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The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes

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THE LAW OF LYING: THE DIFFICULTY OF PURSUING PERJURY UNDER THE FEDERAL PERJURY STATUTES

linda f. harrison

I. INTRODUCTION

A young woman meets her friend for lunch to continue an ongoing discussion describing her sexual affair with a married man who happens to be the President of the United States.[1] She tells her friend that in anticipation of her upcoming deposition in a case which charges the President with sexual harassment,[2] the President has not only asked her to sign an affidavit denying the affair, but tells her that he intends to deny it in his deposition in the same case.[3] The friend, unbeknownst to the young woman, is secretly taping this conversation for use by the Independent Counsel appointed to investigate allegations of wrong-doing by the President while in office.[4] The details of this affair were previously unknown. However, the tape recording, along with subsequent statements made by the young woman to the grand jury, eventually became evidence against the President in the impeachment proceedings against him which arose from this luncheon conversation.[5]

As revealed in the tape recording, when President Clinton appeared at his deposition on January 17, 1998, he denied the existence of an affair with Monica Lewinsky and, in fact, referred to her falsely sworn affidavit in support of his denial.[6] This deposition was conducted in the presence of federal court judge Susan Webber Wright, who presided over the sexual harassment case.[7] During the

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* Associate Professor of Law, Nova Southeastern University, Shepard Broad Law Center. J.D., American University, 1982. I would like to thank my former colleagues at Georgia State University College of Law, Linda Robinson and Jennifer Chiovaro, for their helpful comments, and my colleague at Nova Southeastern University, Steve Friedland, for his encouragement.

Use of lower case in name is at the request of the author.

1. This is obviously a description of the events leading up to the impeachment of then-President William Jefferson Clinton. The young woman described above is Monica Lewinsky, her luncheon date was with Linda Tripp. The Independent Counsel was Kenneth Starr. This information is taken from the Impeachment Referral Report of Independent Counsel Kenneth Starr to the Committee on the Judiciary, U.S. House of Representatives, submitted September 9, 1998 [hereinafter Starr Report]. *See also* SUSAN SCHMIDT & MICHAEL WEISSKOPF, TRUTH AT ANY COST: KEN STARR AND THE UNMAKING OF BILL CLINTON (2000).

2. Jones v Clinton, 990 F Supp. 657 (E.D. Ark. 1998). The charges in this case alleged that Clinton made a lewd pass at Paula Jones while he was governor of Arkansas and she was a state employee. The case was dismissed on April 1, 1998 on a finding that his conduct did not rise to the level of actionable sexual harassment. *Id.* at 667-68. The case was settled in 1998 for $850,000. Jones v. Clinton, 161 F.3d 528 (8th Cir. 1998).

3. SCHMIDT & WEISSKOPF, *supra* note 1, at 25.

4. *Id.* at 23.

5. SCHMIDT & WEISSKOPF *supra* note 1, at 257

6. Starr Report, *supra* note 1, at 10.

7 *See id.* at 6.

deposition, the prosecution attempted to ask the President about the affair, which might have occurred with Ms. Lewinsky during his presidency[8] At that point, the President's lawyer objected to that line of questioning as based on innuendo,[9] and referred to Ms. Lewinsky's sworn affidavit in support of his objection.[10] He explained to Judge Wright that, in her affidavit, Ms. Lewinsky had sworn "that there is absolutely no sex of any kind in any manner, shape or form with [the] [P]resident."[11] When asked about the affidavit, President Clinton stated that the affidavit was "absolutely true."[12] Shortly after this deposition, the President publicly denied the relationship.[13]

After taping the lunch meeting between the two friends, the Independent Counsel confronted Ms. Lewinsky and eventually secured her cooperation in their investigation of the President.[14] In exchange for immunity for making a false statement in her affidavit,[15] Ms. Lewinsky agreed to testify truthfully before a grand jury and to provide the prosecution with details of her affair and also with a blue dress on which she claimed she had discovered semen stains belonging to the President.[16]

After prosecutors secured Ms. Lewinsky's cooperation and obtained the blue dress and a detailed statement from her, President Clinton was called before the grand jury on August 17 1998.[17] In this appearance, the President admitted to engaging in "conduct that was wrong," but insisted that these "encounters did not consist of sexual intercourse" or "sexual relations as I understood that term to be defined at my January 17 1998 deposition."[18] When asked about Ms. Lewinsky's false affidavit submitted to the court during his deposition, Clinton replied, "in the present tense ... that would be a completely accurate statement."[19] When pressed to explain, Clinton said, "[i]t depends on what the meaning of the word *is* is. If *is*

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8. *Id.* at 9-10.

9. *Id.* at 10. Clinton had denied any and all such affairs on December 23, 1997 in his interrogatory filed during discovery. The interrogatory requested "Please state the name ... of (federal employees) with whom you had sexual relations when you (were) ... president of the United States." To this request, the President, under oath, stated "None." *Id.* at 8.

10. *Id.* at 10.

11. SCHMIDT & WEISSKOPF *supra* note 1, at 238. She also claimed in that affidavit that she had "never had a sexual relationship with the [P]resident." *Id.*

12. Starr Report, *supra* note 1, at 10. Based on this line of question and answer by the president and his attorneys, Judge Wright held "Clinton in contempt of court, pointing to 'clear and convincing evidence' of 'false, misleading, and evasive answers that were designed to obstruct the judicial process' in the Jones deposition." SCHMIDT & WEISSKOPF, *supra* note 1, at 277. Judge Wright ordered Clinton to pay $90,000 in legal fees to Jones's attorney for the expenses incurred in the taking of this deposition. *Id.*

13. This denial occurred on January 26, 1998. Starr Report, *supra* note 1, at 251-52.

14. SCHMIDT & WEISSKOPF, *supra* note 1, at 212.

15. She also negotiated immunity for her mother who had been implicated in the cover-up of her affair. *Id.* at 41.

16. *Id.* She surrendered the dress to the FBI for testing on July 29, 1998. *Id.* at 214.

17 *See* Starr Report, *supra* note 1, at 159-61; SCHMIDT & WEISSKOPF *supra* note 1, at 235-38.

18. SCHMIDT & WEISSKOPF, *supra* note 1, at 237 The definition stated "a person engages in sexual relations when the person knowingly engages in or causes contact with the genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent to arouse or gratify the sexual desire of any person." *Id.* at 239

19. *Id.*

means is and never has been, that is not—that is one thing. If it means there is none, that is a completely true statement."[20] When pressed further on the issue, the President denied "trying to give ... a cute answer," but argued that "generally speaking in the present tense, if someone said that, that would be true. And I don't know what [the prosecutor] had in his mind."[21]

The underlying facts of the impeachment hearings of President Clinton are used to illuminate the thesis of this article: that the perjury statutes, as crafted, create interpretive problems that defy logic and usurp the legislative purpose of the statutes.[22] Lying under oath becomes undefinable and hinders prosecutors as often as it catches perpetrators. Because of cumbersome evidentiary requirements, inconsistent judicial interpretation, and complex speech nuances, the statutes are difficult to administer and are thus counterproductive.

By analyzing the perjury statutes, this article squarely confronts these problems. Moreover, by examining how the statutes operate together, this article identifies how intrinsically dysfunctional they are and how they tend to disserve their intended purpose. In doing so, this article points out the added difficulty courts have in applying these statutes to nuances of language and meaning.

Ultimately, this article reveals the inability of the existing perjury statutes to account for the human tendencies that go along with trying to rectify a lie once it is told. Recognizing that truth is the cornerstone of the justice system, the perjury statutes should not be a bar to truth-telling, but should be used to coax the truth out of an individual, if such truth is known. Being faced with obvious exposure to the truth is often a great motivator for getting a truthful answer—which is, and should be, the ultimate goal. Restructuring the perjury statutes to allow an individual to rectify the lie by telling the truth without being charged with perjury would better serve the legislative purpose of the statutes and the goals of justice.

Part II of this article discusses the federal perjury statutes and describes the different application of each statute. Part II also examines the statutes and discusses the courts' interpretation of them. Part III applies the statutes to three hypothetical Clinton perjury allegations. Part IV suggests how the statute might be amended to address the legislative intent and curtail some of the problems that have perplexed the courts and frustrated prosecutors and perpetrators alike. Part V offers conclusions about the continued viability of the statutes.

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20. *Id.* at 238.

21. *Id.* at 239.

22. The actual purpose of § 1623 was to encourage truthful testimony by witnesses appearing before courts and grand juries. *See* S. REP NO. 91-617, at 33, 57-59, 109-11, 149-50 (1969); H.R. REP NO. 91-1549, at 33 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4023-24. This was accomplished by enacting several changes to the federal perjury statutes. Congress eliminated the two-witness rule from § 1623 prosecutions, the requirement that a perjury conviction be obtained only upon direct evidence, and allowed proof of perjury by proof of two contradictory statements without requiring the proof of falsity of one. Congress balanced these enhanced prosecution tools by allowing defendants a defense of recantation, which "serves 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." H.R. REP NO. 91-1549, at 48. *See also* United States v. Moore, 613 F.2d 1029, 1040 (D.D.C. 1979).

II. FEDERAL PERJURY STATUTES

The trio of statutes that are used by the federal government as the basis for charging perjury are found in Title 18 of the United States Code in §§ 1621, 1622, and 1623.[23] Section 1621 applies to material statements made under oath to "a competent tribunal, office, or person, in any case in which a law of the United States authorizes an oath to be administered."[24] This section allows for perjury to be charged for falsehoods made in any proceeding for which the law authorizes an oath to be administered, and includes "ex parte proceedings and investigations as well as ordinary adversary suits and proceedings."[25] Section 1622 applies where one person convinces another to commit "any perjury " whether it is perjury under § 1621 or § 1623.[26] A requirement of a conviction under § 1622 is that actual perjury must have occurred.[27] Section 1623 applies to persons who commit perjury "in any proceeding before or ancillary to any court or grand jury of the United States."[28] This section makes it an offense to knowingly make, under oath, a false

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23. There are four main statutes, but this article will focus only on the main two. *See* 18 U.S.C. §§ 1621, 1623 (2000). *See also* 18 U.S.C. § 1622 (2000) (Subornation of Perjury); 18 U.S.C. § 1001 (2000).

24. Title 18 U.S.C. § 1621, entitled "Perjury generally," provides:

> Whoever—
> (1) 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, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or
> (2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code [28 U.S.C.A. § 1746], willfully subscribes as true 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 under this title or imprisoned not more than five years, or both. This section is applicable whether the statement or subscription is made within or without the United States.

18 U.S.C. § 1621 (2000).

25. 60A AM. JUR. 2D *Perjury* § 39 (1989). *See, e.g.*, United States v. Price, 2001 U.S. App. LEXIS 9341, at *4 (9th Cir. May 8, 2001) (false statements to obtain Social Security benefits); United States v. LaFontaine, 210 F.3d 125, 133 (2d Cir. 2000) (false statement in bail revocation hearing); United States v. Weissman, 195 F.3d 96, 98 (2d Cir. 1999) (false statement to Senate committee); United States v Drinkwine, 133 F.3d 203, 203 (2d Cir. 1998) (false statements at a SEC deposition); United States v. Oakar, 111 F.3d 146, 156 (D.C. Cir. 1997) (false statement to Congress); United States v. Allen, 892 F.2d 66, 67 (10th Cir. 1989) (false sworn financial affidavits).

