additionally, courts have held that a non-responsive answer reflects a misunderstanding rather than a deliberate falsification. *See* United States v. Tonelli, 577 F.2d 194, 197-98 (3d Cir. 1978) (explaining when unresponsive answer is facially true, fact finder should not consider whether it is intended to mislead questioner, but should determine whether declarant does not believe answer's truth); United States v. Sweig, 316 F. Supp. at 1164 (noting that defendant's misunderstanding of questioner's assertion as question generated unresponsive answer).

75. *See, e.g.*, United States v. McComb, 744 F.2d 555, 565 n.11 (7th Cir. 1984) (explaining that declarant, who proffered false testimony relating to loan, is not necessarily immune from prosecution).

76. *See, e.g.*, United States v. DeCoito, 764 F.2d 690, 693 (9th Cir. 1985) (explaining that indictment must simply state that part of the declarant's testimony was false). At statement of the precise untruths, however, must be alleged with sufficient clarity. *See* United States v. Cowley, 720 F.2d 1037, 1044 (9th Cir. 1983) (overturning conviction because indictment failed to distinguish objective truth from supposedly false statements), *cert. denied*, 465 U.S. 1029 (1984); United States v. Slawik, 548 F.2d 75, 83-84 (3d Cir. 1977) (same). Additionally, § 1623(c) provides that where two or more inconsistent statements exist, to the degree that one is false, the government need not determine which statement is false. *In re* Grand Jury Proceedings, 644 F.2d 348, 350 (5th Cir. 1981) (interpreting 18 U.S.C. § 1623(c)).

The allegedly perjurious statement, however, must constitute a factual assertion. *See* Kolaski v. United States, 362 F.2d 847, 848 (5th Cir. 1966) (dismissing information when factual assertion not possibly true). Each false statement a defendant makes constitutes a separate perjury incident. That separate lies before a tribunal are punishable is a well established rule. *See* United States v. McComb, 744 F.2d 555, 565 (7th Cir. 1984) (convicting former state congressman who lied twice regarding campaign contributions under investigation of each perjury count); United States v. De La Torre, 634 F.2d 792, 794 (5th Cir. 1981) (allowing defendant charged with five separate perjury counts based on separate statements given at one trial); United States v. Doulin, 538 F.2d 466, 471 (2d Cir.) (deciding that separate lies before grand jury are punishable when each critical inquiry is directed to separate facet of overall transaction), *cert. denied*, 429 U.S. 895 (1976); United States v. Masters, 484 F.2d 1251, 1253 (10th Cir. 1973) (explaining that indictment properly charged six perjury counts where each was based on response to question regarding separate fact).

77. 409 U.S. 352 (1973).

negative implication.[78] Although *Brontson* concerned a section 1621 conviction, the Court's rationale has been extended to section 1623.[79]

Most courts have adopted *Brontson*'s rationale.[80] The Fifth Circuit,

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78. Brontson v. United States, 409 U.S. 352, 362 (1973). The Court stated that if the declarant speaks the literal truth, her answer—even if calculated to evade or mislead—is not grounds for a perjury prosecution. *Id.* at 360, 362.

In narrowly interpreting § 1621, the *Brontson* Court placed the burden on the questioner to eliminate the possibility of evasion and require responsive answers by "pin[ning] the witness down to the specific object of . . . inquiry." *See* Brontson v. United States, 409 U.S. at 360-62 (explaining that precise questioning imperative as predicate for perjury offense); United States v. Eddy, 737 F.2d 564, 567 (6th Cir. 1984). *See also* United States v. Haimowitz, 725 F.2d 1561, 1580-81 (11th Cir.) (following *Brontson*), *cert. denied*, 469 U.S. 1072 (1984); United States v. Tonelli, 577 F.2d 194, 198 (3rd Cir. 1978) (noting that a charge of perjury is not a substitute for a prosecutor's careful questioning); United States v. Brumley, 560 F.2d 1268, 1277 (5th Cir. 1977) (explaining that perjury conviction failed for lack of specificity, critical question, and unequivocal answer).

The Sixth Circuit applied *Brontson's* rule to protect from perjury a defendant's testimony that was literally true, but unresponsive to the examiner's question. United States v. Eddy, 737 F.2d 564, 571 (6th Cir. 1984). *Eddy's* defendant was questioned regarding whether he submitted an official transcript or medical diploma in order to defraud the Navy as to his actual credentials. *Id.* at 568-69. Eddy said "no" to both charges. *Id.* His answers were found literally true because the documents were falsities and not "official" items. *Id.* The court held that the defendant's misleading answers were literally true in light of the meaning Eddy, not his interrogators, attributed to questions. *Id.* at 571.

79. *See, e.g.*, United States v. Eddy, 737 F.2d at 567; United States v. Cowley, 720 F.2d 1037, 1042 (9th Cir. 1983); United States v. Finucan, 708 F.2d 838, 847 (1st Cir. 1983).

80. *See* United States v. Finucan, 708 F.2d 838, 846-48 (1st Cir. 1983) (applying *Brontson* and dismissing indictment where government charge based on false implications of statement not false in itself); United States v. Slawik, 548 F.2d 75, 86 (3d Cir. 1977) (explaining that impressive questioning cannot be predicate for perjury conviction); *see also* United States v. Niemiec, 611 F.2d 1207, 1210 (7th Cir. 1980) (explaining that *Brontson* standard was not violated where question was direct and precise and answers were responsive); United States v. Vesaas, 586 F.2d 101, 104 (8th Cir. 1978) (noting jury cannot convict for unresponsive but literally true declaration); United States v. Laikin, 583 F.2d 968, 970 (7th Cir. 1978) (deciding that different answers to slightly different questions were consistent with *Brontson*'s literal truth standard); United States v. Tonelli, 577 F.2d 194, 196-98 (3rd Cir. 1978) (requiring acquittal where failure to specifically allege falsehoods charged and to ask specific, unambiguous questions); United States v. Abrams, 568 F.2d 411, 421-23 (5th Cir.) (requiring acquittal where questioner failed to pin down witness and prove answers' falsity), *cert. denied*, 437 U.S. 903 (1978); United States v. Corr, 543 F.2d 1042, 1049 (2d Cir. 1976) (holding that *Brontson* was not intended to apply to false responses, even if unresponsive); United States v. Cook, 489 F.2d 286, 287 (9th Cir. 1976) (ruling that one cannot base perjury conviction on implied false information from literally true responses).

In each case, courts carefully scrutinize the defendant's testimony to determine the specificity of the prosecutor's questions and the literal truthfulness of the defendant's answers. *See* Brontson v. United States, 409 U.S. 352, 354-55 (1973). In *Brontson*, the defendant did not commit perjury where his answers, although unresponsive and misleading, were not untrue. The testimony was as follows:

Q. Do you have any bank accounts in Swiss banks, Mr. Brontson?

A. No, sir.

however, in *United States v. Adi*,[81] lessened the questioner's burden in situations where the subject of the inquiry is apparent to the declarant.[82] The Central District of California further extended *Brontson*'s reasoning in *United States v. Spalliero*,[83] to encompass responsive, but equivocal, answers to unambiguous questions.[84]

Q. Have you ever?
A. The company had an account there for about six months, in Zurich.
Q. Have you any nominees who have bank accounts in Swiss banks?
A. No, sir.
Q. Have you ever?
A. No, sir.

Id. at 354.

The Court stated that it was undisputed that the defendant's answers were literally truthful for three reasons. First, the defendant did not, when questioned, have a Swiss bank account. Second, his company had the Swiss account described (although defendant also had a personal account in the past). Third, neither at the time of nor before the questioning did the defendant have nominees with Swiss accounts. *Id.* at 354-55. *See also* United States v. Eddy, 77 F.2d 564, 569 (6th Cir. 1984) (explaining when defendant's responses were literally true in light of meaning he attributed to questions, perjury conviction could not stand).

The perjury charge's dismissal is not required in circumstances where the answer is demonstrably false or the questions are precise and unequivocal. *See* United States v. Haldeman, 559 F.2d 31, 104 (D.C. Cir. 1976) (affirming perjury conviction where untrue answers supplied); United States v. Corr, 543 F.2d 1042, 1049 (2d Cir. 1976) (holding that unresponsive but false testimony violates § 1621). *See also* United States v. Niemiec, 611 F.2d 1207, 1210 (7th Cir. 1980) (affirming perjury conviction where questioning direct and precise); United States v. Anfield, 539 F.2d 674, 678-79 (9th Cir. 1976) (failing to dismiss perjury charge proper because questions were precise, simple, direct, and unequivocal).

81. 759 F.2d 404 (5th Cir. 1985).

82. In *Adi*, a federal grand jury questioned Adi regarding false statements made in a Bureau of Alcohol, Tobacco and Firearms "Firearms Transaction Record." United States v. Adi, 759 F.2d 404, 410 (5th Cir. 1985). Adi, the purchaser of the weapon in question, paid a friend to acquire firearms and to complete the required report as if the friend were the actual purchaser. *Id.* at 406. In arguing the questions were ambiguous, Adi contended that the questions were "devoid of any facts concerning the precise time, date and place to which the inquiry was directed." The line of questioning was as follows:

Q. But were you with this June fellow when he was buying guns?
A. (Nods [sic] head) No.
Q. So you didn't participate in any of the conversation any way?
A. What I am saying is I don't even know he was buying anything . . .

Id. at 410.

The court rejected this argument because the time frame referred to in the incident was clear. *Id.* Another Fifth Circuit case supported the court's proposition. That court stated that "[i]f [an] answer to an . . . ambiguous question [satisfies] the jury . . . that the defendant knowingly made a false statement, then the statement may serve as the predicate for the offense." United States v. Thompson, 637 F.2d 267, 270 (5th Cir. 1981).

83. 602 F. Supp. 417 (C.D. Cal. 1984).

