



## *The Christian Committees of Correspondence*

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HERBERT W. TITUS Speaks on Impeachment

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I appreciate the opportunity to speak to you on this particular topic. I'm going to take a little bit of a different approach than I know the rest of the panel members are going to take, and that's perhaps good because I think we need to examine this question in a more full constitutional context, particularly with regard to the Federal Judiciary. And so I'm focusing my remarks not so much on impeachment as it is to focus upon a forgotten part of Article III of the United States Constitution, Section 1, which says that federal judges hold office during good behavior. We have, I believe, in this country assumed that when a person is appointed as a federal judge, that that person has a life-time appointment to the federal bench. That is not what the Constitution says. He has an appointment only during good behavior.

Now the reason why this is important is because we have been told - and I remember when I was in law school - I was taught the notion that the only remedy that there was available to a misbehaving judge was the impeachment remedy, or perhaps that the judges themselves would finally go to that judge's office and

ship him off to pasture. As a matter of fact, I believe in my lifetime we've seen where judges finally came together and got a judge to retire because they no longer could perform their duties as a judge. But that's just simply not what was envisioned in the original constitutional text - that impeachment is only one remedy with regard to a judge who is not doing his job; that as a matter of fact, the good behavior is not only a standard, but it is also a remedy that's available to us for judges who are usurping, particularly usurping legislative power.

Now, let's look at this structurally because you will see some parallel structures in the Constitution where there's an ordinary remedy for every elected member of the executive and . . . of the legislative and then the one of the executive branch and every appointed member of the judicial branch, there's an ordinary removal remedy and there's an extraordinary removal remedy. Now, of course, with the president, the ordinary removal remedy is, you vote him out of office or you don't vote them in office. It's a direct people-election remedy. And, of course, the extraordinary remedy with regard to the president is impeachment, and that's very clear from the constitutional text.

Likewise, with regard to members of Congress. The ordinary remedy with regard to a member of the House or the Senate is again, election. With the House members, it's every two years. With regard to the Senate, it's every six years. The extraordinary remedy, which is not well known with regard to a disorderly member of the House or the Senate, is found in Article I, Section 5, where the House or the Senate itself has the power by a two-thirds vote to remove from the House or from the Senate a disorderly member. That's the extraordinary remedy.

Likewise with regard to courts. The ordinary remedy of a judge who is misbehaving is a remedy that was well known at the Common Law, and that was a civil remedy for forfeiture of office

upon proof of misbehavior. Impeachment was considered to be the extraordinary remedy for a judge who had committed extraordinary offenses rather than the ordinary offense of misbehaving, violating the standard of good behavior.

Now, Congressman David Stone - and this is not a well-known story - from North Carolina, spoke in a House debate and it was dated January 13, 1802. And this is what he said about these two remedies available with regard to judges: He says, "A judge doubtless shall be removed from office by conviction or impeachment and conviction, but it does not follow that they may not be removed by other means." He said, "High crimes and misdemeanors, which is the standard for impeachment, always includes those that would be guilty of misbehavior in office. But there's a various species of misbehavior which may render it exceedingly improper for a judge to continue in office that doesn't reach the level of a high crime and a misdemeanor as the Constitution defines it."

Now, Stone is right about that. The impeachment process was well known at Common Law which involved the legislative branch and, of course, as our Constitution sets it forth, the House of Representatives exercises executive power. They're like the prosecuting attorney that investigates the charge and brings the charge - that's what impeachment means. The Senate then performs the judicial function of trying whoever it is who's charged on those charges, and the Constitution, of course, defines what a high crime and misdemeanor is. It sets it forth as the standard upon which the impeachment process is governed. That was well known at the Common Law. The parliament, of course, having that authority, the House of Commons like the House of Representatives, the prosecutorial power and the House of Lords having the trial power such as the Senate.

But there was also a proceeding at Common Law that was known as a "civil proceeding for forfeiture of one's office for misbehavior." This civil proceeding could be brought in a Common Law court by the person who appointed the officer; and then through a judicial proceeding, that person could be removed from office for misbehavior, and misbehavior was a standard that you might say is lower than high crime and misdemeanor.

Now, how do you define good behavior? If you look at Hamilton's Federalist #65, you will see that Hamilton understood that when this word "good behavior" was placed in Article III, Section 1 of the United States Constitution, they had not just invented this term. This was a term that dated back to the sixteenth century and perhaps even before. It was a term that was taken from English law and practice of longstanding. In 1597, for example, good behavior was defined this way: *"Every voluntary act done by an officer contrary to that which belongs to the office. Every voluntary act done by an officer contrary to that which belongs to the office is a violation of the good behavior standard."*

Now notice, what that means is that if a judge exercises legislative power that's not common to the office of the judge, then that judge has violated the standard of good behavior. Under the Common Law rule, he forfeits his office. He's out of there. And the executive officer who appointed the judge to that particular position had the authority to go into a court of law and get that person removed from office under the Common Law Civil Forfeiture Proceeding.

Abuse of office, nonuse of power, a refusal to exercise judicial power and neglect of judicial duty - all of these would have been in violation of the standard of good behavior. Now, abuse of office - it was well understood that if a judge usurped the power of another officer, that that judge has clearly violated the standard of good behavior.