26. Section 1622, entitled "Subornation of perjury," provides: "Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1622 (2000).

27. *See generally* United States v. Hairston, 46 F.3d 361 (4th Cir. 1995); United States v. Silverman, 745 F.2d 1386 (11th Cir. 1984).

28. Section 1623, entitled "False declarations before grand jury or court," provides:

> (a) Whoever under oath ... in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing

material declaration in a proceeding before or ancillary to any court or grand jury proceeding. A statement made under oath in any proceeding less formal than a deposition is not a proceeding ancillary to a court or grand jury [29]

Perjury may be charged by the government under any single provision, or in any actionable combination.[30] Section 1623, which is generally viewed as the narrower

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the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.
(b) this section is applicable whether the conduct occurred within or without the United States.
(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which 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 in any proceeding before or ancillary to any court or grand jury. 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 he made each declaration 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, or it has not become manifest that such falsity has been or will be exposed.
(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 type of evidence.

18 U.S.C. § 1623 (2000).

29. Dunn v. United States, 442 U.S. 100, 113 (1979).

30. *See* United States v. Lande, 968 F.2d 907 913 (9th Cir. 1992); United States v. Cavada, 821 F.2d 1046, 1048 (5th Cir. 1987); Edwards v. United States, 814 F.2d 486, 488 (7th Cir. 1987); United States v Ruggiero, 472 F.2d 599, 606 (2d Cir. 1973). *But see* United States v. Kahn, 472 F.2d 272, 282-84 (2d Cir. 1966) (holding that the argument that Congress intended to allow government absolute prosecutorial discretion to proceed against perjurer under § 1621 or § 1623 is unsupported by the legislative history). However, the principle allowing prosecutorial discretion was later affirmed in *United States v. Sherman*, 150 F.3d 306 (3d Cir. 1998). There, in a grand jury proceeding investigating medical malpractice, a defendant recanted his perjured testimony, but not in time. *Id.* at 308. The government, however, charged him under § 1621. *Id.* at 310. Rejecting the defendant's contention that the government denied him of his due process rights by denying him an opportunity to present his recantation defense, the court held that "a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution." *Id.* at 313 (citing United States v. Ciampaglia, 628 F.2d 632, 639 (1st Cir. 1980)). *See generally* James Nesland, *Perjury and False Declarations*, *in* 2 WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 10.01 (Otto G. Obermaier & Robert G. Marvillo eds., 2003) (describing legislative intent of statutes).

of the two,[31] is sometimes charged along with § 1621, the broader of the two statutes.[32]

Regardless of which statute a violation is charged, the elements of perjury are the same. Perjury requires that there be (1) an oath,[33] (2) intent,[34] (3) a false statement,[35] and (4) materiality[36] However, there are differences between the two statutes such as in the party to whom the false statement is made, the effects of recantation,[37] the use of false materials to commit perjury,[38] the effect of inconsistent declarations,[39] and the requirement of the two-witness rule.[40]

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31. The purpose of § 1623 is to "encourage truthful testimony by witnesses appearing before federal courts and grand juries." United States v Sherman, 150 F.3d 306, 315 (3d Cir. 1998). *See also* Dunn v United States, 442 U.S. 100, 107 (1979).

32. This section is broader in scope because it covers any false statement made under oath before a "competent tribunal, officer, or person," and not just a court or grand jury. 18 U.S.C. § 1621 (2000).

33. Under § 1621 the oath requirement is satisfied where the authority to administer the oath is derived from an administrative rule or regulation. *See* Jared S. Hosid, *Perjury*, 39 AM. CRIM. L. REV 895, 899 (2002). Under § 1623, the requirement of the oath seems to be stricter. *Id.* at 898. *See also* United States v. Gomes-Vigil, 929 F.2d 254, 258 (6th Cir. 1991) (violation of § 1746, falsely made "under penalty of perjury" sufficient to support perjury under § 1623, which requires false statement to be "under oath"). *But see* United States v. Jaramillo, 69 F.3d 388, 391-93 (9th Cir. 1995) (statement made under penalty of perjury but not under oath did not satisfy § 1623(c) perjury charge).

34. *See* United States v. Lighte, 782 F.2d 367 372 (2d Cir. 1986); United States v. Chaplin, 25 F.3d 1373, 1377 (7th Cir. 1994). The intent requirement under § 1621 is willfulness and knowledge of falsity 18 U.S.C. § 1621 (2000). Under § 1623, the intent is described as knowingly stated or subscribed. 18 U.S.C. § 1623 (2000). For a discussion of the intent differences between § 1621 and § 1623, see United States v. Goguen, 723 F.2d 1012 (1st Cir. 1983) and United States v. Sherman, 150 F.3d 306 (3d Cir. 1998). Thus, under § 1621, the government must prove willfulness and knowledge beyond a reasonable doubt. *See* United States v. Dunnigan, 507 U.S. 87, 94 (1993); United States v Nash, 175 F.3d 429, 436 (6th Cir. 1999). Under § 1623, the intent requirement is met if the government can prove or infer that the speaker knew the statement was false when spoken. *See* United States v. Vest, 842 F.2d 1319, 1323, 1324 (1st Cir. 1988).

35. A declaration must be false under §§ 1621 and 1623. United States v. Hvass, 355 U.S. 570, 577 (1958) (under § 1621); United States v Durham, 139 F.3d 1325, 1331 (10th Cir. 1998) (under § 1623). Courts are uncertain, however, on whether direct evidence of falsity is needed. *See, e.g.*, Vuckson v. United States, 354 F.2d 918, 920 (9th Cir. 1966). Courts are also unclear on whether sufficiently compelling circumstantial evidence may suffice where falsity cannot be proved directly. *See, e.g.*, United States v. Sampol, 636 F.2d 621, 655 (D.C. Cir. 1980) (circumstantial evidence permitted to support allegations of false statement). In either case, doubt about the falsity must benefit the defendant. *See* United States v Moreno Morales, 815 F.2d 725, 749 n.32 (1st. Cir. 1987) ("[G]overnment did not need to prove through direct evidence that [defendant] saw the other agents.").

36. Proof of this element rests with the prosecution. *See* United States v Conley, 186 F.3d 7, 19 (1st Cir. 1999). A statement is said to be material if it has a natural tendency to influence the tribunal. *See* United States v. Arambula, 238 F.3d 865, 868 (7th Cir. 2001).

37 Under § 1621, a witness's attempt to repudiate, correct, or otherwise cure the effect of false testimony do not insulate him from prosecution for perjury. *See generally* United States v. Norris, 300 U.S. 564 (1937). Section 1623 allows for the defense of recantation if the other requirements of effect of the false statement on the proceedings and timeliness are met. 18 U.S.C. § 1623(d) (2000).

38. Section 1621 is applicable only when a person under oath "states or subscribes to any material matter which he does not believe to be true." 18 U.S.C. § 1621(1) (2000). However, § 1623 takes effect when a person under oath knowingly makes a false statement or "makes or uses any other information, including any book, paper, document, record, recording, or other material...." *See* 18 U.S.C. § 1623(a) (2000). Despite § 1621 applying to a broader range of proceedings, it has a narrow range of prohibited conduct.

39 Illogical as it may seem, irreconcilably inconsistent statements, one of which must be false,

There are two parts of a dialogue to every perjury charge: the question asked and the answer given. Courts have required near-absolute clarity from the questioner in order to support a perjury charge.[41] However, defendants have routinely escaped perjury convictions by responding to clear questions with non-responsive, vague, or evasive answers. Arguably, what is needed is a standard that works equally for both the prosecution and the defense.

A. *The Question and the Answer*

The general federal perjury statute, § 1621, provides that whoever takes an oath before "a competent tribunal, officer, or person" to testify truthfully but "willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true ... is guilty of perjury."[42] The objective of this statute is to aid the search for the truth by preventing and punishing false testimony.[43]

1. *Prosecutor's Questions*

The U.S. Supreme Court has held that a charge of perjury cannot rest on a defendant's responses to ambiguous questions.[44] A witness is not required to decipher an imprecise or confusing question,[45] and neither is the jury permitted to guess at what meaning a defendant may have ascribed to such a question.[46] The responsibility for framing the inquiry clearly and directly lies with the prosecutor.[47]

Nonetheless, the existence of some ambiguity in a question will not necessarily defeat a perjury charge.[48] Rather, recognizing that almost any question can be interpreted in several ways when subjected to ingenious scrutiny after the fact, courts have distinguished between "arguably ambiguous" questions and "fundamentally ambiguous" questions.[49] That is, even if a question may be subject to more than one interpretation (so that a defendant's answer may be true under one interpretation of a question but false under another), the question is only "arguably ambiguous." Such ambiguities are not fatal to a perjury prosecution if the jury can

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cannot sustain proof of guilt in a § 1621 criminal prosecution. Section 1623, however, allows proof of such statements to prove perjury. *See* United States v. Letchos, 316 F.2d 481, 484 (7th Cir. 1963) (inconsistent statements under § 1621 insufficient proof of perjury); United States v. Nessanbaum, 205 F.2d 93, 95 (3d Cir. 1953) (§ 1621 requires independent proof of falsity of one or the other statement).

40. *See* Kathryn Kavanagh Baran & Rebecca I. Ruby, *Perjury*, 35 AM. CRIM. L. REV. 1035, 1039-40 (1998).

41. *See, e.g.*, Bronston v. United States, 409 U.S. 352, 362 (1973); United States v. Serafini, 167 F.3d 812, 823-24 (3d Cir. 1999); United States v. Farmer, 137 F.3d 1265, 1270 (10th Cir. 1998).

42. 18 U.S.C. § 1621 (2000).

43. Dunn v. United States, 442 U.S. 100, 107 (1979).

44. Bronston v. United States, 409 U.S. 352, 362 (1973). *See also* United States v. Bollin, 264 F.3d 391, 411 (4th Cir. 2001) ("[P]recise questioning is imperative as a predicate for the offense of perjury." (citing Bronston v. United States, 409 U.S. 352, 362 (1973)).

45. *See* United States v. Spalliero, 602 F. Supp. 417, 422 (C. D. Cal. 1984).