84. United States v. Spalliero, 602 F. Supp. 417, 420-22 (C.D. Cal. 1984). Unlike *Brontson* and subsequent Ninth Circuit cases, *Spalliero* presented the problem of questions that contain a double negative. *Id.* at 420-24; *see, e.g.*, United States v. Cowley, 720 F.2d 1037 (9th Cir. 1983); United States v. Matthews, 589 F.2d 442 (9th Cir. 1978), *cert. denied*, 440 U.S. 972 (1979); United

The jury decides whether an answer is false depending upon surrounding circumstances[85] or possible interpretations of ambiguous questions.[86] The test is what the question objectively meant to the declarant at the time of questioning, and not the declarant's subjective belief as to its meaning.[87] The use of false documents in testimony is also grounds for a section 1623 conviction.[88]

States v. Cash, 522 F.2d 1025 (9th Cir. 1975),

The examiner's questions included: "You have never paid him any money?" *Id.* at 423. After one non-responsive reply, the examiner asked, "Is the answer no, sir?" The declarant said "No." *Id.* The court noted that a "yes" or "no" answer is ambiguous to such a question. *Id.* at 424. Although the implied response was false, a precise grammatical reading of the declarant's reply revealed a literally true answer. *Id.* at 422. However, relying on *Brontson*, the court stated that it was the questioner's responsibility to ask clear questions and to clarify ambiguous answers. *Id.* *See also* United States v. Cook, 489 F.2d 286, 287 (9th Cir. 1973) ("A precise grammatical reading of the challenged question and answer demonstrates that [declarant's] answer was literally true.").

85. *See* United States v. Larranaga, 787 F.2d 489, 495-96 (10th Cir. 1986) (surrounding circumstances indicated that had defendant read notes he would have known they did not accurately reflect another party's involvement in business meetings).

86. *See, e.g.*, United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983) (explaining that jury decides if answer to ambiguous question is perjury); United States v. Slawik, 548 F.2d 75, 85-86 (3d Cir. 1977) (noting that where answer would be true on one construction of ambiguous question but not true on another, jury must decide answer's veracity).

87. *See* United States v. Fulbright, 804 F.2d 847, 851 (5th Cir. 1986) (explaining that facially clear words are understood in their common sense and usage and deciding jury could conclude that defendant's reference to "New Orleans" not only included city itself but also suburb); United States v. Eddy, 737 F.2d 564, 567-69 (6th Cir. 1984) (noting that to support conviction for falsely denying submittal of official documents to navy medical programs recruiter, it must be determined defendant was fully aware of actual meaning behind examiner's questions); United States v. Wall, 371 F.2d 398, 400 (6th Cir. 1967) (deciding that it is necessary to determine what question meant to defendant when he answered).

Perjury convictions must be based on the declarant's false statement, not on a particular interpretation given to the statement by a questioner. *See* United States v. Lighte, 782 F.2d 367, 374 (2d Cir. 1986) (explaining that truth or falsity of declarant's statement concerning certain bank accounts depends on objective meaning of examiner's questions, not examiner's interpretations of declarant's answers).

88. Section 1623(a) provides that "whoever . . . makes or uses any . . . information, including any book, paper, document, record, or other material, knowing the same to contain any false material declaration, shall be fined . . . or imprisoned . . . or both." 18 U.S.C. §1623(a) (1988).

Courts focus on the statutory meaning of "uses" and have rejected a narrow reading that would require charged parties to deliver the documents to the grand jury and to rely on them for their testimony. *See* United States v. Dudley, 581 F.2d 1193, 1197-98 (5th Cir. 1978) (explaining that physical delivery unnecessary when defendant knew document contained false material declarations; testimony as to falsity constituted use); United States v. Pommerening, 500 F.2d 92, 98 (10th Cir.) (falsifying subpoenaed documents and relying on them to testify constitutes use of records), *cert. denied*, 419 U.S. 1088 (1974). Rather, courts have found that false testimony based on altered documents constitutes the documents' "use" within the statute's meaning. *See* United States v. Pommerening, 500 F.2d at 98 (explaining that documents' delivery unnecessary for use; defendant only need base testimony on documents).

4. The Materiality Requirement

Both sections 1621 and 1623 require that false statements be material for a conviction.[89] The test for materiality is broad.[90] If the statement was prone to hinder or obstruct the investigation's progress,[91] or if the testimony could have influenced the tribunal[92] with respect to matters the body is competent to

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89. 18 U.S.C. §§ 1621, 1623 (1988); *see, e.g.*, United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985); United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984); United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983); United States v. Ostertag, 671 F.2d 262, 264 (8th Cir. 1982); United States v. Thompson, 637 F.2d 267, 268 (5th Cir. 1981); United States v. Damato, 554 F.2d 1371, 1372 (5th Cir. 1977).

A materiality determination is a legal question the court decides. United States v. Flowers, 813 F.2d 1320, 1325 (4th Cir. 1987); *see, e.g.*, Sinclair v. United States, 279 U.S. 263, 298-99 (1929); United States v. Larranaga, 787 F.2d 489, 494 (10th Cir. 1986); United States v. Bednar, 728 F.2d 1043, 1047 (8th Cir.) *cert. denied*, 469 U.S. 827 (1984); United States v. Carter, 721 F.2d 1514, 1535 (11th Cir.), *cert. denied subnom*, Morris v. United States, 469 U.S. 819 (1984); United States v. Cunningham, 723 F.2d 217, 226 (2d Cir. 1983), *cert. denied*, 466 U.S. 951 (1984); United States v. Bridges, 717 F.2d 1444, 1448 (D.C. Cir. 1983) *cert. denied*, 465 U.S. 1036 (1984); United States v. Finucan, 708 F.2d 838, 848 (5th Cir. 1978); United States v. Howard, 560 F.2d 281 (7th Cir. 1977); Larocca v. United States, 337 F.2d 39 (8th Cir. 1964).

Section 1623 similarly applies § 1621's materiality tests. *See* United States v. Mancuso, 485 F.2d 275, 280 n.15 (2d Cir. 1973) (explaining that there is no indication in § 1623 that Congress intended any change in the nature of the materiality requirement). *See also* United States v. Sun Myung Moon, 718 F.2d 1210, 1237 (2d Cir. 1983) (explaining that because materiality is a legal question, appellate court may substitute judgment for that of lower court on materiality issue), *cert. denied*, 466 U.S. 971 (1984).

90. *See* United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984) (defining materiality broadly); United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983).

91. *See* United States v. Brimberry, 779 F.2d 1339, 1349-50 (8th Cir. 1985) (finding materiality respecting denial of knowledge of legitimate stock accounts because such denial delayed investigation of fraud), *cert. denied*, 481 U.S. 1039 (1987); United States v. Moeckly, 769 F.2d 453, 465 (8th Cir. 1985) (finding materiality respecting false testimony concerning location of pilot's log book in drug smuggling investigation), *cert. denied*, 476 U.S. 1104 (1986); United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984) (explaining that statement that has effect or tendency to impede, influence, or dissuade tribunal or grand jury from pursuing its investigation material); United States v. Bednar, 728 F.2d 1043, 1047 (8th Cir.) (hindering investigation of embezzlement scheme found material), *cert. denied*, 469 U.S. 827 (1984); United States v. Varsalona, 710 F.2d 418, 421 (8th Cir. 1983) (noting that false statement not made immaterial by fact that no crime was actually committed); United States v. Thompson, 637 F.2d 267, 268 (5th Cir. 1981) (finding testimony was material because it had natural effect or tendency to influence, impede, or dissuade grand jury from indicting); United States v. Dudley, 581 F.2d 1193, 1198 (5th Cir. 1978) (finding materiality where defendant's testimony had "natural effect" of dissuading grand jury); United States v. Demauro, 581 F.2d 50, 53 (2d Cir. 1978) (holding testimony to grand jury concerning complex "money-changing" was material because it was capable of impeding proceedings); United States v. Crocker, 568 F.2d 1049, 1057 (2d Cir. 1977) (deciding defendant's statement, in light of his position in music industry, sufficient to establish that false testimony would impede grand jury).

92. *See, e.g.*, United States v. Pandozzi, 878 F.2d 1526, 1533 (1st Cir. 1989); United States v. Flowers, 813 F.2d 1320, 1325 (4th Cir. 1987); United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985); United States v. Thompson, 637 F.2d 267, 268 (5th Cir. 1981); United States v. Damato, 554 F.2d 1371, 1372-73 (5th Cir. 1977); *see also* United States v. Neal, 822 F.2d 1502,

consider,[93] then the testimony is material.[94] A false statement may be material although it relates to collateral issues[95] or other proper matters of

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1506 (10th Cir. 1987) (deeming material defendant's false statement that misled and impeded grand jury investigation); United States v. Anderson, 798 F.2d 919, 929 (7th Cir. 1986) (explaining that defendant judge's false statements concerning disposition of DUI cases material because hindered administration of justice); United States v. Molinares, 700 F.2d 647 (11th Cir. 1983) (noting that test of materiality satisfied if statements may be material to matters that might influence outcome of decision); United States v. Giarratano, 622 F.2d 153, 156 (5th Cir. 1980) (deciding that testimony material when it influences investigating body's decision); United States v. Fayer, 573 F.2d 741, 745 (2d Cir.) (holding that testimony influenced trial judge because showed defendant's knowledge of client's guilt), *cert. denied*, 429 U.S. 830 (1978); United States v. Whimpy, 531 F.2d 768, 770 (6th Cir. 1976) ("[E]ssentially anything that could influence or mislead the trial court or the jury is considered material . . . ."); United States v. Lazaros, 480 F.2d 174, 177 (6th Cir. 1973) (ruling that materiality's test is ability to influence tribunal), *cert. denied*, 415 U.S. 914 (1974); United States v. Paris, 448 F.2d 1277, 1278 (8th Cir. 1971) (finding testimony material if jury would have acquitted had it believed defendant's false statements).

The difference between "the prone to hinder or obstruct" standard and the "tendency to influence" standard is really semantics. Different circuits have worded the test differently, but have used the same analysis. *See* United States v. Lazaros, 480 F.2d at 177 (using "influencing the tribunal" and "tendency to impede" language interchangeably).