Now what does that mean for us today? What it means is this: Judges today believe that they make law. As a matter of fact, in law schools across the country, the first thing that a young lawyer learns before they learn anything else is that judges are the ultimate and supreme law-maker. As a matter of fact, Al Gore couldn't have had the defense that he had that he didn't violate any law, except it's based upon the assumption that until a court decides whether a statute means what someone claims it to mean, it's not the law. And since no vice president had ever been found guilty under the particular statute, how could he have violated the law? Because the law is what the courts say it is, not what the legislature says it is. And this, of course, is the major problem we have in America today - is that we have judges in courts across America who think that it's their job to make the law. When it's as a matter of fact, under the Common Law rule of good behavior, and this is a substantive rule that's written into the Constitution of the United States, is that the Common Law rule is that *a judge is to discover the law, state the law, and apply the law - not make it up.*

So any judge that persists in office to claim that he has the authority to make law is violating the standard of good behavior under the Constitution of the United States and therefore, is subject to forfeiture of office under the Common Law procedure of a civil action for the forfeiture of office.

Now, what's important about this is to recognize that Chief Justice John Marshall, when he decided *Marbury and Madison* - if you go back and read that case carefully - he understood that he was bound by what was written in the Constitution. Now, you can debate whether or not Chief Justice Marshall read the Constitution correctly or not. But the whole institution of judicial review is based upon the assumption that the Constitution controls the court, not the other way around. What we have in America today are judges who believe that THEY control the Constitution and the Constitution means what THEY say it is. *That is a violation of*

Article III, Section 1, the standard of good behavior; because what they're doing is they're usurping the authority of the people to have written in the Constitution the law of the land. It's not the court who decides what the law of the land is - it's the people who have formed the written covenant for the very purpose of controlling government, including judges. As a matter of fact, if you go back and read Chief Justice Marshall's opinion in Marbury v. Madison, you will see he says that the Constitution as it is written is an instrument that governs the court as much as it's an instrument that governs the legislative body.

So, if we are true to the substantive standard of good behavior, then we would find today that most judges are misbehaving. *Most judges who have been appointed to the federal bench today are violating the standard of good behavior because they're violating the substantive norm of good behavior, namely that a judge cannot make law; a judge can only discover, state it, and apply the law.* They have violated that standard; they have usurped legislative power.

Now, one must also examine good behavior as having also established a procedure by which that standard would be applied. If you again go back and look at the term "good behavior" at Common Law, you will find that when the standard of good behavior was used in applicability to an officer of government, it implied or presupposed a certain Common Law procedure by which that substantive standard would be enforced. At Common Law, a Writ of Scire Facias that was available to the one who appointed the officer to go into a Common Law court and file in that court of law a claim that the officer had violated the standard of good behavior.

Now, if you go back and look at history, you will not find in history any judge who is ever charged with misbehavior under the standard of good behavior primarily because in the early history

when this particular writ was being developed, judges did not serve under a standard of good behavior. They served at the pleasure of the king. But over a course of time, and you will find this in this seventeenth century beginning in 1628 and on through the late seventeenth century that judges began to win the battle that they didn't just serve at the pleasure of the king. And you will find a number of judges who claimed that they were removable only upon a Writ of Scire Facias upon proof of misbehavior. So the judges themselves in the Common Law applied to themselves this Common Law procedure of a Writ of Scire Facias to them if there was a charge of misbehavior.

Now I believe that Article III, Section 2 should be understood not only in terms of incorporating the substantive Common Law of good behavior, but also the procedural authority of the appointing officer to bring charges of misbehavior in a court of law on that substantive standard as defined in Article III, Section 1. It is my view that the President then has authority as the Chief Executive Officer of the United States to bring a Writ of Scire Facias in a federal court on the ground that any judge has violated the standard of good behavior and would be able to bring that charge in a federal court against any judge who has been appointed under the appointment power of Article II.

Now, what's important here is to realize that this is not a breach of separation of powers as many people have argued. Many people have argued that the standard of good behavior is a self-enforcing standard in which the judges would have the executive power, as well as the judicial power, as well as the legislative power. That sounds like a federal judge today. But I believe that the Common Law term acknowledged the separation of power's principle and therefore, the President - even under a Constitution that separates powers - would still have the authority to initiate a charge and, of course, the legislature would have the authority to further define good behavior.

What's important in this particular situation, however, and one which I think the Congress of the United States need to be involved, is I do believe that any charge of misbehavior under Article III would have to be brought before an Article III court. Now, some people might think that's like bringing the fox into the hen house. I mean, how is a federal judge going to sit in judgment upon one who's a member of the Federal Judiciary. And this is where Congress comes in.

I believe that Congress has the authority in order to have an independent judicial branch exercise this power with regard to good behavior. Congress can authorize the state courts. After all, state judges under Article VI under of the United States Constitution have a duty to support the Constitution. This is a constitutional standard laid down in Article III on federal judges. This would be an opportunity for Congress to pass a statute that authorizes the President to bring the charge in a state court, rather than in a federal court and in that way, establish an independent judicial appraisal of the good behavior standard that governs the federal judiciary. Probably that would have to be at the deference of the United States Supreme Court because the United States Supreme Court has the judicial power by the Constitution and it would ultimately come before the United States Supreme Court should an appeal process be provided for.

But what's important here, I believe, is for us today to recognize that judges need to be governed by an ordinary remedy as well as an extraordinary remedy, and the extraordinary remedy - the impeachment process - is probably one that primarily should be brought with regard to the United States Supreme Court because of their ultimate authority in terms of exercising the judicial power of the United States. Is this likely to happen? Well, I don't know. But it seems to me that Congress has some opportunity here to corral a runaway judiciary that has so long been operating independently of the Constitution, independently of the people,

independently of those who appoint them, and I believe it's time in America to say no, federal judges do NOT have lifetime appointments - they have only as Article III, Section 1 states, "appointments during good behavior," and we need to put some feet to the good behavior standard.

Thank you very much.

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