46. United States v. Martellano, 675 F.2d 940, 946 (7th Cir. 1982).

47. United States v. Tonelli, 577 F.2d 194, 198 (3d Cir. 1978).

48. United States v. Doherty, 867 F.2d 47, 69 (1st Cir. 1989).

49. *Farmer*, 137 F.3d at 1268-69.

make a reasoned determination of the defendant's understanding of the question.[50] In such an instance, the jury is entitled to find the defendant guilty if it determines that, given the defendant's understanding of the question, his answer was false.[51]

2. *Fundamental Ambiguity*

While the defendant's interpretation of an arguably ambiguous question is within the province of the jury to decide, a question which is fundamentally ambiguous is insufficient as a matter of law to support a jury indictment or conviction.[52]

Fundamentally ambiguous questions are so vague or confusing that they would invoke a jury to engage in "groundless surmise" as to the meaning of the question and to substitute its own interpretation for that of the defendant.[53] Thus, a question is fundamentally flawed if men of average intelligence could not agree on its meaning and it could not be used with mutual understanding without further definition of its terms.[54] Federal courts have identified and relied upon a number of particular factors in determining whether a question is fundamentally ambiguous: (1) the inherent vagueness—or, conversely the inherent clarity—of certain words and phrases, (2) the compound character of a question, (3) the existence of defects in syntax or grammar in a question, (4) the context of the question and answer, and (5) the defendant's own responses to allegedly ambiguous questions.[55]

i. *Inherent vagueness*

Courts have found that some words or phrases are so inherently vague or subject to differing interpretation and usage that they render a question fundamentally ambiguous.[56] On the other hand, courts have also held that some words or phrases

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50. United States v. Lighte, 782 F.2d 367 375 (2d Cir. 1985).

51. United States v. Farmer, 137 F.3d 1265, 1269 (10th Cir. 1989).

52. *Lighte*, 782 F.2d at 375. Important policy considerations underlie the rule of fundamental ambiguity: (1) to prevent convictions which are based on mere conjecture, and (2) to encourage participation in judicial proceedings by refusing to impose the risks of inartful questioning on witnesses. *Bronston*, 409 U.S. at 358-59; United States v. Ryan, 828 F.2d 1010, 1015 (3d Cir. 1987).

53. *Lighte*, 782 F.2d at 375.

54. United States v. Lattimore, 127 F Supp. 405, 410 (D.D.C. 1955). *See also Lighte*, 782 F.2d at 375 (defining question as fundamentally ambiguous when it is not "a phrase with a meaning about which men of ordinary intellect could agree, nor one which could be used with mutual understanding by a questioner and answerer unless it were defined at the time it were sought and offered as testimony" (citing *Lattimore*, 127 F Supp. at 410)).

55. United States v. Serafini, 7 F Supp. 2d 529, 539 (M. D. Pa. 1998).

56. For instance, in *United States v. Lattimore*, 127 F Supp. 405, 406 (D.D.C. 1955), the government indicted the defendant for committing perjury before a Senate sub-committee for denying that he was a "follower of the Communist line." The court held that this phrase had no uniform, commonly accepted definition and that the jury would have to engage in "groundless surmise" to determine the meaning which defendant attributed to this phrase. *Id.* at 409. Hence, the question was fundamentally ambiguous and could not support a perjury conviction as a matter of law. *Id. See also* United States v. Sainz, 772 F.2d 559 564 (9th Cir. 1985) (holding that a question incorporating the word "procedure" was fatally ambiguous when used by a prosecutor during an investigation of corruption in the Immigration and Naturalization Service because the term could refer to the entire procedure of admitting automobiles across the border or to some individual step in that procedure);

have such plain and common meaning that they are inherently unambiguous.[57] Such words should be accorded their natural and commonplace meaning,[58] and the defendant will not be permitted to twist their meaning to escape a perjury charge.[59]

ii. Compound questions

A compound question or a question that is subject to more than one interpretation may be fundamentally ambiguous. If a prosecutor combines two or more discrete inquiries in one question which elicits a single response from the witness, it may be impossible for the jury to know which question the witness believed he was answering.[60]

iii. Defects in syntax or grammar

It may be impossible for the fact-finder to determine if the witness understood the meaning of the questions if the question is flawed by serious errors in syntax or

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United States v. Wall, 371 F.2d 398, 399 (6th Cir. 1967) (holding that a question about whether a defendant has been "on a trip" with someone was vague and was insufficient to support perjury charge because the phrase could refer to physically traveling with someone or merely being with someone at a particular place).

57 *Serafini*, 7 F Supp. 2d at 539.

58. United States v. Nixon, 816 F.2d 1022, 1030 (5th Cir. 1987).

59. United States v. Martellano, 675 F.2d 940, 942 (7th Cir. 1982). *See, e.g.*, United States v. Long, 534 F.2d 1097, 1100 (3d Cir. 1976) (finding that the terms "bribes," "kickbacks," and "payoffs" were not legal terms of art, but were "words of common currency which form part of the vocabulary of almost any American in his teens or older"); United States v. Kross, 14 F.3d 751, 756 (2d Cir. 1994) (holding that question incorporating the word "ever" is not fundamentally ambiguous because the term is not imprecise on its face).

60. United States v Landau, 737 F Supp. 778, 781-83 (S.D.N.Y 1990) (finding question whether the witness had told certain people that "[he] had to make payments to the union or that it was necessarv because of the union's picketing that it cost you more money?" to be fundamentally ambiguous, in part, because it posed two separate inquiries—whether the payments were necessary and whether the picketing cost more—in a form that prompted a single response). *See also*, United States v. Markiewicz, 978 F.2d 786, 809 (2d Cir. 1992) (holding that question was fundamentally ambiguous where it could have been asking about the defendants' actions in a personal capacity or her official actions as a member of a tribal council); United States v. Tonelli, 577 F.2d 194, 199-200 (3d Cir. 1978) (questioning whether defendant "handled" certain pension funds fundamentally ambiguous where handling could have meant touching the check or effecting the transaction, and it was the prosecutor's responsibility to clarify which question he was asking); United States v. Eddy, 737 F.2d 564, 571 (6th Cir. 1984) (reversing conviction where question asked incorporated at least four separate lines of inquiry). *But see*, United States v. Heater, 63 F.3d 311, 327 (4th Cir. 1995) (holding evidence sufficient to support perjury conviction because question, "Have vou ever bought or sold marijuana?" "intelligible" even though compound); United States v. Chapin, 515 F.2d 1274, 1282 (D.C. Cir. 1975) (holding that compound question, "Did you ever express any interest to [Mr. Segretti] or give [Mr. Segretti] any directions or instructions with respect to any single or particular candidate?" not ambiguous because both parts of question asked for same information; use of two analogous phrases in the same question was a mere "rhetorical flourish").

grammar.[61] Also, the use of an unclear reference may cause a question to be fatally ambiguous.[62]

iv Context

In determining whether a question is fundamentally ambiguous as a matter of law, courts will also examine the context of the question.[63] Important contextual clues are the questions and answers that preceded or followed the question which provoked the allegedly perjurious response and the defendant's understanding of the overall purpose of the investigation.[64]

Thus, a question that appears clear when considered in isolation may be fundamentally ambiguous in light of the broader line of questioning.[65] The context of questioning cuts both ways, however, and a defendant will not be permitted to

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61. *See Ryan*, 828 F.2d at 1016-17 (conviction for perjury reversed where response to a request for "Previous Address (last five years)" on a credit card application was fundamentally ambiguous because singular form of the noun "address" on the application could have been variously construed as asking the applicant to supply any previous address he had within the last five years, the applicant's most recent address, or all addresses the applicant had within the last five years); United States v. Farmer, 137 F.3d 1265, 1270 (10th Cir. 1998) (court found the question "Have you talked to Mr. McMahan, the defendant, about your testimony here today?" ambiguous because it was unclear whether the phrase "here today" was intended to modify the word "talked" or the word "testimony," thus a jury could not reasonably determine if the prosecutor was asking whether the witness had talked to the defendant on the day of her testimony before the grand jury or whether she had talked with him on some earlier occasion about the testimony she was going to give on that day). *But see* United States v. Williams, 552 F.2d 226, 229 (8th Cir. 1977) (holding that, given context of inquiry, defendant understood prosecutor's use of plural form of term "liens" to include singular term "lien" and so evidence was sufficient to support perjury conviction).

62. *See, e.g.*, United States v. Lighte, 782 F.2d 367, 375 (2d Cir. 1986) (reversing conviction based on fundamental ambiguity where prosecutor used the pronoun "you" to refer to the defendant in a series of questions but did not clarify when he was referring to the defendant in his capacity as trustee and when he was referring to the defendant in his individual capacity); United States v. Slawik, 548 F.2d 75, 85 (3d Cir. 1977) (reversing perjury conviction because, inter alia, the questioner's unqualified reference to "it" and "this" throughout a series of 0questions made the questions fundamentally ambiguous).

63. *See Farmer* 137 F.3d at 1269· *Martellano*, 675 F.2d at 943.

64. *Martellano*, 675 F.2d at 943; *Chapin*, 515 F.2d at 1280; United States v. Butt, 745 F Supp. 34, 36 (D. Mass. 1990).

65. *Farmer* 137 F.3d at 1269. *See also* United States v. Bell, 623 F.2d 1132, 1135 (5th Cir. 1980) (court dismissed defendant's perjury count that was based on defendant's negative response to question "...do you have records that are asked for in the subpoena?" because, even though such records existed, the prosecutor's earlier question suggested that he was interested only in records which the defendant bought with him to the grand jury room); *Tonelli*, 577 F.2d at 198 (government alleged that defendant falsely denied that he had "participated" in the placement of certain funds at a bank; court vacated conviction emphasizing that indictment removed the question from context by omitting the defendant's truthful response to a crucial follow-up question in which the prosecutor had recognized that the earlier question was ambiguous and had qualified and defined his meaning of the term "participation."); United States v. Manapat, 928 F.2d 1097 1101 (11th Cir. 1991) (affirmed lower courts dismissal of perjury charges against defendant who government alleged had failed to disclose prior criminal and traffic convictions on a Federal Aviation Administration medical application after concluding that the confusing configuration of questions on the form—in which questions regarding prior convictions were placed in the middle of a sequence of questions relating to medical history—rendered the application form ambiguous as a matter of law.)

isolate a question from the context of the broader questioning to distort its meaning and escape a perjury charge.[66] In examining the context of a question, the court may also consider the purpose of the overall investigation, as well as the defendant's understanding of that purpose, because a particular question's meaning may be manifest in light of the larger objectives of the trial or grand jury proceeding.[67]

3. *Defendant s Answers*

i. Literal truth

In order to constitute perjury the matters sworn to must be false.[68] The truth is always a complete defense. Perjury cannot be based upon an answer that is literally true, even though the answer is incomplete, misleading, or non-responsive.[69]

In *Bronston v United States*, the Supreme Court was asked to determine whether a witness may be convicted of perjury for an answer, under oath, that is literally true but not responsive to the question asked and arguably misleading by negative implication.[70] The Court held that a person cannot be guilty of perjury who speaks the truth, even if it is non-responsive.[71] Finding that § 1621's purpose is to "keep the course of justice free from the pollution of perjury "[72] the Court held that the words of the statute confine the offense to one who "states" a material matter that one does not believe to be true. The statute cannot be construed to mean what in casual conversation might be inferred. Rather, it is to be construed only upon what

66. *Martellano*, 675 F.2d at 944. *See also* United States v. Bonacorsa, 528 F.2d 1218, 1221 (2d Cir. 1976) (defendant's conviction upheld on grounds that his answer, when asked from whom he had bought the "fifth horse," followed by the question "And anybody else?" was not fundamentally ambiguous because the preceding question and answer clearly indicated that the question referred to the people from whom the defendant bought the horse); United States v. Boone, 951 F.2d 1526, 1535 (9th Cir. 1991) (holding that evidence was sufficient to support perjury conviction because questions regarding "these trusts" not ambiguous in context of immediately preceding questions referring to three specific trusts); United States v. Doherty, 867 F.2d 47, 68-69 (1st Cir. 1989) (holding that question incorporating phrase "that exam" not fundamentally unclear because prosecutor had referred to "captain's exam" and "written exam" only a few questions earlier); United States v Long, 697 F Supp. 651, 660-61 (S.D.N.Y 1988) (holding that prosecutor's reference to "mortgage" not fundamentally ambiguous because previous nine pages of deposition testimony revealed that defendant understood term to refer to a specific loan).