The Second Circuit disagrees, however, regarding the stringency of the test to be used. *Compare* United States v. Mancuso, 485 F.2d 275, 281 (2d Cir. 1973) (finding materiality if it *could* conceivably aid investigation) *with* United States v. Freedman, 445 F.2d 1220, 1227 (2d Cir. 1971) (finding material if it *would* aid investigation). Because of this difference, many Second Circuit courts limit *Freedman* to its facts. *E.g.*, United States v. Demauro, 581 F.2d 50, 53 n.1 (2d Cir. 1978); United States v. Doulin, 538 F.2d 466, 470 n.3 (2d Cir.), *cert. denied*, 429 U.S. 895 (1976).

93. *E.g.*, United States v. Abrams, 568 F.2d 411, 420 (5th Cir. 1978); United States v. Phillips, 540 F.2d 319, 332 (8th Cir. 1976); United States v. McFarland, 371 F.2d 701 (2d Cir. 1966), *cert. denied*, 387 U.S. 906 (1967) LaRocca v. United States, 337 F.2d 39, 43 (8th Cir. 1964).

94. Further, the mere potential to impede, or to influence, has been found to establish materiality, as have questions upon a witness' cross-examination. *See* United States v. McComb, 744 F.2d 555, 563 (7th Cir. 1984) (explaining that defendant's false testimony to grand jury about contributions to political action committee potentially impedes investigation); United States v. Molinares, 700 F.2d 647, 653 (11th Cir. 1983) (noting that materiality test is satisfied if statements may be material to matters that might influence outcome of decision); United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977) (deciding that grand jury investigation of bombing was potentially impeded by defendant's false statements as to his whereabouts); *see also* United States v. Abrams, 568 F.2d 411, 421 (5th Cir.) (explaining that false statement did not impede but influenced fraud investigation), *cert. denied*, 437 U.S. 903 (1978). *See also* United States v. Finucan, 708 F.2d 838, 848 (1st Cir. 1983) (noting that even though not dispositive of an issue before a tribunal, a statement could be material if it had potential to mislead the tribunal); *cf.* Harrell v. United States, 220 F.2d 516, 519 (5th Cir. 1955) (explaining that defendant's false testimony suppressed important evidence concerning content of liquor still operator's statements to sheriff).

95. *See, e.g.*, United States v. Thompson, 637 F.2d 267, 268 n.2 (5th Cir. 1981) (explaining that collateral statements sufficiently material if influential on grand jury's decision); United States v. Abrams, 568 F.2d 411, 420 (5th Cir.) (finding material "any proper matter of inquiry"), *cert. denied*, 437 U.S. 903 (1978); United States v. Damato, 554 F.2d 1371, 1373 (5th Cir. 1977) (finding material collateral matters "that might influence the court . . . in the decision of the questions before the tribunal"); United States v. Anfield, 539 F.2d 674, 677-78 (9th Cir. 1976)

inquiry,[96] including credibility.[97] The government has the burden of proving that the defendant's statements are material to issues before the grand jury.[98] Having analyzed how each statute operates, the most important difference between the statutes—the availability of defenses such as retraction—should be examined.

(noting that requirement is only that false declarations have a "tendency to influence, impede or hamper a tribunal").

96. *See* United States v. Abrams, 568 F.2d at 420 (explaining that false testimony was material to proper matter of inquiry in insurance claim fraud investigation); United States v. Freedman, 445 F.2d 1220, 1226-27 (2d Cir. 1971) (noting that it must be shown that truthful answer would have been probative to inquiry, causing further investigation).

97. *See* United States v. Scivola, 766 F.2d 37, 44 (1st Cir. 1985) (explaining that difference between number of chairs defendant admitted to having and number alleged by government was material to defendant's credibility); Harrell v. United States, 220 F.2d 516, 519 (5th Cir. 1955) (finding defendant's statements discredited chief prosecution material); United States v. Weiler, 143 F.2d 204, 205-06 (3d Cir. 1944) (explaining that defendant's statements regarding actions that relate to explanation material to credibility), *rev'd on other grounds*, 323 U.S. 606 (1945). *But see* United States v. Freedman, 445 F.2d 1220, 1226-27 (2d Cir. 1971) (explaining that statements must have probative value connected with inquiry's scope).

Materiality's determination depends upon the circumstances in which the testimony was given. *See* United States v. Bednar, 728 F.2d 1043, 1047 (8th Cir.) (explaining that testimony regarding false entries in firm books was material to allegation of embezzlement of securities brokerage firm) *cert. denied*, 469 U.S. 827 (1984); United States v. Armilio, 705 F.2d 939, 941 (8th Cir.) (noting that testimony regarding purchase of handgun was material to possession of firearms charge), *cert. denied*, 464 U.S. 891 (1983); United States v. Howard, 560 F.2d 281, 284 (7th Cir. 1977) (deciding that materiality should be determined at time of investigation); United States v. Germillion, 464 F.2d 901, 905 (5th Cir.) ("materiality need only be established as of the time the answers were given"), *cert, denied*, 409 U.S. 1085 (1972); United States v. Lococo, 450 F.2d 1196, 1198 n.3 (9th Cir. 1971) (holding that false testimony material even if later proven that truthful statement would not have helped grand jury), *cert. denied*, 406 U.S. 945 (1972); United States v. Stone, 429 F.2d 138, 140-41 (2d Cir. 1970) (ruling that materiality refers merely to relationship between interrogation and grand jury's objective; thus it must be established as of time witness' answers given).

98. *E.g.*, United States v. Bednar, 728 F.2d 1043, 1047 (8th Cir.), *cert. denied*, 469 U.S. 827 (1984); United States v. Ostertag, 671 F.2d 262, 264 (8th Cir. 1982). For example, the Fourth Circuit stated "the government must establish a nexus between the [grand jury's] investigation and [a defendant's] false declaration." United States v. Farnham, 791 F.2d 331, 334 (4th Cir. 1986). The government need not prove that the testimony impeded the grand jury. Nevertheless, "there must . . . be a minimal showing that the testimony at issue had the capacity to affect the outcome of the grand jury's investigative proceedings." *See* United States v. Friedhaber, 826 F.2d 284, 286 (4th Cir. 1987), *reh'g granted*, 856 F.2d 640 (4th Cir. 1988) (en banc); United States v. Swift, 809 F.2d 320, 323 (6th Cir. 1987) ("False statements to a grand jury satisfy the materiality requirement [of § 1623] if a truthful statement might have assisted or influenced the grand jury in its investigation. That [the] false statement did not succeed in leading the grand jury astray is irrelevant."). *See also* United States v. Pandozzi, 878 F.2d 1526, 1533 (1st Cir. 1989) ("the effect necessary to meet the materiality test is relatively slight") (citing United States v. Moore, 613 F.2d 1029, 1037-38 (D.C. Cir. 1979)); Bednar v. United States, 651 F. Supp. 672, 673 (E.D. Mo. 1986) ("alleged perjurious statements must be considered within the context of the grand jury's investigation"), *aff'd*, 855 F.2d 859 (8th Cir. 1988).

B. *Defenses to Perjury*

1. Retraction

Retraction is not a bar to section 1621 prosecution,[99] although the retraction may mitigate the intent element.[100] Section 1623(d) changed the common law rule that retraction is not a defense to perjury.[101] Unlike section 1621, retraction may bar section 1623 prosecution.[102] Although Congress enacted section 1623 to cover perjury occurring before a court or grand jury, a successful section 1623 retraction does not preclude section 1621 prosecution.[103] Consequently, a declarant who adheres to section 1623's limited retraction defense may nevertheless be prosecuted under the general perjury statute, section 1621. The problem is that a declarant who commits section 1623 perjury has no incentive to correct the perjury so long as the declarant may still be incarcerated for section 1621 perjury. Such prosecution goes against the basic goal of perjury law, which is to *encourage* truthful

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99. 18 U.S.C. § 1621 provides no retraction remedy. *See* United States v. Norris, 300 U.S. 564 (1937) (explaining that retraction does not bar § 1621 prosecution); United States v. Swainson, 548 F.2d 657 (6th Cir. 1977) (finding defendant guilty of making false statements under oath before grand jury); United States v. Del Toro, 513 F.2d 656, 665 (2d Cir. 1975) (deciding that prompt retraction does not excuse § 1621 perjury violation), *cert. denied*, 423 U.S. 826 (1975).

100. United States v. Kahn, 472 F.2d 272, 284 (2d Cir. 1973) (explaining that retraction is relevant to show absence of intent to commit perjury). The defendant may, however, establish a defense by using the retracted testimony to prove an absence of intent in the prior statement, or that the prior statement was made mistakenly. *See* United States v. Lococo, 450 F.2d 1196 (9th Cir. 1971) (finding willingness to correct statement relevant to intent issue), *cert. denied*, 406 U.S. 945 (1972); *see also* Beckanstin v. United States, 232 F.2d 1 (5th Cir. 1956) (explaining that defendant's answer that he graduated from M.I.T., when he merely attended the school, established no deceptive intent because he attempted to correct the testimony, but his attorney stated that the mistake was unimportant).

Conversely, if the previous statement was obviously false or would be proven false, a subsequent retraction will not prevent a § 1621 conviction. *See* United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977) (explaining that retraction came after it became manifest false statements would be exposed).

101. United States v. Roche, No. 91-595-13, 1992 U.S. Dist. LEXIS 9062, at *9 (E.D. Penn. June 5, 1992).

102. *See* 18 U.S.C. § 1623(d) (1988).

