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The Right Way Out

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THE RIGHT WAY OUT; Perspective

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Body

Perspective

TO AVOID impeachment, President Clinton must, but cannot, admit he lied under oath. To avoid paralyzing the nation through an impeachment trial, the House of Representatives must, but cannot, find sanctions that attach real and lasting consequences to the President's lies under oath.

The President and Congress can have it both ways. The President can admit he lied under oath without conceding perjury. Without the President resigning, Congress can remove the chief offender and yet avoid a trial. Magic? No. We can find a right way out of this mess, but only when we understand how we got into it.

We got here because of the President's infuriating defense to his lies. His entire strategy--in the grand jury, in the Jones deposition, in his responses to Congress--was dictated by a 1973 unanimous U.S. Supreme Court opinion, **Bronston** v. U.S., 409 US 352. In Bronston, the Court said, The perjury statute is not to be loosely construed, nor the statute invoked simply because a wily witness succeeds in derailing the questioner--so long as the witness speaks the literal truth. The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry.

THE PRESIDENT'S first rebuttal, released moments before the Starr report, spends pages quoting from and using **Bronston**. The President said, The Supreme Court has made abundantly clear that it is not relevant for perjury purposes whether the witness intends his answer to mislead, or indeed intends a pattern of answers to mislead, if the answers are truthful or literally truthful.

Again and again the President has defended his statements under oath as misleading but legally accurate, reciting the Court's mantra. Without the Supreme Court's opinion in **Bronston**, the President would be stripped of his defense and defenders.

We got here because in the 25 years since the Supreme Court announced that Congress did not intend to punish crafty deceit as perjury, as long as statements under oath, taken in isolation, were literally true, Congress did nothing to correct that judicial interpretation: After the President, a lawyer, coached Haldeman on how to testify untruthfully and yet not commit perjury, as Watergate Special Prosecutor Leon Jaworski declared in 1974, Congress left its perjury statute intact. After Executive officials lied to Congress under oath in Iran/Contra, later defending their carefully calculated deceit as literally true and therefore not perjury, still Congress did not change its perjury statute.

In recent judiciary committee hearings, Representative Sheila Jackson-Lee, a Texas Democrat against impeachment, declared it time to heal. But this sore can never heal until we combat the infection at its source. Representative Lindsey Graham, a Republican from South Carolina in favor of impeachment, declared that if the House does not impeach him, if the Senate does not convict him it's over--the President will be constitutionally cleansed. The President, personally, may be cleansed but the stain--the standard which permits half-truths and misleading statements under oath--will further set.

The President has no one to blame but himself, declared Representative Rodney P. Frelinghuysen, a moderate New Jersey Republican explaining his decision to impeach. Yes, but when it comes to responsibility for lying, all three branches of government and both political parties are implicated. Even the Independent Counsel has joined the cynical parade of literalists. Kenneth Starr denied under oath to the special master that his office leaked grand jury testimony, only to defend the literal truth of that statement by admitting the office leaked to the media what grand jury witnesses had told his investigators

moments before they were to testify, thus sounding eerily like the President he would impeach. Lawyers and we law teachers have done more than our share of promoting corrosive literalism and half-truths.

ONCE WE understand the problem as ultimately not whether the President lied under oath--he did, nor whether perjury before a grand jury is an impeachable offense--it can be, but the standard of truth used to determine perjury, and the legal climate that rewards craft and guile under oath, a good way out suggests itself, which removes the Chief Offender and allows the country to move on.

Let the President admit that by reasonable, common sense standards, he lied under oath. He may continue to deny he committed perjury but only because he relied on the Supreme Court's inappropriate lawyer-centered standard of truth. Let the President unambiguously condemn that standard as inappropriate in the legal press, no less than in everyday life. And let him agree that the proper test for perjury should be not only the literal meaning of words but also the speaker's meaning--how the speaker intended his words to be understood. Let the President commit himself to sign legislation that outlaws lying under oath through half-truths, promising neither to seek nor accept a pardon for perjury should he face trial at the end of his term.

Let Congress, Republicans and Democrats, declare that perjury before a federal grand jury is an impeachable offense. Let an angry Congress strongly censure the President not only for his abuse of power, but for his abuse of truth. Let that Congress declare by joint resolution that the evidence before them may well establish Clinton's perjury in a criminal trial, even under the literalist standard, but that an even higher burden--proof to a moral certainty--must be met to remove a President for perjury. Based upon the record before it, let the House declare, in this case under the prevailing and soon-to-be-abolished literalist standard, there is a shade less than proof to a moral certainty necessary for the President's removal for perjury.

Most importantly, let Congress change, or clarify, its definition of perjury:

A person commits perjury who intentionally makes a materially false statement under oath. A person who gives an answer not literally false but consciously calculated to create a materially false impression when considered in the context in which it was given, also commits perjury.

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With this single change, we remove the artful dodge from our system of justice although we allow the Artful Dodger to remain in the White House. Learning from history and no longer condemned to repeat it, this nation can move on. Let us exit from this crisis where we first entered, with a new commitment--morally and legally, to the truth, the whole truth and nothing but the truth.

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