67 *Chapin*, 515 F.2d at 1280. *See also* United States v. Williams, 536 F.2d 1202, 1206 (7th Cir. 1976) (defendant argued that prosecutor's question whether the heroin dealer "remain[ed] at the house during that day" was ambiguous because the word "day" could mean either the whole calendar day or just the daylight hours; court held "day" not ambiguous because everyone at trial knew the purpose of the inquiry was to determine the drug dealer's whereabouts at eight o'clock on a particular evening.) Similarly, the court in *Chapin*, relied on the defendant's understanding of the grand jury's purpose of investigating the commission of political "dirty tricks" during the 1972 presidential campaign to find sufficient evidence that the defendant understood the terms "distribute" and "express any interest in" question about the dissemination of campaign literature. *Chapin*, 515 F.2d at 1280.

68. 60A AM. JUR. 2D *Perjury* § 9 (1988).

69. Bronston v. United States, 409 U.S. 352, 361-62 (1973).

70. *Bronston*, 409 U.S. at 352.

71. *Id.* at 356.

72. *Id.* at 357 (citing United States v. Williams, 341 U.S. 58, 68 (1951)).

is spoken.[73] The Court ruled that the "burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry."[74]

Nor can perjury be based upon a non-responsive, and therefore ambiguous, statement the literal truthfulness of which cannot be ascertained.[75] A court may also consider the substance and manner of the defendant's responses to allegedly vague questions, and the defendant's own use of allegedly ambiguous language, in determining whether there was mutual understanding between the defendant and the examiner as to the meaning of a question.[76] The court may also consider whether the defendant exhibited any hesitancy equivocation, or confusion in answering an allegedly ambiguous question.[77]

B. The Two Witness Rule under Section 1621

One primary difference among § 1621, § 1622, and § 1623 lies in the standard of proof requirements. Under § 1621 and § 1622, as in all criminal cases, the burden

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73. The Supreme Court specifically rejected the government's argument that the statute be broadly construed. The court held that it had no reason to go beyond the precise words of the statute "to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of [an] unresponsive answer." *Id.* at 358.

74. *Id.* at 360. *Accord* United States v. Kehoe, 562 F.2d 65, 69 (1st Cir. 1977); *Long*, 697 F Supp. 651 at 660; United States v. Hairston, 46 F.3d 361, 375 (4th Cir. 1995); United States v. Abroms, 947 F.2d 1241, 1245 (5th Cir. 1991); United States v Reynolds, 919 F.2d 435, 437 (7th Cir. 1990); United States v Williams, 536 F.2d 1202, 1205 (7th Cir. 1976); United States v. Porter, 994 F.2d 470, 475 (8th Cir. 1993); United States v. Sainz, 772 F.2d 559, 564 (9th Cir. 1985); United States v. Clarridge, 811 F Supp. 697 712 (D.D.C. 1992); United States v Bollin, 264 F.3d 391, 411 (4th Cir. 2001); United States v. Eddy, 737 F.2d 564, 566 (6th Cir. 1984); United States v. Ruedlinger, 990 F Supp. 1295, 1303 (D. Kan. 1997); United States v. Shotts, 145 F.3d 1289, 1298 (11th Cir. 1998); United States v. Rendon-Marquez, 79 F Supp. 2d 1361, 1362-63 (N.D. Ga. 1999).

75. United States v. Esposito, 358 F Supp. 1032, 1033 (D. Ill. 1973); United States v. Cobert, 227 F Supp. 915, 919 (S.D. Cal. 1964).

76. United States v Serafini, 7 F Supp. 2d 529, 539 (M.D. Pa. 1998). *See also* United States v. Andrews, 370 F Supp. 365, 369 (D. Conn. 1974) (court refused to dismiss indictment as a matter of law; defendant's contention that phrases "bookmaking operations" and "settling up" were vague belied by use of the words "settle up" and "numbers" in his own testimony, and thus, he was unlikely to have misunderstood the meaning of the term); United States v. Chapin, 515 F.2d 1274, 1280 (D.C. Cir. 1975) (court dismissed the defendant's contention that he could have understood the word "distribute" to refer to personal distribution of campaign material on street corners and house to house, in part because in earlier grand jury testimony, the defendant had used the term to mean "pass on to others.")

77 *See* United States v. Long, 534 F 2d 1097 1100 (3d Cir. 1976) (two defendants argued that words "bribes," "kickbacks," and "payoffs," called for legal conclusions and were thus, confusing to a layperson; court observed that they answered the question unequivocally and never evidenced any confusion about the meaning of the words.); United States v. Nixon, 816 F.2d 1022, 1030 (5th Cir. 1987) (court declined to accept defendant's claim that the questions about "discussions" was ambiguous; court relied in part on fact that defendant gave an expansive, immediate, and unqualified answer to the question); United States v. Caucci, 635 F.2d 441, 445 (5th Cir. 1981) (finding evidence sufficient to support perjury conviction and emphasizing that defendant who alleged that the term "associates" was ambiguous did not ask for clarification and answered question without hesitance or qualification).

of proof on the government is guilt beyond a reasonable doubt.[78] However, § 1621 requires that the government meet this burden of proof by producing no fewer than two witnesses to establish perjury

1 *Analysis of the Two-Witness Rule*

The two-witness rule is "deeply rooted in past centuries,"[79] and is designed to prevent a defendant from being convicted on the strength of his oath versus that of another.[80] Under modern theory the rule "rests on society's obligation to protect a witness 'from oppression, or annoyance by charges of having borne false testimony '"[81] Additionally "witnesses who are compelled to testify will [do so] more freely if they know that they will not be subject to prosecution for perjury simply because [another] witness may ... have a different recollection of the same events."[82]

Despite its deep roots in American jurisprudence,[83] the two-witness rule was omitted by Congress in § 1623, which allows a conviction upon the testimony of one witness by providing that "[i]t shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence."[84] However, in perjury prosecutions under § 1621 the two-witness rule is used to assess the legal sufficiency of the government's evidence.[85] Under the two-witness rule, the falsity of the allegedly perjurious testimony must be established through either (1) the testimony of two or more witnesses, or (2) the testimony of one witness supported by additional direct or circumstantial corroborative evidence.[86]

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78. 18 U.S.C. 1623(e) (2000).

79 For example, there is a Biblical reference to the requirement of two witnesses. *Deuteronomy* 17:6 states: "At the mouth of two witnesses or three witnesses, shall he that is worthy of death be put to death; but at the mouth of one witness he shall not be put to death." *See also* JOHN HENRY WIGMORE, EVIDENCE § 2032, at 326 n.6 (1978).

80. *See* United States v. Collins, 272 F.2d 650, 652 (2d Cir. 1959) (also stating that the two-witness rule was intended to prevent ill-founded retaliatory attack upon a witness by a perjury prosecution of no more than the contrary oath of another); United States v. Marchisio, 344 F.2d 653, 665 (2d Cir. 1965); Gebhard v. United States, 422 F.2d 281, 286 (9th Cir. 1970); Vuckson v. United States, 354 F.2d 918, 920 (9th Cir. 1966).

81. *See* United States v. Goldberg, 290 F.2d 729, 733 (2d Cir. 1961) (quoting 7 JOHN HENRY WIGMORE, EVIDENCE 276 (3d ed. 1940)). *See also* Vuckson v. United States, 354 F.2d 918, 920 (9th Cir. 1966) (stating that the crime of perjury is not proved in the same manner as most crimes and has been declared, from the time of Blackstone, not capable of proof under testimony of but one witness, because "there is then but one oath against another." (quoting United States v. Wood, 39 U.S. 430, 437 (1840)).

82. *See Marchisio*, 344 F.2d at 665. *See also* United States v. Diggs, 560 F.2d 266, 269 (7th Cir. 1977) (the policy behind the two-witness rule is that a conviction for perjury ought not to rest on "the fear that innocent witnesses might be unduly harassed or convicted in perjury prosecutions if a less stringent rule were adopted") (quoting Weiler v. United States, 323 U.S. 606, 609 (1945)).

83. For a history of the law of perjury, see Richard H. Underwood, *False Witness: A Lawyer s History of the Law of Perjury*, 10 ARIZ. J. INT'L & COMP L. 215 (1993).

84. 18 U.S.C. § 1623(e) (2000).

85. 18 U.S.C. § 1621 (2000).

86. United States v Menting, 166 F.3d 923, 929 (7th Cir. 1999). *See also Diggs*, 560 F.2d at 269 (the rule advances important policy interests, including: (1) protecting defendants against

The federal courts appear to be in disagreement as to whether the two-witness rule replaces proof beyond a reasonable doubt as a prerequisite to conviction of a crime. In *Brightman v. United States*,[87] the court ruled that (1) while corroborating as well as primary evidence on the issue of falsity is necessary, the evidence in its entirety need only convince the jury beyond a reasonable doubt, and (2) the corroboration rule is an additional requirement and not a qualification of the reasonable doubt rule.[88]

In other cases, however, the two-witness rule has been considered an exception to the reasonable doubt rule. In *United States v. Nessanbaum*, the court stated that the two-witness rule is a unique exception to the general rule that proof of guilt beyond a reasonable doubt is sufficient to sustain a conviction.[89]

The Supreme Court has held that when the government seeks to prove perjury by the use of circumstantial evidence allowed under the two-witness rule, two factors are crucial to an analysis of the sufficiency of the corroborative evidence: (1) the degree to which the evidence, if true, substantiates the testimony of the sole witness, and (2) the trustworthiness of that evidence.[90] The circuits are divided, however, in their interpretation and implementation of these guidelines.[91]

i. Inconsistent with innocence standard

A majority of courts hold that corroborative evidence is sufficient if it is inconsistent with the defendant's innocence and is strong, clear, and compelling enough to assure the court that the guilty verdict is solidly founded.[92] A minority of courts impose a less rigorous standard and require merely that the corroborative

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conviction on the basis of the potentially unreliable or biased testimony of a single witness and (2) fostering the search for truth by encouraging witnesses to testify without fear of prosecution based on the oath of one witness); *Marchisio*, 344 F.2d at 665 ("All that is required under the rule ... is that the evidence independent of the principal witness' testimony be sufficient to corroborate that testimony ").