103. The federal government has argued that because § 1623 is "'an additional felony provision' . . . intended to 'supplement, not supplant existing perjury provisions,'" a defendant with a § 1623(d) defense could be prosecuted for § 1621 perjury. United States v. Kahn, 472 F.2d 272, 283 & n.8 (2d Cir.) (citing SENATE REPORT, *supra* note 16 at 150), *cert. denied*, 411 U.S. 982 (1973). Legislative history, however, states that § 1623(d) "serves as an inducement . . . to give truthful testimony by permitting him voluntarily to correct a false statement *without incurring the risk [of] prosecution [sic]* by doing so." HOUSE REPORT, *supra* note 10, at 48 (emphasis added). The Second Circuit noted that "we find . . . disturbing . . . the government employing §1621 whenever a recantation exists, and §1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position." United States v. Kahn, 472 F.2d at 283.

testimony.

Section 1623 imposes four conditions on this limited defense.[104] First, the retraction must be in the same continuous court or grand jury proceeding in which the false declaration was made.[105] Second, the statement, when retracted, must not have substantially affected the proceeding.[106] Third, at the time of the declaration, it must not have become manifest that the falsity would be exposed.[107] Finally, the declarant must admit the declaration's falsity.[108] Although the retraction defense is examined later,[109] section 1623's retraction defense has been virtually unavailable because a declarant who commits section 1623 perjury may be prosecuted under the general perjury statute, section 1621. Thus, until Congress changes the federal perjury statutes, section 1623's limited retraction defense will remain meaningless.

Although arguments regarding the constitutionality of retractions have been made, they have been largely unsuccessful.[110] Retraction does not violate the Fifth Amendment merely because a declarant availing herself of the defense would necessarily incriminate herself.[111] Additionally, because no right to retract exists, a witness is not deprived of due process when the government

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104. For an effective retraction the accused must come forward and explain unambiguously and specifically which prior answers were false and in what respect they were false. *See* United States v. Goguen, 723 F.2d 1012, 1017 (1st Cir. 1983) (explaining that § 1623 requires outright repudiation of prior false testimony). Neither § 1623 nor due process principles require the prosecution to inform the declarant of the right to retract. *See* United States v. Scrimgeour, 636 F.2d at 1026-27 (explaining that due process does not require government to advise a grand jury witness of right to retract).

Further, the witness has no absolute right to notification from the prosecution that the testimony has become manifest. *Id.* The prosecutor may have a responsibility to advise a witness that the testimony has raised doubts regarding veracity. *See* United States v. Beasley, 809 F.2d 1273 (7th Cir. 1987) (explaining that possible duty to warn is not inconsistent with statute because, if serious doubts exist as to veracity of testimony, prosecutor may have duty to inform witness).

Subsequent testimony merely casting doubt on the perjurious statement's truth does not constitute a retraction barring prosecution. United States v. Anfield, 539 F.2d 674, 679 (9th Cir. 1976) (explaining that witness did not retract but only cast doubt on what was perjurious). The requirement that the retraction occur in the same continuous proceeding has been applied to bar retractions made in an affidavit subsequent to the grand jury proceedings in which the initial false statement was made. *See* United States v. Krough, 366 F. Supp. 1255 (D.D.C. 1973) (deciding that grand jury had already acted at time of retraction).

105. 18 U.S.C. § 1623 (1988).

106. *Id.*

107. *Id.*

108. *Id.*

109. *See infra* notes 158-64 and accompanying text.

110. United States v. Mitchell, 397 F. Supp. 166, 175 (D.D.C. 1974) (explaining that testimony's retraction in "Watergate affair" not unconstitutional even if admission of truth, that is retraction's prerequisite, would admit liability for perjury prosecution).

111. *Id.*

shows immediately following testimony that perjury has been committed, thus denying an opportunity to retract.[112] Although retraction is the only statutorily recognized defense, other defenses currently available to a declarant charged under either section 1621 or section 1623 should be analyzed.

2. Other Defenses

The body in front of which the perjury occurred—typically a grand jury—must have jurisdiction over the matters investigated.[113] Flaws in the indictment can generate numerous defenses, such as failure to set forth the precise falsehood alleged and the falsehood's factual basis with sufficient clarity to allow a jury to determine its truth.[114] Several other defenses are available,

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112. *See* United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981) (explaining that no retraction right exists that would prohibit prosecutor from immediately telling declarant of evidence of perjury). Whether a retraction is timely and effective is a legal matter decided by a court. *See* United States v. Goguen, 723 F.2d 1012, 1017 (1st Cir. 1984) (noting that whether oral retraction to Federal Bureau of Alcohol, Tobacco, and Firearms special agent, which occurred two months after defendant's grand jury testimony, was timely and effective was legal matter); United States v. D'Auria, 672 F.2d 1085, 1091 (2d Cir. 1982) (deciding whether valid offer to retract testimony has been made to grand jury investigating illegal payoffs by insurance agency to political figures was legal issue to be decided by court). The issue must be raised before trial or the opportunity to do so is lost. *See* United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981) (explaining that retraction must be raised before trial to jurisdictionally bar prosecution and if rejected retraction issue may not be argued to jury).

113. *See* Brown v. United States, 245 F.2d 549, 552 (8th Cir. 1957) (explaining that because grand jury lacked authority to inquire into offenses committed outside its jurisdiction, false answers given by declarant not considered perjury). Venue is only proper in the district where the statement is uttered. United States v. Reed, 601 F. Supp. 685, 722-23 (S.D.N.Y. 1985). Because of the wide latitude given grand juries to investigate, generally a defense alleging the defendant would not have been summoned to testify absent a purpose of procuring the declarant's indictment will be ineffective. *See* United States v. Vesich, 724 F.2d 451, 460-61 (5th Cir. 1984) (explaining that grand jury investigation was not used as means to elicit perjury from defendant by calling him to testify about particular conversation, despite fact that grand jury possessed conversation's recording); *see also* United States v. Mandujano, 425 U.S. 564, 583 (1976) (explaining that grand jury did not commit entrapment or abuse of process by calling defendant to testify).

114. *See* United States v. Tonelli, 577 F.2d 194, 200 (3d Cir. 1978) (explaining that imprecision in indictment rendered review of materiality impossible); United States v. Slawik, 548 F.2d 75, 83 (3d Cir. 1977). *But see* United States v. Cole, 784 F.2d 1225, 1227 (4th Cir. 1986) (noting that perjury indictments that alleged quoted testimony was perjurious without disclosing nature of grand jury proceedings or how testimony was material were sufficient); United States v. Ras, 713 F.2d 311, 318 (7th Cir. 1983) (deciding that indictment does not require perjured testimony's exact words; testimony's substance suffices); United States v. Stassi, 401 F.2d 259 (5th Cir. 1968) (determining that it is not essential that all testimony in indictment be false), *rev'd on other grounds*, 394 U.S. 310 (1968); United States v. Weiss, 579 F.Supp. 1224, 1244 (S.D.N.Y. 1983) (finding that indictment sufficiently alleged manner in which grand jury deemed answers false).

The indictment's defects may also engender a duplicity and multiplicity defense. Indictments cannot be dismissed as multiplicitous (where an offense is charged in multiple counts) or duplicitous

including the "perjury trap"[115] where the prosecution deliberately uses judicial proceedings to secure perjured testimony,[116] selective enforcement,[117] vindictiveness,[118] and ambiguous questions.[119] Further, a successful

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(where multiple crimes are charged in one count) provided each count requires different evidence to establish a distinct offense. *See* United States v. Wood, 780 F.2d 955, 962-63 (11th Cir. 1986) (explaining that indictment's three counts not multiplicitous or duplicitous because each required different evidence to establish crime); United States v. Lazaros, 480 F.2d 174, 179 (6th Cir. 1973) (reversing conviction on perjury counts that did not state separate offenses); Gebhard v. United States, 422 F.2d 281, 290 (9th Cir. 1970) (reversing conviction on six of fifteen counts based on repeated and rephrased questions), *cert. denied*, 415 U.S. 914 (1974). *But see* United States v. Davis, 548 F.2d 840 (9th Cir. 1977) (upholding duplicitous count, but sentence for all counts not exceeding maximum allowable for a single count). To challenge the indictment's sufficiency, the defendant should move to withdraw the allegedly insufficient counts. United States v. Lighte, 782 F.2d 367, 373 (2d Cir. 1986) (explaining that defendant moved to withdraw insufficient counts).

115. For a discussion of the "perjury trap," see Bennett L. Gershman, *The "Perjury Trap,"* 129 U. PA. L. REV. 624 (1981) (analyzing the boundaries of legitimate grand jury interrogation and formulating guidelines that balance investigative process' needs and witnesses' rights).

116. In United States v. Simone, 627 F. Supp. 1264 (D.N.J. 1986) the declarant, Robert Simone, asserted the perjury trap defense and also alleged he was a selective prosecution victim. United States v. Simone, 627 F. Supp. 1264, 1266 (D.N.J. 1986). The court held that the answers "were not induced by governmental tactics or procedures so inherently unfair . . . as to constitute a prosecution for perjury in violation of the Due Process Clause of the Fifth Amendment." *Id.* at 1269-72. The questions put to Simone directly related to the question that was before the court. *Id.* at 1272. The court concluded that, having lied under oath, Simone could not be insulated from a perjury charge "solely because he said what the government anticipated he would say." *Id.* at 1271. The district court found that the government would have jeopardized an ongoing criminal investigation and perhaps undercover witnesses' lives if it disclosed that it had information contrary to the defendant's testimony. *Id.*

See United States v. Martino, 825 F.2d 754, 757 (3d Cir. 1987) (explaining that defendants claimed government brought them before grand jury exclusively to extract perjured testimony); United States v. Phillips, 540 F.2d 319, 332 n.8 (8th Cir.) (findings of prosecutorial misconduct unsupported by facts; no entrapment), *cert. denied*, 429 U.S. 1000 (1976); United States v. Caputo, 633 F. Supp. 1479, 1486-87 (E.D. Pa. 1986) (noting that defendants asserted prosecutor intentionally extracted statements known to be false; government may call witness with expectation he may commit perjury, but it may not call witness for purpose of securing perjury indictment), *rev'd on other grounds*, 825 F.2d 754 (3d Cir. 1987). *But see* United States v. Taylor, 881 F.2d 840 (9th Cir. 1989) (refusing to recognize "perjury trap" doctrine).

