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## PERJURY AS A GROUND FOR IMPEACHMENT— A TEXTUAL AND CONTEXTUAL ANALYSIS

*Monroe H. Freedman\**

The Impeachment Clause of the Constitution provides that the President, Vice-President, and all civil officers of the United States shall be removed from office on conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>1</sup> During the impeachment proceedings against President Clinton, a repeated contention was that the crime of perjury falls within this Clause.<sup>2</sup> The modest thesis of this paper is that it does not—that the crime of perjury is not of the same general category as treason and bribery within the meaning of the Constitution.<sup>3</sup>

I agree with House Manager Bill McCollum that the “most important point” in deciding whether perjury is a high crime or misdemeanor is whether perjury is “of the same cloth,”<sup>4</sup> or the same general class, as treason and bribery. I also agree with him that, in order to make that

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1. U.S. CONST. art. II, § 4.

2. See 144 CONG. REC. H11784 (daily ed. Dec. 18, 1998) (statement of Representative Johnson); 144 CONG. REC. H11806-07 (daily ed. Dec. 18, 1998) (statement of Representative Bryant).

3. Cf. *Nix v. Whiteside*, 475 U.S. 157 (1986). In both the oral argument in that case and in the majority opinion, the issue arose of whether the crime of perjury is distinguishable from bribing a juror, in determining whether defense counsel has an ethical obligation to inform the court. See *id.* at 174. Both the argument by Whiteside’s counsel and the majority opinion with regard to this issue are criticized in Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1949-51 (1988).

4. *The Charges: ‘This is About a Scheme. This is About a Lot of Lies.’*, N.Y. TIMES, Jan. 16, 1999, at A12 (quoting House Manager Bill McCollum’s presentation to the Senate in the Senate impeachment trial of President Clinton as recorded by the Federal News Service); see also 145 CONG. REC. S996 (daily ed. Jan. 26, 1999) (statement of House Manager Bryant) (“[I]n terms of the impact on our judicial system in the search for truth, there is no difference between a person lying, which is perjury, and a person paying another person to lie, which is bribery.”); 145 CONG. REC. S294 (daily ed. Jan. 16, 1999) (statement of House Manager Canady) (“[P]erjury [is] . . . by [its] . . . very nature akin to bribery.”); 145 CONG. REC. S223 (daily ed. Jan. 14, 1999) (statement of House Manager Sensenbrenner) (“Perjury is the twin brother of bribery.”); 144 CONG. REC. H11797 (daily ed. Dec. 18, 1998) (statement of House Manager McCollum) (“[P]erjury . . . rises to the virtual level of bribery . . .”).

judgment, it is appropriate<sup>5</sup> to consider the relative penalties for the crimes of perjury and for the crimes of treason and bribery.<sup>6</sup>

Considering the constitutional impeachment provision textually, we begin with the fact that two crimes, "Treason" and "Bribery," are stated specifically, followed by a general phrase, "or other high Crimes and Misdemeanors."<sup>7</sup> The centuries-old canon of construction in such cases is *ejusdem generis*, which requires that the general phrase must be limited to "the same general class" of things that are specified before it.<sup>8</sup> The question, therefore, is whether perjury is of the same general class as treason and bribery.

During the Clinton impeachment proceedings, the principal argument that was made for including perjury in the general class with treason and bribery was that perjury is penalized more severely than bribery under the Federal Sentencing Guidelines.<sup>9</sup> In response, Charles Ruff, representing President Clinton, addressed the status of perjury under the sentencing guidelines, but made no reference to the relevant federal criminal statutes and made no textual analysis of the Constitution.<sup>10</sup>

5. The word "appropriate" is used deliberately, without meaning to suggest that the penalties assigned to particular acts are necessarily determinative.

6. See 144 CONG. REC. H11797 (daily ed. Dec. 18, 1998) (statement of Representative McCollum).

7. U.S. CONST. art. II, § 4.

8. See A DICTIONARY OF MODERN LEGAL USAGE 308 (2d ed. 1995).

[E]jusdem generis is a canon of construction providing that when general words follow the enumeration of persons or things of a specific meaning, the general words will be construed as applying only to persons or things of the same general class as those enumerated. For example, in the Sunday Observance Act 1677, the language *no tradesman, artificer, workman, labourer or other person whatever* was held not to include a coach proprietor, a farmer, a barber, or a real-estate agent; the general words *or other person whatever* were held confined to persons with similar occupations to those specifically listed—despite the breadth of *whatever*.

*Id.*

9. See, e.g., 144 CONG. REC. H11797 (daily ed. Dec. 18, 1998) (statement of Representative McCollum). Representative McCollum stated:

[P]erjury which rises to the virtual level of bribery, in fact under the Federal sentencing guidelines has a greater amount of sentencing in our court system, a higher level of it than bribery, which is, as my colleagues know, treason, bribery and other high crimes and misdemeanors, it seems abundantly clear that perjury is impeachable.