87 386 F.2d 695 (1st Cir. 1967).

88. *Id.* at 698. *See also Diggs*, 560 F.2d at 270 (pointing out that in a prosecution for perjury, as in all criminal cases, the burden on the government is that of proving the defendant guilty beyond a reasonable doubt; that the two-witness rule merely imposes an evidentiary minimum required to meet this burden as a matter of law and that the rule focuses on the totalitv of the government's evidence in order to assure a sufficiency necessary to fulfill its underlying policy that perjury convictions not be based merely on an "oath against an oath."); Young v. United States, 212 F.2d 236, 241 (D.C. Cir. 1954) (ruling that fulfillment of the two-witness rule is necessary for conviction of perjury, but it is not sufficient for conviction, since an additional requirement is that the jury could reasonably believe that there was no reasonable doubt as to the defendant's guilt).

89 205 F.2d 93, 95 (3d Cir. 1953). *See also* United States v. Laughlin, 226 F Supp. 112, 114 (D.D.C. 1963) (ruling that the two-witness rule presents an exception to the general rule that evidence which is sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt is sufficient to sustain a conviction).

90. Weiler v United States, 323 U.S. 606, 610-11 (1945).

91. At least two courts have concluded that the split of authority is more apparent than real, with the outcome in most cases being determined largely on their particular facts. United States v. Diggs, 560 F.2d 266, 269-70 (7th Cir. 1977); United States v Weiner, 479 F.2d 923, 926 (2d Cir. 1973).

92. *See* United States v Forrest, 639 F.2d 1224, 1226 (5th Cir. 1981); *Weiner* 479 F.2d at 926; United States v. Thompson, 379 F.2d 625, 628 (6th Cir. 1967); Doty v. United States, 261 F.2d 10, 12 (10th Cir. 1958); United States v. Neff, 212 F.2d 297 307-08 (3d Cir. 1954).

evidence "tends" to establish guilt and that the corroborative evidence and the direct evidence be inconsistent with the defendant's innocence.[93] Regardless of which standard is used, all courts require that the corroborative evidence be independent of the witness with the direct testimony.[94] "Independent" means evidence coming from a source other than that of the direct testimony of one witness.[95]

Courts which adhere to the majority view often appear to interpret the requirement that the corroborative evidence be "inconsistent with the defendant's innocence" to mean that the evidence must be *absolutely* inconsistent with innocence. Thus, the court may not uphold a perjury conviction if the corroborative evidence admits of some plausible alternative explanation of the facts which can be harmonized with the defendant's innocence.[96]

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93. *Diggs*, 560 F.2d at 270; *Brightman*, 386 F.2d at 697; Arena v. United States, 226 F.2d 227, 236 (9th Cir. 1955). There is virtually no authority for the proposition that the corroborative evidence must in itself be sufficient to support a conviction (requiring the government to effectively prove its case twice over). United States v. Weiner, 479 F.2d 923, 927 (2d Cir. 1973). *But see Neff*, 212 F.2d at 308 (holding that corroborative evidence "must be equally strong and convincing as the direct testimony").

94. *See* United States v. Hiss, 185 F.2d 822, 824 (2d Cir. 1950); *Neff*, 212 F.2d 297 at 303; Paternostro v. United States, 311 F.2d 298, 306 (5th Cir. 1962); United States v. Davis, 548 F.2d 840, 843 (9th Cir. 1977); McWhorter v. United States, 193 F.2d 982, 983 (5th Cir. 1952); *Diggs*, 560 F.2d 266 at 268-69; United States v. Haldeman, 559 F.2d 31, 118 (D.C. Cir. 1976).

95. *See, e.g.*, *Diggs*, 560 F.2d at 270; *McWhorter* 193 F.2d at 983. *See also* United States v. Freedman, 445 F.2d 1220, 1226 (2d Cir. 1971) (stating that circumstantial evidence in corroboration of testimony of one witness must be such that were it standing alone it would have independent probative value).

96. *See, e.g.*, *Thompson*, 379 F.2d at 625. In that case, the direct testimony of a police major, who interrogated the defendant, directly contradicted the defendant's claim that the major had refused the defendant's request to call an attorney. *Id.* at 627. In reversing the defendant's perjury conviction, the court concluded that the corroborative testimony of two FBI agents (who participated in the interrogation) that they did not hear the defendant make such a request was not sufficient because it did not obviate the possibility that the defendant made the request before or after the agents were present. *Id.* at 628. *See also* United States v. Chestman, 903 F.2d 75 (2d Cir. 1990). In that case, a stockbroker was convicted of committing perjury before the SEC for testifying that he had not spoken with a certain customer before 9:49 a.m. *Id.* at 80. The court held that a phone message the customer left a 8:58 a.m. was not sufficiently corroborative of testimony that the defendant talked to the customer later in the day, and it observed that the fact that the defendant had to leave a phone message was equally supportive of the theory that the two did *not* make contact before 9:49 a.m. *Id.* at 81. *See also* United States v. Paternostro, 311 F.2d at 306-07 (holding that testimony of witness who overheard unidentified person say "[t]he Captains are getting the money" was not sufficiently corroborative of charge that police lieutenant had falsely denied participating in or having knowledge of police corruption because comment could have plausibly concerned the difference in the respective salaries of captains and lieutenants); *Weiner* 479 F.2d at 928 (where defendant denied having met with witnesses, witnesses' testimony that defendant met with him in New York on a certain date carrying a plaid suitcase and papers printed in purple ink was not sufficiently corroborated by evidence that the defendant had purchased an airline ticket two days before the alleged meeting and by defendant's co-workers' testimony that defendant had previously received a memo printed in purple ink and sometimes carried a plaid suitcase because the corroborative evidence was not probative of the meeting's having occurred; nonetheless, the witness's testimony that he telephoned the defendant for recommendation of a stockbroker was confirmed by testimony of an attorney that the witness called him, asking for a recommendation of a stockbroker, the day after the defendant told him to expect a call from a "friend" seeking such advice). *But see* United States v. Salanitro, 432 F.2d 59, 60 (10th Cir. 1970) (finding an FBI agent's testimony that he saw defendant at an airport with a third person

In addition to being inconsistent with defendant's innocence, the corroborative evidence must be of a quality that assures the reviewing court that the conviction was "solidly founded."[97] Evidence will not meet this criterion if it does not create a reasonable and logical inference of the defendant's guilt.[98] Further, courts have held that corroborative evidence which required the fact-finder to engage in speculation or conjecture in order to reach a guilty verdict is not sufficient to uphold a perjury charge.[99] Finally, the probative force of corroborative evidence may turn on the quantity, as well as the character, of the evidence offered.[100]

ii. Tends to establish guilt standard

In several jurisdictions, the corroborative evidence is sufficient if it tends to establish the defendant's guilt and, when considered together with the testimony of the primary witness, is inconsistent with the defendant's innocence.[101] Even under

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and a sheriff's testimony that he saw the third person conversing with someone who the sheriff later identified as the defendant established that defendant's denial that he knew the third person was false).

97. United States v. Forrest, 623 F.2d 1107 1111 (5th Cir. 1980).

98. *See Forrest*, 639 F.2d at 1227 (two-witness rule not met where, to prove that defendant lied when she denied speaking to purchaser about selling him stolen eggs, the government offered the purchaser's testimony that the phone call occurred, testimony from one of defendant's husband's employees that he delivered eggs to another party at the defendant's direction, and testimony of a second employee that he delivered eggs to the purchaser at the defendant's husband's direction; while the government's evidence might have established that defendant was involved in her husband's stolen egg enterprise, the employees could not corroborate the purchaser's testimony that the phone call actually occurred).

99. *See, e.g., Paternostro*, 311 F.2d at 298. The government relied on the corroborative testimony of a prostitute that a uniformed officer named "Pat" solicited her for bribes after her arrest even though she could not identify the defendant as "Pat" and police records showed that another officer with the same name, who always worked in uniform and who admittedly participated in the graft ring, had arrested the prostitute. *Id.* at 307 The court reversed the defendant's conviction because it found that only by the "wildest conjecture, surmise, and suspicion" could the jury infer from this evidence that the defendant had accepted the bribe. *Id.* at 307-08. *See also Neff*, 212 F.2d at 297 There, the court held that corroborative evidence that the defendant signed a nominating petition for a Communist Party candidate, was a member of the Communist Party, and collected dues for the Party at her workplace did not establish that she committed perjury by denying she had ever attended a Communist Party meeting. *Id.* at 307 Although the evidence established that the defendant was a member of the Party, which made it "probable" that she had attended a Party meeting, it did not "lead directly to the inevitable ... conclusion" that the defendant had lied. *Id.* at 308.

100. *See Forrest*, 623 F.2d at 1111. In that case, the defendant was convicted of falsely testifying that he bought automobiles at a certain auction company. *Id.* at 1109. A witness testified that the defendant told him that the company did not exist; moreover, FBI agents testified to the extensive efforts they engaged in in establishing no such company existed. *Id.* at 1111-12. The court concluded that the "considerable amount" of unrebutted evidence satisfied the corroboration requirements of the two-witness rule. *Id.*

101. United States v. Diggs, 560 F.2d 266, 270 (7th Cir. 1977). In that case, the government prosecuted the defendant for perjury for denying that he had knowledge about a particular machine gun or that he had delivered it to a particular person. The recipient of the gun testified that the defendant had personally delivered it to him. *Id.* at 268. The prosecution offered the corroborative testimony of other witnesses who saw the defendant visit the recipient's house on the date of the delivery and saw the weapon in the recipient's home after the defendant left, although they did not see him actually make the delivery. *Id.* In upholding the conviction, the court held that the totality of the evidence, which consisted of the direct testimony of the recipient and the independent corroborative testimony of the

this standard, however, the court will not uphold a perjury conviction if the corroborative evidence does not give rise to a reasonable inference of the defendant's guilt.[102]

While this conflict in standards has been noted by the courts, it is generally agreed that the difference, if any is mainly in emphasis and semantics.[103] It is not thought to render a difference in results. However, an examination of the cases decided under the tests reveals a difference in results that is attributable to the tests. Further, this difference in treatment would be abated if the two-witness rule was not mandated under § 1621, but rather, the jury was left to decide the sufficiency of the government's evidence. Proof of this conclusion lies in the fact that under other rules applicable in perjury cases, the two-witness rule does not act as a bar to conviction.