117. *See* United States v. Arias, 575 F.2d 253, 255 (9th Cir.) (explaining that to prevail on discriminatory prosecution claim, appellant must show others similarly situated not prosecuted for similar conduct and selection based on impermissible ground), *cert. denied*, 439 U.S. 868 (1978).

118. *See* United States v. Eddy, 737 F.2d 564, 571-72 (6th Cir. 1984) (finding presumption of vindictiveness when facts indicate no perjury indictment would have been brought had defendant not been acquitted); *cf.* United States v. Godwin, 457 U.S. 368, 381 (1982) (applying vindictiveness presumption only in cases where "reasonable likelihood of vindictiveness" exists).

119. *See* United States v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986) (explaining that questions may be so vague as to preclude perjury conviction for responses).

Also, a subsequent perjury charge is collaterally estopped where a defendant has been acquitted, and the jury must have believed the defendant's story to acquit. *See* United States v. Sarno, 596 F.2d 404, 408 (9th Cir. 1979) (explaining that when issues in perjury indictment determined adversely to government in prior case, defendant entitled to dismissal on basis of

constitutional defense might exist where the sixth amendment right to speedy trial is promptly asserted and the prosecution delays seeking a trial for perjury.[120]

In contrast, the Supreme Court has held that the failure to provide *Miranda* warnings in grand jury proceedings is not a perjury defense.[121] Likewise, a grant of federal immunity[122] is not a shield against a subsequent perjury prosecution.[123] In *United States v. Apfelbaum*,[124] a witness was granted immunity and later convicted of making false statements while testifying. The Court held that neither the immunity statute involved[125] nor the Fifth

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collateral estoppel and double jeopardy); United States v. Robinson, 418 F. Supp. 121, 126 (D. Md. 1976) (barring government from basing perjury count on defendant's testimony that jury in prior case must have believed to reach verdict); *but see* United States v. Williams, 341 U.S. 58, 64-65 (1951) (explaining that acquittal no bar to perjury charge for trial testimony when such testimony not substantively related to crime charged); United States v. Giarratano, 622 F.2d 153, 155 (5th Cir. 1980) (finding no perjury indictment for taking money to defraud not necessarily decided by acquittal at first mail fraud); United States v. Woodward, 482 F. Supp. 953, 954 (W.D. Pa. 1979) (finding no double jeopardy problem because defendant's acquittal of criminal charges does not preclude subsequent perjury prosecution).

Denial of the defendant's right to show bias during cross-examination may be a basis for reversing the conviction. *See* United States v. Lavelle, 751 F.2d 1266, 1272 (D.C. Cir. 1985) (denying right to show bias on cross-examination reverses a perjury conviction if (1) there is an affirmative assertion and (2) judge knowingly decided to limit or deny right), *cert. denied*, 474 U.S. 817 (1985).

120. *See* United States v. Bagga, 782 F.2d 1541, 1545 (11th Cir. 1986) (explaining that where defendant did not assert right to speedy trial and prosecution made reasonable efforts to try case, seven year delay between trial and indictment did not violate Sixth Amendment).

121. United States v. Mandujano, 425 U.S. 564 (1976) (plurality opinion) (explaining that *Miranda* warnings are not required when testifying before grand jury; perjured testimony will not be suppressed for lack of warning); *see* United States v. Long, 706 F.2d 1044, 1051 (9th Cir. 1983) (noting that target witness under oath deserves neither *Miranda* nor additional perjury warnings); United States v. Pommerening, 500 F.2d 92 (10th Cir.) (deciding that failure to give *Miranda* warnings did not bar perjury prosecution for perjury before grand jury), *cert. denied*, 419 U.S. 1088 (1974), *reh. denied*, 420 U.S. 939 (1975).

The Court reasoned that a significant difference exists between grand jury testimony and a police interrogation. *See* United States v. Mandujano, 425 U.S. 564 (1976). The witness was not forced to incriminate himself; fifth amendment rights are recognized in the grand jury. *Id.* at 581. Perjury is not a permissible substitute for invoking the Fifth Amendment. *Id.* at 584; United States v. Smith, 538 F.2d 159, 161 (7th Cir. 1976) (failing to suppress statements although no *Miranda* warning given).

122. 18 U.S.C. § 6002 (1988).

123. Glickstien v. United States, 222 U.S. 139, 142 (1911) (explaining that defendant granted immunity under bankruptcy statute had no license to commit perjury).

124. 405 U.S. 115 (1980).

125. 18 U.S.C. § 6002 (1988).

Amendment allows a witness to commit perjury under a grant of immunity.[126] Additionally, the declarant's fifth amendment right to indictment by an unbiased grand jury is not violated if she is indicted before the same grand jury before which she allegedly made the false statements.[127] The Supreme Court has also held that an attorney's refusal to cooperate with an accused in presenting perjured testimony at trial does not violate the accused's sixth amendment right to assistance of counsel.[128]

Other unsuccessful defenses include failure to warn of contrary evidence,[129] lack of counsel in habeas corpus proceedings,[130] failure by the investigating body to establish a crime's existence,[131] and incarceration of the declarant.[132] Additionally, the fifth amendment privilege against self-incrimination,[133] the failure to specify precisely the alleged perjury,[134] double

126. United States v. Apfelbaum, 445 U.S. 115 (1980); *accord* Daniels v. United States, 196 F. 459, 462-63 (6th Cir. 1912) (explaining that immunity under bankruptcy statute applied only to crimes committed prior to testimony, not to false statements in bankrupt's examination); Edelstein v. United States, 149 F. 636, 642-44 (8th Cir. 1906) (convicting defendant of making false statements under bankruptcy statute unprotected by immunity attached to bankruptcy).

127. See United States v. Brimberry, 779 F.2d 1339, 1351 (8th Cir. 1985) (explaining that defendant not denied fifth amendment rights because it is assumed jurors did not violate their oath, although the same grand jury indicted him for allegedly committed perjury before).

128. Nix v. Whiteside, 475 U.S. 157 (1986); *see* United States v. Lavelle, 751 F.2d 1266, 1272-73 (D.C. Cir. 1985) (explaining that conviction may be reversed for denial of right to show bias on cross-examination if that right is asserted and judge knowingly decided to deny it); Carol T. Rieger, *Client Perjury, A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121 (1985) (examining counsel's options when faced with client who decides to commit perjury).

129. *See* United States v. Goguen, 723 F.2d 1012, 1018 (1st Cir. 1984); United States v. Camporeale, 515 F.2d 184, 189 (2d Cir.1975).

130. *See* United States v. Masters, 484 F.2d 1251, 1253-54 (10th Cir. 1973) (explaining that lack of representation by counsel at habeas corpus proceeding did not justify making obviously untrue statements under oath).

131. *See* United States v. Provinzano, 333 F. Supp. 255, 258 (E.D. Wis. 1971) (explaining that it is no defense that investigating body that heard allegedly false statements did not establish crime's existence).

132. *See* Credille v. United States, 354 F.2d 652, 653 (10th Cir. 1965) (finding no defense where defendant is convicted person serving sentence).

133. *See In re* Grand Jury Proceedings, 661 F.2d 1331 (5th Cir. 1981) (available in LEXIS, Genfed library) (explaining that privilege against self-incrimination unavailable in testimony before grand jury because of asserted fear of prosecution for perjury); United States v. Orta, 253 F.2d 312, 314 (5th Cir. 1958) (noting that witness has option of telling truth or remaining silent; he may not, though uninformed of rights, commit perjury and then claim constitutional protection).

134. *See* United States v. Ras, 713 F.2d 311, 319 (7th Cir. 1983) (explaining that indictment sufficient that set out allegations in substance and fairly informed defendant of charges against him). *See also* United States v. Finucan, 708 F.2d 838, 847-48 (1st Cir. 1983) (dismissing requirement when government cannot prove testimony is anything more than incomplete and evasive).

jeopardy,[135] and indictment by a subsequent grand jury upon discovery of false testimony after the original proceeding[136] are unsuccessful defenses. Finally, a crime's illegally seized evidence may be admitted in the prosecution of perjury committed during the original trial.[137] Although non-statutory defenses are recognized, the statutory defense of retraction remains the most significant difference between the two federal perjury statutes.

C. Differences Between the Statutes

Section 1621, entitled "Perjury Generally," codifies common law perjury[138] in expansively applying the offense to false statements made under oath before a "competent tribunal, officer or person."[139] Section 1623 limits perjury's definition to false statements made "in any proceeding before or ancillary to any court or grand jury of the United States."[140] Thus, the threshold standard for application of section 1623 is that it applies only to statements made in proceedings at least as formal as a deposition.[141]

Congress adopted section 1623 as part of the 1970 Organized Crime Control Act to expand section 1621's scope and to increase the reliability of testimony before federal courts.[142] Although section 1621 defines perjury

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135. *See* United States v. Williams, 341 U.S. 58, 62 (1951) (explaining that where there is no identity of offenses, falsely claiming innocence may be prosecuted without committing double jeopardy).

136. *See* United States v. Sun Myung Moon, 718 F.2d 1210, 1238-39 (2d Cir. 1983) (explaining that if prosecutor does not discover grand jury witness committed perjury until grand jury disbanded, another grand jury can indict witness for perjury), *cert. denied*, 466 U.S. 971 (1984).

137. *See* United States v. Finucan, 708 F.2d 838, 845 (1st Cir. 1983). The defendant in *Finucan* was charged with conspiracy to commit mail fraud and tacking motor vehicle odometers. *Id.* at 840. The state executed an invalid search warrant at defendant's residence. *Id.* at 841. Subsequently, the defendant committed perjury before a grand jury and was charged with violating § 1623. *Id.* at 840. The court suppressed the evidence regarding the conspiracy and odometer tampering charges. However, the court admitted the evidence for the perjury charges, reasoning that "admission . . . will ordinarily have little if any impact on the exclusionary." *Id.* at 845. The court favorably cited similar rulings from three other circuits. *Id.* *See* United States v. Paepke, 550 F.2d 385 (7th Cir. 1977); United States v. Raftery, 534 F.2d 854 (9th Cir.), *cert. denied*, 429 U.S. 862 (1976); United States v. Turk, 526 F.2d 654 (5th Cir.), *cert. denied*, 429 U.S. 823 (1976).