*Id.*

10. Mr. Ruff argued:

As to the lesson to be learned from the more modern day, the sentencing guidelines, Manager McCollum argued to you a few weeks ago that those to whom you have given the responsibility to assess the comparative severity of crimes have concluded that perjury is at least as serious a crime as bribery. That decision, he told you, is evidenced by the commission's decision to assign perjury an offense level of 12, or approximately 1 year in prison, and to bribery an offense level slightly below that. But even to the extent that such an argument were to be weighed in the constitutional balance, Manager

The failure to make reference to the federal criminal statutes is surprising, in part, because the sentencing guidelines were adopted by a commission, while the statutes were enacted by Congress itself. More important, the statutory penalties for treason and bribery are substantially more severe than is the penalty for perjury. Under the federal treason statute, the penalty includes death or life in prison.<sup>11</sup> Under the federal bribery statute, the penalty includes fifteen years in prison.<sup>12</sup> By contrast, under the federal perjury statute, the highest allowable penalty is only five years in prison.<sup>13</sup>

There is, however, a further consideration that I believe to be even more significant than the relative penalties of imprisonment under the three statutes. The only constitutional impeachment provision that was discussed in the impeachment debates was Article II, Section 4—the one referring to “Treason, Bribery, or other high Crimes and Misdemeanors.”<sup>14</sup> In fact, though, the Constitution also deals with impeachment in Article I, which gives the power to impeach to the House of Representatives<sup>15</sup> and gives the power to try impeachments to the Senate.<sup>16</sup>

The particular part of Article I that seems to tell us something important about what the Framers intended to be within the general category of “Treason, Bribery, or other high Crimes and Misdemeanors” is in Article I, Section 3, Clause 7. That paragraph reads in full:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and *disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States*: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.<sup>17</sup>

That is, the person who is impeached and convicted is not only removed from office. In addition, that person is considered so unfit that he or she can be precluded from ever again being elected or appointed to a federal

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McCollum was simply not being candid with you, for he failed to explain that under these same guidelines a bribe of, let's say, \$75,000 taken by an elected official, or a judge for that matter, automatically carries an offense level of 24, or twice that of perjury, and a prison sentence four to five times longer.

145 CONG. REC. S1345 (daily ed. Feb. 8, 1999) (statement of Mr. Ruff).

11. See 18 U.S.C. § 2381 (1994).

12. See *id.* § 201(b)(4).

13. See *id.* § 1621.

14. U.S. CONST. art. II, § 4.

15. See *id.* art. I, § 2, cl. 5.

16. See *id.* art. I, § 3, cl. 6.

17. *Id.* (emphasis added).

office, regardless of the subsequent desire of the electorate or of an official with the power of appointment.<sup>18</sup> Therefore, considering Article II, Section 4, in the context of the Constitution as a whole (specifically, including consideration of Article I, Section 3) it appears that a crime or other act should not be considered impeachable unless we judge it to be so serious that the official should not only be removed from office, but that he or she should never thereafter be permitted to hold office.

The relative penalties applicable to the crimes of treason, bribery, and perjury are significant<sup>19</sup> in making such a judgment, because in the criminal statutes for treason and bribery, Congress has specifically included that same constitutional penalty of disqualification to hold federal office.<sup>20</sup> The penalty for treason includes not only death or life in prison—the statute also expressly states that the person guilty of treason “shall be incapable of holding any office under the United States.”<sup>21</sup> Similarly, the penalty for bribery includes not only fifteen years in prison—the statute also says expressly that the public official who is found guilty of accepting a bribe “may be disqualified from holding any office of honor, trust, or profit under the United States.”<sup>22</sup> With regard to perjury, however, Congress has made the highest allowable penalty only five years in prison, with no reference to disqualification to hold any office of honor or trust under the United States.<sup>23</sup>

Thus, in passing the treason and bribery statutes, Congress has expressly made the judgment that one who commits treason or bribery cannot (or may not) be trusted to serve as a public official, even if a majority of voters should want to elect that person. In passing the perjury statute, however, Congress has determined that the voters should be allowed to decide whether a particular act of lying should be enough to preclude one from thereafter holding elective office.<sup>24</sup>

It appears, therefore, that both the House and Senate have themselves made the judgment that perjury is not of the same general category, or “of the same cloth,” as treason or bribery, with regard to the seriousness of the offense and, more specifically, with regard to the re-

18. *See id.*

19. As with the word “appropriate,” I use the word “significant” deliberately, without meaning to suggest that the penalties assigned to particular acts are necessarily determinative.

20. *See* 18 U.S.C. §§ 201, 2381 (1994).

21. *Id.* § 2381.

22. *Id.* § 201.

23. *See id.* § 1621.

24. Perhaps the Congress decided that if people who lie were to be disqualified to hold office, the government would be unable to function.

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relationship of the offense to one's future fitness to hold office in the federal government.