C. *Section 1623(c)—Inconsistent Statements*

Section 1623(c), governing inconsistent declarations under oath, provides that the defendant may be convicted of making false declarations if he has made two

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three witnesses, was sufficient to satisfy the requirements of the two-witness rule. *Id.* at 270. *See also* Brightman v United States, 386 F.2d 695, 695 (1st Cir. 1967). There the defendant was convicted of falsely testifying in a bankruptcy proceeding that monies from the sale of certain corporate property were paid to employees who prepared the property for shipment to buyers. *Id.* at 696. The employees' direct testimony that they were never paid was corroborated by the testimony of a foreman that the employees had been laid off before the sale and the testimony of a "phalanx" of purchasers that they prepared the equipment themselves. *Id.* at 696-97 The court emphasized that it could be "reasonably inferred" from the "total evidence" that the employees were not on the payroll at the time of the sale, and thus, they could not have been paid by the defendant. *Id.* at 698. *But see* United States v. Chaplin, 25 F.3d 1373, 1380-81 (7th Cir. 1994) (two-witness rule not met where defendant stated in a bankruptcy proceeding that he did not recall giving $8,000 to his father-in-law on a specific date in October, although father-in-law testified defendant "probably gave him money" sometime in October and a deposit slip for father-in-law's account showed an $8,000 deposit on the specified date, because evidence did not establish that the father-in-law received money on that date; however, two-witness rule was met on defendant's denial that he placed items in father-in-law's garage where father-in-law testified that defendant did so and another witness testified to seeing items in the garage, labeled with the defendant's name).

102. *See* United States v Howard, 445 F.2d 821, 822 (9th Cir. 1971). In that case, the defendant was convicted of falsely stating that he used bogus identification to rent a car. *Id.* at 822. The rental car agent testified that the defendant's companion rented the car and produced the false identification. A police officer, who pulled over the defendant and his companion several days after the rental transaction, testified that the companion produced the identification card used to rent the car. *Id.* at 822-23. An FBI agent also testified that the defendant later claimed that he actually bought the car, which he believed was "hot," and later found the rental invoice in the glove compartment. *Id.* at 823. The court concluded that the police officer's testimony failed to establish an inference that the defendant did not possess the false identification when he rented the car because the defendant could easily have used the identification during the rental transaction and later given it to his accomplice. Similarly, the FBI agent's testimony as to the defendant's claim to have purchased the car tended to show only the defendant's consciousness of guilt. This guilt would be equally consistent with rental and conversion of the car or with his aiding an accomplice in the theft of the car. *Id.*

103. *See* United States v Weiner, 479 F.2d 923, 927 (2d Cir. 1973) (stating that "an examination of the facts ... of the cases ... discloses that is they differ at all, the divergencies are very few and very narrow"); *Diggs*, 560 F.2d at 269-70 (expressly agreeing with the Second Circuit's conclusion that the division "judged by its results, appears to be a matter of semantics and a slight difference in emphasis").

irreconcilably contradictory declarations such that one of them is necessarily false.[104] The government need not prove which of the declarations was false through extrinsic evidence, but rather falsity of one of two declarations is inferred from their inconsistency with each other.[105] In addition, any recantation made by a defendant respecting his testimony is not a bar to prosecution for perjury based on defendant's inconsistent statements.[106]

D. Recantation as a Defense

Section 1623(d) bars a prosecution for perjury where the defendant recants his false statement.[107] The central purpose of § 1623 was to encourage truthful testimony before the courts and grand juries.[108] Congressional intent was to lift the common-law rules of evidence that burdened perjury prosecutions and increase the chance of convictions while adding a recantation provision allowing witnesses to retract false declarations without inviting a perjury prosecution under § 1623.[109] The effect of § 1623(d) recantation is not to erase the lie, but rather to erect a bar to prosecution where the statutory requirements have been met.[110]

Courts are unanimous that the recantation defense is a matter of law to be decided, prior to trial, by the court.[111] However, courts do not agree as to who bears the burden of proof to establish the recantation defense or what that burden is. The Ninth Circuit has held that the burden rests with the prosecution to "prove the inapplicability of this defense beyond a reasonable doubt."[112] However, the Fifth and D.C. Circuits have held that "the defendant must show that he is within an exception"[113] by a preponderance of the evidence.[114] This is less problematic than

104. *See* United States v. Jaramillo, 69 F.3d 388, 390 (9th Cir. 1995); United States v. Moriel, 201 F Supp. 2d 952, 956 (S.D. Iowa 2001) ("[A] statement other than one made under oath, such as a sworn affidavit, can constitute one of the statements involved" in a perjury prosecution under § 1623(c)).

105. *See* United States v. Dunn, 577 F.2d 119, 122 (10th Cir. 1978). *See also* Dunn v. United States, 442 U.S. 100, 104 (1979); United States v. Flowers, 813 F.2d 1320, 1324 (4th Cir. 1987).

106. *See* United States v McAfee, 8 F.3d 1010, 1017 (5th Cir. 1993) (recantation is not a defense to an action brought under the "willful perjury" statute (§ 1621)). *But see* United States v. Scavola, 766 F.2d 37 45 (1st Cir. 1985); Unites States v. Moore, 613 F.2d 1029, 1039 (D.D.C. 1979).

107 *McAfee*, 8 F.3d at 1016.

108. *Moore*, 613 F.2d at 1040; United States v. Sebaggala, 256 F.3d 59, 64 (1st Cir. 2001) (quoting *Moore*, 613 F.2d at 1040) (stating that the "core purpose of the recantation provision is to encourage truthful testimony").

109. *See* 60A AM. JUR. 2D *Perjury*, § 107

110. *See* United States v. Goguen, 723 F.2d 1012, 1017 (1st Cir. 1983); United States v. D'Auria, 672 F.2d 1085, 1093 (2d Cir. 1982); United States v. Parr, 516 F.2d 458, 472 (5th Cir. 1975); United States v. Kahn, 472 F.2d 272, 283 (2d Cir. 1973).

111. *See, e.g.*, *Kahn*, 472 F.2d at 285. *See also* United States v. Denison, 663 F.2d 611, 618 (5th Cir. 1981) ("[T]he defense of recantation must be raised before trial under Federal Rule of Criminal Procedure Rule 12(b)(2) as a jurisdictional bar to prosecution.... [O]nce rejected, the recantation issue may not be raised at trial and argued to the jury.").

112. *See, e.g.*, United States v Guess, 629 F.2d 573, 577 n.4 (9th Cir. 1980); United States v. Tobias, 863 F.2d 685, 688 (9th Cir. 1988).

113. *See, e.g.*, United States v. Scrimgeour, 636 F.2d 1019, 1024 (5th Cir. 1981); *Moore*, 613 F.2d at 1044-45.

114. *See Scrimgeour* 636 F.2d at 1024 (rejecting the defendant's offer of proof that he did not

it may seem because, as is shown, regardless of who carried the burden, recantation has never worked as a defense.

To avoid a perjury prosecution, a witness must comply with the requirements of the statute and declare the falsity of the statement (1) during the same proceeding and before it "substantially affects" the proceeding, or (2) before it becomes manifest that the defendant's falsity will be exposed.[115] While the statute specifically uses the word "or," implying that recantation can occur by meeting one prong and not the other, courts have held that the "or" in this statute is to be construed as meaning "and," so that "[r]ecantation can only be a defense to a perjury charge if the prior false statement has not yet substantially affected the proceeding and it has not become clear to the defendant that such falsity has been or will be exposed."[116] Even where the court finds that the defendant's statement has occurred in the same proceeding,[117] defendants do not typically satisfy the requirement that the subsequent statement actually *recants* the previous one, or they fail to recant before it becomes manifest that the falsehood is exposed.

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know that his lies had been or would be exposed to the government, reversing the district court's findings, implying a preponderance of the evidence standard for use by the defendant); *Moore*, 613 F.2d at 1044 (stating that in criminal prosecutions the burden is on the government to prove beyond a reasonable doubt every essential element of the offense it charges; however, if the statute sets forth an exception, the burden is on the accused to bring himself within the exception, thus allowing for an implication that the court would impose a lesser burden of proof upon the defendant). *See also* United States v. Awadallah, 202 F Supp. 2d 17, 37 (2002) ("Even assuming the government has the burden of proving, *by a fair preponderance of the evidence*, that the recantation defense has not been met ....") (emphasis added)).

115. 18 U.S.C. § 1623(d) (2000).

116. 60 AM. JUR. 2D *Perjury* § 109 (1980). *See also* McMahon v United States, 2000 WL 1869451, at *2 n.2 (10th Cir.2000) (finding, without deciding the issue, that a majority of circuits that have considered the question hold same); *Kahn*, 472 F.2d at 284; United States v. Crandall, 363 F Supp. 648, 654 (W.D. Pa. 1973). *Accord Scrimgeour* 636 F.2d at 1019 (explaining that a conjunctive reading of 1623(d) comports with accepted principles of statutory construction and is supported by the underlying congressional intent; determining that Congress did not intend to allow a perjurer to avoid prosecution by merely recanting before his perjury adversely affects a grand jury proceeding but even after his perjury has already been exposed.); United States v. Swainson, 548 F.2d 657, 663 (6th Cir. 1977); *Moore*, 613 F.2d at 1040 (ruling that while "or" is normally to be read in the disjunctive, and while criminal statutes are to be strictly construed, Congress did not intend 1623(d) to countenance the flagrant injustice that would result if a witness were permitted to lie to a judicial tribunal and then, only upon learning that he had been discovered, recant in order to bar prosecution); United States v. Fornaro, 894 F.2d 508, 511 (2d Cir. 1990) (holding recantation effective only if false statement has not substantially affected proceeding *and* if it has not become manifest that falsity has been or will be exposed); United States v. Lewis, 876 F Supp. 308, 310-11 (D. Mass. 1994); United States v. Sherman, 150 F.3d 306, 317 (3d Cir. 1998). *But see* United States v. Smith, 35 F.3d 344, 345-47 (8th Cir. 1994) (term "or" could not be construed, consistent with rule of lenity, to mean "and;" accordingly, defendant could invoke defense either by showing that, at the time of admission, declaration had not substantially affected the proceeding, or by showing that it had not become manifest that declaration's falsity had been or would be exposed).

117. *Crandall*, 363 F Supp. at 655 (admitting that this requirement was met where the defendant gave his statement admitting of the falsity of his earlier testimony where, although the grand jury had been dismissed, they were subject to recall; however, defendant did not meet element of recantation where exposure of the falsity of his statement had become manifest to him before he gave his written statement).

Consequently, no reported case has *ever* found either of these two elements satisfied. Thus, no defendant has *ever* successfully pleaded this defense.[118]

1 *Sufficiency of Admissions of Falsehood*

The recantation defense to false declarations before a grand jury or court requires explicit admission that prior testimony was false; it does not require the fact-finder to be "dragged through the lowly process of bargaining with a witness for the truth."[119] Admissions of falsehood are not sufficient to bar prosecution for perjury where the defendant admits to lying, not as an act of contrition or out of a desire to tell the truth, but as the basis for a plea bargain.[120] This is also the case where the defendant offers only to "add to and clarify" his testimony[121] or return to "answer any questions" the grand jury might have,[122] or where the defendant's subsequent statement is just inconsistent with, but does not declare the falsity of, his earlier

118. The court in *United States v. Awadallah*, 202 F Supp. 2d 17, 38 (S.D.N.Y 2002) stated that the recantation defense appears to be "an illusion—often asserted but never found." The court noted that it is not difficult to understand this result given the courts' broad interpretation of the terms "admits to be false" and "manifest." *Id.* at 39. The court opined:

> [A] defendant must seemingly incriminate himself by admitting that he intentionally made a false statement (i.e., committed perjury) and then pray that a court will find that the falsity of his previous statement was not already manifest. This interpretation, in effect, nullifies the statute because, to invoke the defense, a defendant must forfeit his Fifth Amendment right against compulsory self-incrimination. This, in turn, ignores the canon of statutory construction under which courts must generally interpret statutes to avoid constitutional problems.