138. Statutes proscribing perjury have remained virtually unchanged since the first perjury statute was enacted in 1790. *See* Act of April 30, 1790, ch. 9, § 18, 1 Stat. 116.

139. 18 U.S.C. § 1621 (1988).

140. 18 U.S.C. § 1623 (1988).

141. *See* Dunn v. United States, 442 U.S. 100, 111-12 (1979) (explaining that § 1623 does not include sworn statement in interview with attorney).

142. *See* Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IV, 84 Stat. 922 (detailing statutory elements and penalties of 18 U.S.C. § 1623 false declarations).

more broadly than section 1623,[143] section 1621 only covers "any written testimony, declaration, deposition, or certificate by [the declarant] subscribed."[144] Section 1623, however, includes "any other information, including any book, paper, document, record, recording, or other material" the declarant uses.[145]

Section 1623 defines intent as requiring knowledge,[146] in contrast to section 1621's willfulness requirement.[147] Congress made section 1623's mens rea "knowingly" rather than "willfully" in order to ease the prosecution's burden. Also, the two witness rule is intended to prevent convictions for perjury based solely on one person's word.[148] Section 1621 prosecutions are held to the "two-witness" evidentiary rule,[149] whereas section 1623 prosecutions are not.[150] In abolishing the two witness rule's requirement for section 1623 prosecutions, the drafters specifically intended to make convictions easier to obtain.[151] Thus, section 1623's drafters intended that section to serve

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143. For general discussions regarding the statutes' different treatment of written materials, see Gillen et al., *supra* note 2, at 620; William G. Kiesling, Project, *Fourth Survey of White Collar Crime: Perjury*, 24 AM. CRIM. L. REV. 639, 640 (1987).

144. 18 U.S.C. § 1621 (1988).

145. 18 U.S.C. § 1623 (1988).

146. *See* United States v. Anderson, 798 F.2d 919, 928-29 (7th Cir. 1986) (explaining that § 1623 does not require specific intent to impede administration of justice by means of false statement); United States v. Watson, 623 F.2d 1198, 1206-07 (7th Cir. 1980) (noting that mere knowledge of falsity of declaration sufficed to satisfy § 1623).

147. Under § 1621 perjury occurs when the declarant "states or subscribes [to] any material matter which he does not believe to be true." 18 U.S.C. § 1621 (1988).

148. 18 U.S.C. § 1621's "two-witness" rule provides that perjury must be proved by either two witnesses' sworn testimony or a single witness' sworn testimony corroborated by independent evidence. United States v. Nessanbaum, 205 F.2d 93, 98 (3d Cir. 1953) (citing United States v. Palese, 133 F.2d 600, 602 (3d Cir. 1943)).

149. *See* United States v. Diggs, 560 F.2d 266 (7th Cir. 1977) (explaining that evidence of three independent witnesses, corroborated by fourth witness satisfied two witness rule and sufficient for perjury conviction), *cert. denied*, 434 U.S. 925 (1977); United States v. Swainson, 548 F.2d 657 (6th Cir. 1977) (noting that perjury conviction based on defendant's admission did not violate two witness rule's spirit), *cert. denied*, 431 U.S. 937 (1977); United States v. Haldemen, 559 F.2d 31, 97 n.185 (D.C. Cir. 1976) (explaining two witness rule's requirements) United States v. DeLeon, 474 F.2d 790, 791 (5th Cir.) (deciding that rebuttal of defendant's testimony by police officer and traffic ticket satisfied two witness rule), *cert. denied*, 414 U.S. 853 (1973); United States v. Haggarty, 388 F.2d 713, 716 (7th Cir. 1968) (determining that two witness rule allowed witness and tape recording to show falsity of defendant's testimony).

150. 18 U.S.C. § 1623(e) eliminates the two witness rule by stating that proof beyond a reasonable doubt will satisfy the section's requirements and no particular number of witnesses is needed to establish the necessary proof. 18 U.S.C. § 1623(e) (1988). *See* United States v. Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973) (invalidating defendant's argument that § 1623's removal of two witness rule violates Sixth Amendment's confrontation clause, because the rule is not of "constitutional dimension").

151. *See* HOUSE REPORT, *supra* note 10, at 48 (discussing congressional intent in passing § 1623).

as a stronger deterrence to perjury by making perjury convictions more likely.[152]

Section 1623, unlike section 1621, encompasses a declarant's inconsistent statements.[153] In section 1623 inconsistent-statement prosecutions, the government is not required to prove which statement is false.[154] Further, section 1621's maximum penalty for convictions is a $2,000 fine and five years imprisonment,[155] whereas section 1623's maximum penalty is a $10,000 fine or five years imprisonment, or both.[156] This difference reflects the Supreme Court's adoption of the English common law view that punishment for perjury should not be so severe that potential witnesses are discouraged from testifying.[157]

A false statement's retraction may preclude section 1623 prosecution, but not section 1621 prosecution.[158] By permitting a perjurer to retract, Congress intended that the interest of truth-telling be advanced, but also recognized the persistent danger of reducing perjury's deterrent effect with respect to truth-telling.[159] Congress' effort to improve truth-telling was thus twofold.[160]

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152. United States v. Roche, No. 91-595-13, 1992 U.S. Dist. LEXIS 9062, at *17 (E.D. Pa. June 5, 1992).

153. *In re* Grand Jury Proceedings (Greentree), 644 F.2d 348, 348-50 (5th Cir. 1981).

154. *Id.*

155. 18 U.S.C. § 1621 (1988).

156. 18 U.S.C. § 1623 (1988).

157. Brontson v. United States, 409 U.S. 352, 359-60 (1973).

158. 18 U.S.C. § 1623 (d) in pertinent part provides:

> Where . . . the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section, if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

18 U.S.C. § 1623(d) (1988); *see* United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990) (finding retraction unavailable where defendant failed to retract before evident falsity would be exposed).

The circuit courts treat the allocation of burdens under the retraction defense differently. The Ninth Circuit requires the prosecution to "prove the inapplicability of recantation beyond a reasonable doubt" once the defendant raises it as an affirmative defense. United States v. Tobias, 863 F.2d 685, 688 (9th Cir. 1988). In contrast, in the District of Columbia the defendant must prove the retraction. United States v. Moore, 613 F.2d 1029, 1044 (D.C. Dir. 1979).

At least three circuit courts have held that a defendant's implicit knowledge of the statement's falsity does not suffice for § 1623(d) retraction defense purposes. *See, e.g.*, United States v. Tobias, 863 F.2d at 689 (requiring defendant to "unequivocally repudiate . . . prior testimony" to satisfy § 1623 (d)); United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985) (finding no effective retraction where defendant did not specifically state any of testimony was false); United States v. D'Auria, 672 F.2d 1085, 1092 (2d Cir. 1982) (explaining that defendant must make outright retraction and repudiation of false testimony).

159. United States v. Roche, No. 91-595-13, 1992 U.S. Dist. LEXIS 9062, at *11 (E.D. Pa. June 5, 1992).

First, Congress magnified criminal law's deterrent role by easing the government's path to perjury convictions.[161] Congress emphasized creating an incentive for the witness to speak the truth at all times.[162] Second, Congress extended absolution to perjurers who retract under prescribed conditions to secure truth through correction of previously false testimony.[163] Thus, retraction is "at the fulcrum of a delicate balance."[164]

The interplay between sections 1621 and 1623, with their differing penalties,[165] has stimulated debate over the exercise of prosecutorial discretion in determining the appropriate statute under which to charge a defendant.[166] The government maintains that prosecutors have discretion to choose either statute.[167] Defendants argue, however, that Congress intended using section 1623 for perjury proceedings in all possible cases.[168] Courts have questioned whether Congress intended to give prosecutors such wide discretion.[169] However, courts to date have left the issue unresolved.[170] Although courts have called attention to the current abuses of the perjury statutes, a detailed analysis of the problematic areas is necessary to understand the need for a single perjury statute.

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160. *Id.* (discussing United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979)).

161. *Id.* at 11-12.

162. *Id.*

163. *Id.*

164. *Id.* at 12.

165. *See* text accompanying *supra* notes 155-64.

166. *See, e.g.*, Dunn v. United States, 442 U.S. 100, 108-09 (1979) (reversing defendant's § 1623 conviction because indictment failed to allege perjury in ancillary proceedings and noting that § 1621 would have applied if charged); United States v. Swainson, 548 F.2d 657, 663 (6th Cir.) (explaining that defendant's § 1621 charge was abuse of prosecutorial discretion denying defendant complete defense under § 1623), *cert. denied*, 431 U.S. 937 (1977); United States v. Kahn, 472 F.2d at 283-84 (dictum) (noting no impropriety in § 1621 charge rather than § 1623 charge because substantive elements are same even though retraction defense unavailable).

167. *See* United States v. Kahn, 472 F.2d 272, 284 (2d Cir.) (arguing prosecutor had discretion to choose section under which to try alleged perjurer), *cert. denied*, 411 U.S. 982 (1973).

168. *See* United States v. Swainson, 548 F.2d 657, 663 (6th Cir.) (arguing that Congress intended utilization of § 1623 for all perjury proceedings involving grand jury testimony), *cert. denied*, 431 U.S. 937 (1977).

169. *See* United States v. Kahn, 472 F.2d 272, 283-84 (2d Cir.) (refusing to decide issue because defendant not prejudiced), *cert. denied* 411 U.S. 982 (1973). *Kahn*, however, questioned if Congress intended to give such wide discretion in choosing the charge and level of proof needed to convict. *Id.*

170. United States v. Swainson, 548 F.2d 657, 663 (6th Cir.), *cert. denied*, 431 U.S. 937 (1977). *Swainson* did not reach this issue because it was raised incorrectly in a post-trial motion.