Id. The court noted that it is nonetheless bound by precedent and the defendant's recantation defense was rejected. *Id.*

119. Precision Window Mfg., Inc. v. NLRB, 963 F.2d 1105, 1110 (8th Cir. 1992). *See also* United States v. Tobias, 863 F.2d 685, 688-89 (9th Cir. 1988).

120. United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975) (holding that confession did not amount to recantation where defendant gave perjurious testimony to the grand jury and then went to the United States Attorney where he agreed to cooperate and changed his story as to the events he had testified to; court held this was hardly the type of recantation considered by Congress); United States v. Scivola, 766 F.2d 37 45-46 (1st Cir. 1985) (holding that a plea of guilty after learning that the prosecution is about to introduce tape recordings tending to prove his involvement in the original crime is not recantation).

121. United States v. D'Auria, 672 F.2d 1085, 1092-93 (2d Cir. 1982) (holding that defendant's counsel's statement that his client wished an opportunity to add to and clarify his testimony, that he had not understood certain questions, and that he wished to come forward with whatever additional information he could provide did not constitute an outright retraction; noting that defendant did not go so far as to say he wished to change his testimony).

122. *See* United States v. Slawik, 408 F Supp. 190, 211-12 (D. Del. 1975) (holding that recantation did not occur where defendant merely offered to return to subsequent grand jury to answer any questions it might have about prior grand jury testimony).

one.[123] Additionally, admissions of "mistakes" in grand jury testimony[124] or of failure to specifically recant[125] do not satisfy the statute as a matter of law [126]

2. *Substantial Affect on the Proceeding*

The recantation defense requires that the witness recant before "substantially affect[ing] the proceedings."[127] Substantial effect includes the impact of falsehoods on a grand jury which prohibited it from bringing an indictment where it otherwise would have,[128] the passage of time,[129] or where the grand jury has already acted on the false testimony given to it.[130]

3. *Manifestness*

The second element is that it cannot be manifest that the witness's falsity had been, or would be, exposed.[131] Because courts apply a "had or would be" standard,

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123. *See* United States v. Krough, 366 F Supp. 1255, 1256 (D.D.C. 1973) (holding affidavit given to government did not admit of falsehoods but, rather, made statements that were inconsistent with this earlier testimony); United States v. Goguen, 723 F.2d 1012, 1017-18 (1st Cir. 1983) (holding that for an effective recantation, the accused must come forward and explain unambiguously and specifically which of his answers in his prior testimony was false and in what respects they were false).

124. United States v. Goguen, 723 F.2d at 1017-18 (holding that statements to agent that he might have been "mistaken" about some of his answers to questions from grand jurors ineffective recantation; to be effective, accused must come forward and explain unambiguously and specifically which of his answers and prior testimony were false and in what respects they were false).

125. *Awadallah*, 202 F Supp. 2d at 36-39 (holding that failure to recant statement that he did not know the name of individual in college exercise book was required by statute and failure to do that was not recantation under § 1623).

126. *Id.* The court in *Awadallah* noted that recantation is a complete defense only when the defendant admits that his allegation was "false." *Id.* at 37 Holding that the defense can only be invoked if the defendant unequivocally admits that his allegedly perjurious statements were false, the court found that the defendant contended that he was "confused" or "forgot," or that the photocopies were not clear, but did not admit that his testimony was "false." *Id.* The question of whether he "forgot" or was "confused" was a question of fact for the jury to decide. *Id.* The only question the court had to decide, as a matter of law, was whether the defendant made a timely recantation by "admit[ting] [that his] declaration [was] false." *Id.* at 38. It held that he did not. *Id.*

127 18 U.S.C. § 1623(d) (2000).

128. United States v Tucker, 495 F Supp. 607, 612-13 (E.D.N.Y 1980) (holding that false testimony prevented grand jury from indicting business partner because of denial by witness that he had met with business partner; court found that before defendant could return to the grand jury to recant, prosecutors had dropped case against business partner, granted him immunity for his testimony against the defendant; court also noted that 1623 does not require court to delve into the minds of the prosecutor to determine why it made decisions it did concerning charges).

129. United States v. Crandall, 363 F Supp. 648, 655 (W.D. Pa. 1973) (holding that defendant did not decide to recant for two months after his false testimony deprived the grand jury of hearing and considering competent evidence of the defendant's and another's guilt; that had defendant recanted earlier, perhaps not much harm would have been done, however, since he chose to wait two months to recant, he cannot be heard to argue no substantial effect on the grand jury).

130. *Krough*, 366 F Supp. at 1256 (holding that testimony about Watergate break-in that jury acted upon precluded, as a matter of law, a finding that there was no substantial effect on the proceedings).

131. 18 U.S.C. § 1623(d) (2000).

it is nearly impossible for the defendant to survive this prong. For example, courts have held that whether exposure manifests not only applies to whether the inevitable exposure manifests to the defendant, but also to the prosecution.[132] Courts consistently hold that the "not made manifest" element applies to the witness's knowledge that his falsehood is, or would be, exposed,[133] and that it is his awareness that his falsehood has been revealed that terminates the availability of the recantation defense.[134]

III. APPLICATION OF THE FEDERAL PERJURY STATUTES TO SPECIFIC ALLEGATIONS

Returning to the original scenario involving President Clinton and Ms. Lewinsky will help illustrate the difficulty of applying the perjury statutes. For the purpose of this illustration, assume the following statements to be the government's allegations:[135]

(1) When, in his interrogatory filed in the Paula Jones case, President Clinton denied that he had sexual relations with any employee of the federal government while he was President, he committed perjury under § 1621, in that his interrogatory was made under oath and contained a false statement.
(2) When President Clinton stated in his deposition in the Paula Jones case that Ms. Lewinsky's affidavit was "absolutely true," he committed perjury under § 1623(a), in that he lied in a qualifying proceeding about a material matter.
(3) When President Clinton stated in his grand jury testimony that he "engaged in conduct that was improper," admitting to oral sex with Ms. Lewinsky[136] (after denying, in the Paula Jones deposition, that he engaged in sexual relations with her), he committed perjury under § 1623(c) by making inconsistent statements in two qualifying proceedings.[137]

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132. United States v. Kahn, 472 F.2d 272, 288 (2d Cir. 1973) (holding that by the time the defendant returned to the grand jury where he recanted, the prosecution had already received testimony from the mayor and council members where they admitted to accepting the bribes that the defendant denied giving in his prior testimony).

133. Courts consider not only what the defendant knows, but what the defendant's attorney was presented by the prosecution in determining what is manifest. United States v. Lewis, 876 F Supp. 308, 311 (D. Mass. 1994). *See also Tucker* 495 F Supp. at 612; United States v. Mazzei, 400 F Supp. 17 19 (W.D. Pa. 1975). This would seem to preclude a defendant from ever recanting where his lawyer was told before trial of the evidence the prosecution held against him.

134. *See generally Tucker* 495 F Supp. at 607· *Crandall*, 363 F Supp. at 648; *Mazzei*, 400 F Supp. at 17· United States v. Scrimgeour, 636 F 2d 1019 (5th Cir. 1981); United States v. Denison, 663 F.2d 611 (5th Cir. 1981); United States v. Swainson, 548 F.2d 657 (6th Cir. 1977); United States v Moore, 613 F.2d 1029 (D.C. Cir. 1979); United States v. Mitchell, 397 F Supp. 166 (D.C. Cir. 1974).

135. There were other points about which Clinton testified that prosecutors could have alleged were perjurious. These three hypothetical allegations are not meant to indicate that they could not have pursued other avenues. *See* SCHMIDT & WEISSKOPF, *supra* note 1, at 240.

136. It is clear that he was admitting to acts of oral sex with Ms. Lewinsky. The FBI report had identified the semen found on her dress as matching President Clinton's. *Id.* at 226. This information was passed on to President Clinton's lawyers before his grand jury testimony. *Id.* at 168-69.

137 When Ms. Lewinsky signed an affidavit she knew to be false she perjured herself under

A. Allegation One

In the interrogatory filed in the Paula Jones case, Clinton answered "[n]one" when asked to name any federal employees with whom he had had sexual relations while President.[138] The definition of sexual relations provided by the government stated "a person engages in sexual relations when the person knowingly engages in or causes contact with the genitalia, anus, groin, breast, inner thigh or buttocks of any person with an intent to arouse or gratify the sexual desire of any person."[139]

In the two parts of the dialogue that are examined—the question and the answer—the answer "none" is clear. Applying the seminal case of *Bronston*,[140] if the question asked is answered truthfully, there is no perjury. The government's definition of sexual relations allows Clinton to argue that the question was clear and the answer was clear. According to their own definition, he did not "knowingly engage in or cause contact with the genitalia, anus, groin, breast, inner thigh, or buttocks" of Ms. Lewinsky. Rather, she engaged in or caused contact with him. Therefore, under the clear question analysis, his answer was literally true, thus not perjurious.

If the question is read as ambiguous, whom should the ambiguity benefit? Assuming that the government had charged Clinton with perjury under § 1621(a) for lying about his relationship with Ms. Lewinsky based on his denial in the interrogatory, they would have been faced with Clinton's explanation of his understanding of the question he was answering. Clinton's explanation was that he understood the definition to exclude oral sex if it was performed *on the deponent* (him).[141] In fact, Clinton admitted that if *he* had touched or fondled *her* that would have been included in the definition.[142] Under the case law, the benefit would go to the answerer, because a witness is not required to decipher an imprecise or confusing question.[143]

Here, the question is clear enough, but the definition provided creates an ambiguity. Case law holds that the responsibility for framing the inquiry clearly lies with the prosecutor.[144] Applying the law concerning ambiguous questions found in former cases, Clinton would have a good argument that if the government was asking him to name any federal employee with whom he had ever had sexual relations with while he was President, their own definition of sexual relations

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§ 1621. When the President urged Ms. Lewinsky to sign an affidavit *she* described as false, alleging "that there is absolutely no sex of any kind in any manner, shape or form with the president" he was suborning perjury under § 1622. For simplicity's sake, however, this article will focus only on the perjury possibly committed by the president.

138. Starr Report, *supra* note 1, at 10.

139. SCHMIDT & WEISSKOPF, *supra* note 1, at 239.

140. Bronston v. United States, 409 U.S. 352 (1973).

141. SCHMIDT & WEISSKOPF *supra* note 1, at 239.

142. When asked whether that had happened, he answered that in his recollection, he "did not have sexual relations with Ms. Lewinsky." *Id.* at 240.