IV. PROBLEMATIC AREAS OF THE PERJURY STATUTES

A. Discourages Rather than Encourages Truthful Testimony

Although courts have addressed the current inadequacies of the federal perjury statutes, these problematic areas should be analyzed in-depth before a single perjury statute that resolves these inadequacies is proposed. Section 1623(d) provides a limited defense to prosecution where the declarant retracts false testimony.[171] Two conditions must be adhered to for a successful retraction.[172] First, the declarant may retract *only* when the original "declaration has not substantially affected the proceeding."[173] Second, the declarant must retract before "it has become manifest . . . such falsity has been or will be exposed."[174]

Congress' goal in enacting section 1623(d) was to encourage truth-telling to the maximum extent possible.[175] In enacting section 1623, Congress emphasized truth-telling at every step of a witness' testimony.[176] As the House Report states, the limited retraction provision induces truthful testimony "by permitting [the witness] voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so."[177] Thus, Congress provided a limited retraction defense to encourage truthful testimony, not to confer a boon on the perjurer who frustrates a judicial investigation or who retracts only when confronted with certain exposure.[178]

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171. 18 U.S.C. § 1623(d) (1988).

172. For cases explaining the heavy burden a declarant must overcome to successfully retract untrue statements, see United States v. Scivola, 766 F.2d 37, 45 (1st Cir. 1985); United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981); United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980); United States v. Roche, No. 91-595-13, 1992 U.S. Dist. LEXIS 9062, at **7-8 (E.D. Pa. June 5, 1992).

173. 18 U.S.C. § 1623(d) (1988) (emphasis added).

174. *Id.*

175. The House Committee on the Judiciary reported, retraction "serves as an inducement to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so." HOUSE REPORT, *supra* note 10, at 48. *See also* 116 CONG. REC. 589 (1970) (Senator McClellan's remarks) ("[T]itle IV encourages truth . . . by encouraging the correction of testimony without fear of prosecution."); *Id.* at 35196 (Representative Celler's remarks) ("[i]n order to encourage truthful testimony, the title, as amended, permits recantation to be a bar to a false declaration in certain circumstances"); *Id.* at 35292 (Representative Poff's remarks) ("[t]his provision encourages the witness to correct a false statement by permitting him to do so without incurring the risk of prosecution based on inconsistent statements").

176. HOUSE REPORT, *supra* note 10, at 48.

177. *Id.*

178. *See* United States v. Moore, 613 F.2d 1029, 1043 (D.C. Cir. 1980) (concluding that Congress did not countenance in § 1623(d) the injustice that would result if a witness lied to a judicial tribunal and then, upon learning that the lie was discovered, retracted to bar prosecution), *cert. denied*, 446 U.S. 954 (1980).

By enacting section 1623, Congress changed existing case law by providing a limited opportunity for the perjurer to correct testimony without fear of criminal conviction.[179] Congressional effort to improve truth-telling in judicial proceedings was thus twofold.[180] First, Congress magnified criminal law's deterrent role by easing the path to conviction. Congress emphasized encouraging the witness always to speak truthfully.[181] Second, Congress extended absolution to perjurers who retract under prescribed conditions, to secure truth through the correction of previously false testimony.[182]

The current status of the perjury statutes discourages a primary congressional purpose: the encouragement of truthful testimony by witnesses.[183] Because a successful section 1623 retraction does not preclude section 1621 prosecution,[184] a declarant could adhere to section 1623's strict provisions and further the truth-telling process,[185] but nevertheless be convicted of section 1621 perjury. Thus, the current scheme frustrates Congress' emphasis because a witness will be hesitant to retract, knowing section 1621 prosecution is available.

A single perjury statute would solve the problem that section 1623 sought

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179. *Compare* § 1623 *with* the Supreme Court's 1937 rejection of the defense. The Court, per Justice Roberts, reasoned:

> Perjury is an obstruction of justice; its perpetuation well may affect the dearest concerns of the parties before a tribunal. Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when a witness' statement has once been made. It is argued that to allow retraction of perjured testimony promotes the discovery of the truth and, if made before the proceeding is concluded, can do no harm to the parties. The argument overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not put the court and the parties to the disadvantage, hindrance and delay of ultimately extracting the truth by cross examination, by extraneous investigation, or other collateral means.

United States v. Norris, 300 U.S. 564 (1937). In United States v. Dennison, 663 F.2d 611 (5th Cir. 1981), the court explained that § 1623(d) changed the common law rule that retraction is not a defense to perjury.

180. *See* United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979) (interpreting § 1623's legislative intent), *cert. denied*, 446 U.S. 954 (1980).

181. *Id.*

182. *Id.*

183. *See* United States v. Moore, 613 F.2d 1029, 1041 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

184. *See* Project, *Third Annual Survey of White Collar Crime: Perjury*, 22 AM. CRIM. L. REV. 270, 466-67 (1984) [hereinafter *Perjury Survey*].

185. *See* United States v. Moore, 613 F.2d 1029, 1043 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 954 (1980).

to eliminate, but instead intensified. Such a statute should incorporate section 1623's legislative concerns and maintain section 1621's spirit.[186] Further, a single statute would necessarily include a limited retraction defense, keeping intact the Supreme Court's fears in *United States v. Norris*[187] and section 1623's ambitious—but realistic—goals.[188]

If the perjury statutes remain unchanged, the scales of justice will tip against a defendant who retracts a harmless statement and undermine the entire judicial process' primary goals—the furtherance of truth in judicial proceedings. Consequently, until a single statute is adopted to eliminate the current problems, congressional intent and the entire judicial process' purposes will be frustrated. Thus, in addition to encouraging truthful testimony, a single statute is needed because, as the next Section establishes, the current status of the perjury statutes is also hindering the judicial process' truth finding goals.

B. Section 1621's Current Liability Hinders the Judicial Process' Truth-Finding Goals

Section 1621 represents the common law belief that "perjury can not be purged,"[189] because "the crime is complete when a witness' statement has once been made."[190] Nevertheless, the *Model Penal Code* drafters long ago proposed a retraction defense, recognizing the importance of providing an "incentive to correcting falsehoods."[191] Similarly, section 1623 and numerous state criminal codes have acknowledged a retraction defense's benefits.[192]

Imposing perjury liability is essential because it enhances the judicial process' primary goal by increasing "the ability of an investigating body to learn

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186. A suggested approach and model statute is included and explained in section V of this note, *infra*.

187. The Court rejected the retraction defense, fearing the defense might encourage a witness to swear falsely in the belief that if the falsity were discovered, the witness might avoid punishment by belatedly telling the truth. United States v. Norris, 300 U.S. 564 (1937).

188. The proposed statute satisfies *Norris'* fears and adheres to legislative intent by making retraction available *only* if the testimony has not affected the proceeding *and* it is not manifest that the falsity will be exposed. Thus, where the declarant comes forth after exposure, or under threat of imminent exposure, the narrow retraction defense will not preclude prosecution for perjury.

189. *See generally* Alan G. Kimbrell, *Crimes Against the Public*, 38 MO. L. REV. 571, 585-86 (1973) (discussing the policy considerations around the social desirability of a retraction defense in perjury cases).

190. United States v. Norris, 300 U.S. 564, 574 (1937); *see* Jay K. Goldberg, Note, *The Criminal Code Reform Bill of 1978 and the Peril of False Statements*, 47 GEO. WASH. L. REV. 573, 582 (1979).

191. MODEL PENAL CODE § 208.20 comment at 129 (Tent. Draft No. 6, 1957).

192. *E.g.*, 18 U.S.C. § 1623(d) (1988).

the truth."[193] A limited defense is also a valuable aid in encouraging the correction of misstatements.[194] Consequently, a conditional defense fosters the same goals as the imposition of liability. Nevertheless, unless the current inadequacies of the perjury statutes are corrected so that a limited defense is available, these goals will remain frustrated. A single statute that includes a retraction defense solves this dilemma and fosters the search for truth, because the social desirability of discovering the truth favors encouraging retraction over punishing potentially penitent perjurers.

C. Prosecutorial Circumvention of Legislative Intent

An underlying purpose of the perjury statutes is to encourage truthful testimony by witnesses.[195] The House Report accompanying the 1970 Organized Crime Control Act states that section 1623(d) "serves as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct his false statement *without incurring the risk prosecution* [sic] *by doing so.*"[196] Thus, section 1623's legislative intent is to encourage truthful testimony before a court and grand jury.[197]

Section 1621, the general perjury statute, applies to false statements under oath before "a competent tribunal, officer or person."[198] Section 1623, however, restricts perjury to false declarations under oath "in any proceeding before or ancillary to any court or grand jury of the United States."[199] This distinction is important because section 1623 offenses are, in essence, a subcategory of section 1621 offenses. Thus, where perjury occurs before a court or grand jury, prosecutors may prosecute under section 1621 rather than comply with section 1623's legislative intent.[200]

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193. 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 365, 666 (1970).

194. Jerold H. Israel, *The Process of Penal Law Reform—A Look at the Proposed Michigan Revised Criminal Code,* 14 WAYNE L. REV. 773, 808 n.200 (1968).

195. United States v. Moore, 613 F.2d 1029, 1040 (D.C. Cir. 1979), *cert. denied,* 446 U.S. 954 (1980).

196. HOUSE REPORT, *supra* note 10, at 48 (emphasis added).

197. *Id. See also supra* note 175.

198. 18 U.S.C. § 1621 (1988).

199. 18 U.S.C. § 1623 (1988).

200. *See* United States v. Kahn, 472 F.2d 272, 284 (2d Cir. 1973) (finding that § 1623, which applies only to grand jury proceedings, did not replace § 1621 and that the substantive elements for perjury are the "same under either statute"), *cert. denied,* 411 U.S. 982 (1973).