143. *See* United States v. Spalliero, 602 F. Supp. 417, 419-20 (C.D. Cal 1984).

144. *See* United States v. Tonelli, 577 F.2d 194, 198 (3d Cir. 1978).

allowed him to give the literally true answer of "none." Thus, Clinton did not commit perjury under § 1621(a) when answering the interrogatory

B. Allegation Two

If the government sought to pursue perjury charges against Clinton under § 1623(a) for his statement made in the Paula Jones deposition that Ms. Lewinsky's affidavit was "absolutely true,"[145] the analysis would center around whether he "[made] or use[d] any other information knowing the same to contain any false material declaration...."[146] Here, the scrutiny would be upon the words of the affidavit, and the interpretation given to them.[147] Clinton's explanation for affirming the truthfulness of the affidavit is that the words, written in the present tense, are true; that is, he is not having sexual relations with Ms. Lewinsky He admitted that their relationship had been over for several months,[148] so when he was asked to affirm her affidavit, and at the time she made it, it was true. At that time, there was no sexual relationship between them.

Again, the same defense—for the same reason—would defeat the prosecution. His answer, when given, was literally true, as was the statement made in Ms. Lewinsky's affidavit.

C. Allegation Three

1 Inconsistent Statements

When Clinton gave his grand jury testimony, admitting that he engaged in conduct that was improper, was he committing perjury by making two inconsistent statements in violation of § 1623(c)? His first statement was that he did not engage in sexual relations, as it was defined by the government, with any employee while he was President. He made that statement in his interrogatory He also affirmed Ms. Lewinsky's statement that "there is absolutely no sex of any kind" occurring between them in his Paula Jones deposition. He also said that he had engaged in "improper conduct" in that Ms. Lewinsky had performed oral sex on him. That statement was made in his grand jury appearance.

Under § 1623(c), the government can charge perjury where it can show the defendant has made, under oath, two or more material declarations which are inconsistent to the degree that one of them is necessarily false.[149] While the government does not have to prove which one was false, it does have to establish that they are irreconcilably inconsistent. If Clinton s argument that he did not engage in sexual relations with Ms. Lewinsky because she performed oral sex on

145. Starr Report, *supra* note 1, at 10. This was in response to a question posed by Clinton's own attorney as to whether Ms. Lewinsky's statement in her affidavit, denying a sexual relationship with President Clinton was true. *Id.*

146. 18 U.S.C. § 1623(a) (2000).

147. The specific words were "that there is absolutely no sex of any kind in any manner, shape, or form with [the] president." SCHMIDT & WEISSKOPF, *supra* note 1, at 238.

148. *Id.* at 239-41.

149. 18 U.S.C. § 1623(c) (2000).

him, and not him on her, is valid, then his statement that he engaged in improper conduct is not inconsistent. He never denied that she had performed oral sex on him; he denied that he had sex with her. Clinton did not say that they had never had a relationship; rather, he denied that there was one currently. In fact, prior to his "improper conduct" statement in his grand jury testimony, there is no statement from Clinton describing *his* conduct at all, only hers. There are not two statements about the same thing here, only one statement about Lewinsky's conduct and one statement about his. The statements that Clinton made do not contradict at all and, therefore, do not need to be reconciled. Hence, there are no inconsistent statements and the government could not prevail.

2. *Recantation*

Under the statute, even if Clinton wanted to recant his denial concerning his relationship with Ms. Lewinsky, he could not recant during his grand jury testimony. Under § 1623(d), a defendant can recant if "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" if, "at the time the admission is made, .. it has not become manifest that such falsity has been or will be exposed."[150] Once the prosecutors told Clinton's counsel that they had Ms. Lewinsky's dress and that the semen found on the dress implicated Clinton, which they did before his testimony began, he was precluded as a matter of law from effectively recanting.[151] As a matter of law, any admission had become manifest. Consequently, Clinton had no choice but to "stay[] on [his] former statement about that."[152]

IV. WHAT'S WRONG WITH THE STATUTES?

A. *The Tricky Recantation Defense—§ 1623(d)*

The defense of recantation is problematic under the current statutory scheme. The tension created between § 1621 and § 1623 creates a catch-22 for the defendant. The reason for this tension may perhaps be explained by looking at the policy of both. Section 1621 requires a witness to testify truthfully at all times, and subjects him to punishment for perjury if he willfully falsifies his testimony without regard for any change of heart by the witness, on the theory that to do otherwise is to encourage false swearing. Under § 1621, once the false statement is uttered, the crime is complete.[153]

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150. 18 U.S.C. § 1623(d) (2000).

151. This is because the court has ruled that whatever the attorney knows, the defendant knows as well. *See* United States v. Lewis, 876 F. Supp. 308, 310-11 (D. Mass. 1994).

152. SCHMIDT & WEISSKOPF *supra* note 1, at 240.

153. Although the element of wilfulness may be a matter for the jury's decision, some courts hold that once this element is shown, the offense is complete at that time, and nothing the witness may do thereafter can alter this fact. *See* United States v. Norris, 300 U.S. 564, 674 (1937) ("Deliberate material falsification under oath constitutes the crime of perjury and the crime is complete when the witness's statement has onece been made."). Other courts have held that though a witness may have

The goal of § 1623, however, is different. It is important that the court know the truth and, as a means to achieving this end, it encourages one who knowingly testifies falsely to come forward with the truth, so that justice may be done. By employing a "knowingly" standard, rather than using § 1621's "willful" standard, Congress intended to lessen the burden on prosecutors to obtain a conviction.[154] On the other hand, Congress also intended to increase the chance that truthful testimony would be offered by providing the recantation defense.[155] However, with the strict limitations imposed in § 1623(d), namely, that the recantation must occur in the same proceeding, before the false statement has substantially affected the proceeding, and before it has become manifest that the falsity has been or will be exposed, it would seem that the opportunity to recant is non-existent.

The defense of recantation is illusory for two reasons. First, as the court stated in *Awadullah*,[156] there is no reported case in which the defense has been successfully raised. It seems as if the requirements needed to take advantage of that defense are insurmountable and Congress has failed in its attempt to allow for the truth to be told without penalty albeit belatedly Second, the defense, even if it has been successfully raised, does not bar a § 1621 prosecution.[157] If the defendant makes a false statement in a § 1623 proceeding, he can be immediately charged under § 1621 because discretion rests with the prosecution.[158]

Two things need to happen in order for recantation to have its intended effect. First, the government should have to "show its hand" to a defendant from whom they are about to take sworn testimony in a grand jury or court proceeding.[159] Congress's intent in exacting § 1623 was to improve truth-telling in judicial proceedings.[160] It further intended the statute to apply pressure calculated to induce the witness to speak the truth *at all times*.[161] Courts have recognized that "maximum deterrence of perjury is necessarily inconsistent with maximum range for recantation."[162] However, the maximum deterrence of perjury is to compel truthfulness from the beginning. Of what benefit is it to give a defendant the

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intended to deliver false testimony, his subsequent retraction or correction may be sufficient to absolve him from having committed perjury or from having sworn falsely. *See* United States v Lighte, 782 F.2d 367, 372-73 (2d Cir. 1986) (holding that for a false statement to have been made "knowingly" under § 1623, the declarant must not have made it "by mistake or inadvertence"). In any event, it should not be on the defendant to take his chances with the charges against him.

154. This is also evidenced by the removal of the two-witness rule from § 1623 prosecutions. *See* 18 U.S.C. § 1623 (2000).

155. *See* S. REP NO. 91-617 at 150 (1969) ("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.").

156. United States v. Awadallah, 202 F Supp. 2d 17 37 (S.D.N.Y 2002).

157 Section 1621 does not permit a recantation defense. *See, e.g.*, United States v Norris, 300 U.S. 564, 574 (1937).

158. *See, e.g.*, United States v Swainson, 548 F.2d 657, 663 (6th Cir. 1977); United States v. Del Toro, 513 F.2d 656, 666 (2d Cir. 1975).

159. *See* United States v Denison, 663 F.2d 611, 618 (5th Cir. 1981) (holding that no right of recantation exists that would prohibit the prosecutor from immediately telling defendant of evidence of perjury.)

160. *See* S. REP NO. 91-617 at 57-59 (1969).

161. *See id.*

162. United States v Moore, 613 F.2d 1029, 1041 (D.C. Cir. 1979).

opportunity to lie when the government knows absolutely that it cannot succeed?[163] By telling the defendant directly what information it has against him, the defendant knows that any false statement knowingly given will result in perjury charges under § 1623. If the truth is what the government is after, this is one way to insure it.[164]

Second, the government should not be given the discretion to charge a defendant under § 1621 for a false statement made in violation of § 1623. Congressional intent is thwarted every time a defendant is charged under both, or under § 1621 when the violation occurs under § 1623 Currently, while nothing statutorily precludes the government from charging both, the court in *United States v Kahn* was correct in stating that a § 1621 charge for a § 1623 violation strips the defendant of his right to present a recantation defense.[165] Where a defendant wants to assert that as a matter of law, he is precluded from doing so under § 1621.[166] Since the courts have rejected the unfairness argument posited by defendants in the past, Congress should act to amend the statute in order to remove this discretion.

V CONCLUSION

President Clinton settled his legal battles with the Offices of the Independent Counsel in January 2001, shortly before leaving office. His agreement guaranteed that he would escape an indictment in exchange for admitting that certain of [his] responses to questions about Ms. Lewinsky were false" (without ever admitting which statements those were).[167] Clinton stated that he "tried to walk a fine line between acting lawfully and testifying falsely but now [] recognize[s] that [he] did not fully accomplish this goal...."[168]

In enacting the Organized Crime Control Act of 1970, Congress attempted to clarify the obligations of both prosecutors and defendants in a perjury prosecution. Through judicial interpretations, prosecutorial maneuvering, and defendant manipulation, the law of perjury has developed into a maze-like path that thwarts a prosecutor's efforts to obtain truth and a defendant's ability to tell it. Congressional mandate should be followed and truth-telling encouraged. Removing the barriers to this end should be the goal of all parties.

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163. *Denison*, 663 F.2d at 616.

164. *See* United States v. Beasley, 809 F.2d 1273, 1280 (7th Cir. 1987) (suggesting that possible duty to warn is not inconsistent with § 1623 because if there is serious doubt as to the veracity of the testimony, prosecutor may have duty to inform the witness).

165. 472 F.2d 272 (2d Cir. 1973). "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." *Id.* at 283.

166. Section § 1621 precludes a recantation defense. *See* United States v. Norris, 300 U.S. 564, 573-74 (1937).

167 Neil A. Lewis, *Exiting Job Clinton Accepts Immunity Deal; Admits Testimony Was False—Long Legal Fight Ends*, N.Y TIMES, Jan. 20, 2001, at A1.

168. *Statements of Clinton and Prosecution and Excerpts from News Conference*, N.Y TIMES, Jan. 20, 2001, at A14.