A defendant cannot remedy section 1621 perjury by retracting.[201] In contrast, retraction may bar section 1623 prosecution subject to four conditions.[202] Compliance with section 1623's strict retraction requirements, however, does not preclude section 1621 prosecution.[203] Consequently, a perjurer who desires to admit the statement's falsity before a court or grand jury, invoking section 1623(d)'s narrow defense, may be prosecuted under section 1621. Thus, prosecutors can disregard legislative intent by manipulating the perjury statutes to place perjurers in the most disadvantageous trial position.

Circuit courts question such tactics, recognizing that, although Congress constitutionally could have granted prosecutors such wide discretion, legislative history supports the contrary.[204] In *United States v. Kahn*,[205] the Second Circuit—addressing but not deciding this problem—found it "disturbing the prospect of the government employing section 1621 whenever a retraction exists, and section 1623 when one does not, simply to place perjury defendants in the most disadvantageous trial position."[206] Courts are rendered helpless, however, because of the exact wording of the perjury statutes. Until these inadequacies receive legislative attention, the concerns expressed by the court in *Kahn* will endure. Thus, section 1623 and its commendable legislative efforts will remain meaningless and will be ignored if prosecutors charge perjurers under section 1621, when section 1623's narrow retraction defense would bar such unnecessary prosecution.

V. PROPOSED SOLUTION: A SINGLE PERJURY STATUTE

Congress enacted section 1623 and its limited retraction defense for use in perjury prosecutions before a court or grand jury. Presently, this conditional defense is ignored because a declarant who utters a false statement before a court or grand jury, but subsequently retracts pursuant to section 1623(d)'s requirements, may nevertheless be prosecuted under section 1621. Consequently, a declarant has no incentive to correct a false declaration despite Congress' desire to encourage such corrections without fear of prosecution. Congress should enact the following perjury statute that encourages a declarant to correct a false statement occurring before a court or grand jury.

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201. *See* United States v. Norris, 300 U.S. 564, 573 (1937) (explaining that retraction is futile once perjured testimony has been offered); United States v. Del Toro, 513 F.2d 656, 665 (2d Cir.) (noting that prompt retraction does not excuse § 1621 perjury violation), *cert. denied*, 433 U.S. 826 (1975).

202. *See* text accompanying *supra* notes 104-08.

203. *See supra* notes 27-32 and accompanying text.

204. *See supra* notes 27-32 and accompanying text.

205. 472 F.2d 272 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973).

206. *Id.* at 283.

Perjury

(a) Whoever, under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) before any competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, testifies, declares, or certifies truly, or makes any written testimony, declaration, deposition, or certificate, subscribes, is true, knowingly makes or uses any other information, including book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or outside the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before a competent tribunal, officer, or person, the defendant under oath has knowingly made two or more declarations, that are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if —

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question before a competent tribunal, officer, or person. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant, at the time each declaration was made, believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, and it has not become manifest that such falsity has been or will be exposed.

> Admission that a declaration is false does not bar prosecution under this section where the declaration occurs under oath before competent tribunals, officers, or persons in proceedings that do not constitute a court or grand jury proceeding.
>
> (e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other types of evidence unless the declaration occurs under oath before competent tribunal, officer, or person in proceedings that do not constitute a court or grand jury proceeding.

This proposed statute encompasses both section 1621, perjury generally, and section 1623, perjury before or ancillary to a court or grand jury. The statute preserves Congress' two-fold effort to improve truth-telling in judicial proceedings.[207] The statute magnifies criminal law's deterrent role by easing the path to perjury convictions;[208] however, the statute also extends absolution to perjurers who retract under prescribed conditions, thereby securing truth through the correction of previously false testimony.[209] Thus, despite altering the current perjury statutes, the proposed statute pays particular attention to both goals.

The proposed statute further eases the government's burden in proving perjury convictions. Currently the government must prove that a defendant willfully presented false testimony to prevail in a section 1621 prosecution.[210] Section 1623 eased the prosecution's heavy burden—at least regarding false declarations before a court or grand jury—by requiring the prosecution prove only that the declarant knowingly made a false statement.[211] The proposed statute further eases the prosecution's burden by applying the easier-to-meet "knowing" standard to all perjury prosecutions, regardless of where they occur. Thus, under the proposed statute, the government may now prevail in settings less formal than a court or grand jury by proving that the declarant *knowingly* made a false material declaration.

The proposed statute further accommodates Congress' second goal, securing

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207. United States v. Moore, 613 F.2d 1029, 1041 (D.C. Cir. 1979), *cert. denied*, 440 U.S. 954 (1980).

208. *Id.*

209. *Id.*

210. *See* 18 U.S.C. § 1621 (1988) ("[W]illfully and contrary to such oath states or subscribes any material matter which he does not believe to be true . . . .").

211. *See* 18 U.S.C. § 1623(a) (1988) ("[K]nowingly makes any false material declaration . . . knowing the same to contain any false material declaration . . . .").

truth through the correction of false testimony and also achieves the objectives of early perjury law as it developed in the common law. Section 1623 encourages truthful testimony by serving "as an inducement to the witness to give truthful testimony by permitting him voluntarily to correct a false statement without incurring the risk [of] prosecution by doing so."[212] Currently, however, the government may prosecute under section 1621 when faced with a section 1623 violation.[213] Because a primary reason for section 1623's enactment was to allow perjurers a limited retraction defense, the proposed statute better effectuates this legislative intent.

The legislative intent behind the retraction defense is incorporated into the proposed statute because section (a), when read together with section (b), allows for a conditional retraction defense only during a court or grand jury proceeding. Further, in accord with section 1621's legislative intent, a retraction defense is unavailable in settings less formal than a court or grand jury. Thus, the legislative intent behind both statutes is finally achieved because witnesses who commit perjury before a court or grand jury are provided a limited opportunity to retract without fear of prosecution.[214]

The proposed statute solves another inadequacy found in section 1623's retraction provision. Because section 1623(d) uses *or* rather than *and*, the conditions to the retraction bar appear disjunctive, thus making conviction more difficult. A grammatical reading, however, is inconsistent with Congress' intent to provide for a conditional defense while concurrently easing the prosecution's burden in obtaining perjury convictions. Thus, a literal reading implies that a perjurer need only meet one of section 1623(d)'s requirements.

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212. HOUSE REPORT, *supra* note 10, at 48.

213. *See Perjury Survey*, *supra* note 184, at 466-67.

214. This proposed statute keeps intact the spirit of, and legislative intent behind §§ 1621 and 1623. The author believes that a limited retraction defense should be available for witnesses who testify in settings less formal than a court or grand jury because truthful testimony should always be encouraged.

Such a statute could benefit the overburdened judicial system. For example, if a witness were able to retract a false statement during the same deposition that the statement occurred, then the truth-finding process would be achieved much earlier in the judicial process. Further, spurious litigation could be avoided because witnesses will be encouraged to correct statements so that settings as formal as a court or grand jury may never be reached. Thus, scarce judicial resources could be conserved with such a statute as issues become resolved before formal proceedings occur.

Should Congress choose to adopt such measures, the proposed model statute could readily be adapted to effectuate such needs. For example, section (b) could read instead:

> A declarant shall not be guilty of perjury under this section if such declarant admits such declaration to be false, retracts such false declaration in the course of the proceeding in which such declaration was made before it became manifest that such false declaration was or would be exposed and before such false declaration substantially affected such proceeding.

The proposed statute, accepting the approach adopted by courts that have addressed the issue,[215] recognizes that section 1623(d)'s literal meaning frustrates legislative intent. Consequently, the proposed statute's conditional retraction defense is limited in nature. This limited defense more readily effectuates legislative intent than the current perjury statutes. Thus, the retraction provision is available to perjurers only if their false testimony has not substantially affected the proceeding *and* it has not become manifest that the falsity has been or will be exposed.

Currently, the legislative intent behind the federal perjury statutes is being ignored. Although Congress created section 1623 specifically for perjury occurring before a court or grand jury, the present status of the statutes prevents such uses from ever occurring. Consequently, neither goal that Congress sought to achieve—facilitating perjury convictions and encouraging truthful testimony through a retraction defense—is being served. Sensitive both to legislative intent and the aims of prosecutors and potentially penitent perjurers, the proposed perjury statute solves the existing statutory inadequacies. Encouraging truthful testimony by allowing a retraction defense, the proposed statute achieves the purposes behind the current perjury statutes. Thus, the proposed statute achieves the purposes behind the current perjury statutes that are being frustrated by encouraging truthful testimony through a retraction defense.

VI. CONCLUSION

Congress enacted 18 U.S.C. section 1623 to address perjury occurring before a court or grand jury. Section 1623 includes a limited retraction defense to encourage a declarant to correct false statements without the risk of prosecution. Presently, however, Congress' efforts to encourage the truth-finding process are being frustrated.

Under the current status of the perjury statutes, a perjurer who complies with section 1623's narrow retraction defense may nonetheless be prosecuted for perjury under section 1621, the general perjury statute. Consequently, because of the current inadequacies of the perjury statutes, Congress' intent is being circumvented. This Note's proposed statute solves the inadequacies present in the federal perjury statutes by easing the government's path to prosecution and by encouraging truthful testimony through a limited retraction defense. Until

215. *See* United States v. Moore, 613 F.2d 1029 (D.C. Cir. 1979) (concluding that despite literal reading, clear legislative intent required the use of *or*), *cert. denied*, 440 U.S. 954 (1980); United States v. Mitchell, 397 F. Supp. 166, 177 (D.D.C. 1974) (deciding that failure to satisfy one condition of § 1623(d) makes the retraction defense inapplicable). In Kramer v. United States, 434 U.S. 961 (1977), the Court left open the question whether § 1623(d)'s prerequisites were to be given a conjunctive or disjunctive interpretation.

such a single statute is adopted, the lofty purposes behind section 1623's enactment will never be achieved.

George W. Aycock, III