# Impeaching a Judge for Federalist Society Membership

Unitary Executive Theory, the Good Behavior Standard and the Role of the Senate

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24.07.2026 doi: 10.59704/3438e8eb63954e18

On June 29 the U.S. Supreme Court decided *Trump v. Slaughter*. Congress had built roughly two dozen regulatory bodies to operate outside presidential control, with fixed terms and removal only for inefficiency, neglect of duty, or malfeasance in office. The Court held that design unconstitutional and overruled *Humphrey's Executor v. United States*, the 1935 precedent that had permitted it for ninety-one years. Every one of those officials now serves at the president's pleasure. Chief Justice John Roberts wrote, "If anything more is left of Humphrey's, we overrule it."

The ruling completed a forty-year project that began in the Reagan administration. Unitary executive theory is one part of it, the claim that the president alone controls the entire executive branch. The rest is a body of rulings that place a president beyond prosecution, leave the disqualification clause unenforceable, remove the independence Congress built into the agencies, and apply constitutional principle selectively along partisan lines. Judges credentialed through a single organization delivered all of it, and Senator Sheldon Whitehouse documented on the Senate floor that 86 percent of the first Trump administration's Supreme Court and appellate nominees were or had been members.

The remedy follows from that completion. In my view, membership in the Federalist Society, the network that supplied them, is sufficient cause to impeach and remove a federal judge.

## The Federalist Society Built the Doctrine

Every official who enforces federal law works under presidential command, and Congress cannot insulate any of them. Its authors present the theory as originalism, and Reagan administration lawyers invented it in the 1980s because they needed a constitutional argument for the power they wanted. The Federalist Society, the conservative legal movement's membership and networking organization, launched in 1982, and membership is treated as a credential inside Republican administrations. Co-founder Steven Calabresi coauthored the law review articles claiming the theory as the framers' design, and Justice Antonin Scalia's 1988 dissent in *Morrison v. Olson*, the only vote against upholding the independent counsel in a seven to one decision, became the movement's central text.

The historical claim was weak from the beginning. Its defenders offer one piece of proof, a congressional debate in 1789 over removing the Secretary of Foreign Affairs. The legal historian Jed Shugerman went through those vote records and found no majority for the removal power the theory claims, and Nikolas Bowie and Daphna Renan of Harvard Law School have documented the strong version as a recent construction. The movement built the doctrine anyway and spent four decades credentialing the judges who would write it into constitutional law.

## The Rulings Have No Source in the Constitution

Section 3 of the Fourteenth Amendment was written to keep insurrectionists out of federal office. In December 2023 the Colorado Supreme Court found that Donald Trump had engaged in insurrection and removed him from the state's primary ballot. The United States Supreme Court reversed in *Trump v. Anderson* three months later, holding that a state cannot enforce Section 3 against a candidate for federal office. Only Congress can, and only by passing a statute that sets out how. Congress has not passed one. The Court never disputed the finding that he had engaged in insurrection. Four months after that, the

same Court held in *Trump v. United States* that a president has criminal immunity for official acts.

However, the Constitution contains no immunity for a president's official acts. Hamilton wrote in Federalist 69 that a president, unlike a king, would be liable to prosecution in the ordinary course of law once removed from office, and Charles Pinckney, a delegate to the Constitutional Convention, told the Senate in 1800 that no privilege of the kind Congress enjoys was intended for the executive. Roberts called the dissent's evidence for that history compelling and dismissed the argument it supports as "now-discredited". Article II directs the president to take care that the laws be faithfully executed. A president who cannot be prosecuted for official acts is exempt from the laws he is sworn to carry out.

Thirteen months earlier, in *Biden v. Nebraska* in 2023, the same Court had held that a Democratic president could not cancel student loan debt because the statute did not authorize it, a ruling about what a president may do in office. It then held that a Republican president cannot be prosecuted for what he does in office. Cancelling student loan debt was an official act. The precedents that would have required different outcomes are overruled, *Humphrey's Executor* after ninety-one years and *Chevron* after forty in *Loper Bright*.

American constitutional doctrine has three legitimate sources. The text of the United States Constitution. The recorded acts of the people who wrote and ratified it. The decisions of courts interpreting it over time.

Unitary executive theory comes from none of the three. Article II directs the president to take care that the laws be faithfully executed, a duty to carry out what Congress passed, and the doctrine reads that same clause as control over every person who carries it out. The first Congress, staffed by the men who wrote and ratified the document, created offices that did not answer to the president alone. No court accepted the strong version for two hundred years.

The content therefore came from outside the document. It came from lawyers in the Reagan administration who wanted a result and built a constitutional argument to support it. Enforcing that content as binding law adds to the Constitution, and adding to the Constitution has one procedure, which is Article V. They used judicial appointments instead.

## The Supreme Court Does Not Get the Last Word

Are the courts, and the Supreme Court in particular, the final deciders of what the Constitution means? If the Constitution means whatever the Court says it means regardless of the text, that is a glaring exploitable error at the founding of the nation. A movement that captured the Court could change the Constitution without amending it.

The founders thought that out, wrote about it, and built safeguards. Each branch reads the Constitution for itself when exercising its own assigned powers, a position called departmentalism. James Madison denied in Federalist 49 that any branch could claim an exclusive right to fix the boundaries of the others' powers. President Thomas Jefferson pardoned men convicted under the Sedition Act in 1804 and explained that the judges' reading of the statute did not govern the executive inside its own sphere. President Andrew Jackson stated the parity directly in his 1832 veto of the Bank recharter, that the opinion of the judges carries no more authority over Congress than the opinion of Congress carries over the judges. The Court first claimed that its reading binds the political branches as well in *Cooper v. Aaron* in 1958, 169 years after ratification.

Congress's own assigned power here is impeachment. *Nixon v. United States*, a 1993 case concerning a federal judge named Walter Nixon, holds that how the Senate tries an impeachment is not reviewable. The Senate decides for itself what the good behavior standard requires, and the Court's rulings do not govern that judgment. That is the safeguard against judicial error, and it works only if the Court is not the final decider.

## Good Behavior Reaches More Than Crime

The framers wrote the remedy for that. Federal judges hold office "during good Behaviour" under Article III, a standard Hamilton called "one of the most valuable of

the modern improvements" in Federalist 78 and Justice Joseph Story, author of the leading nineteenth-century commentary on the Constitution, wrote in 1833 that impeachment reaches political offences including usurpation and habitual disregard of the public interests. Answering the objection that judges would encroach on legislative authority, Hamilton called the impeachment power a complete security in Federalist 81, because judges will not risk a series of deliberate usurpations while the legislature can degrade them from their stations.

The judicial oath requires every judge to swear to "administer justice without respect to persons". A judge who swears that oath while committed to a different constitution has violated it at the moment of commitment. The rulings are evidence. The commitment is the violation.

So a judge can fail the standard in three independent ways, by membership in the Federalist Society itself, by enforcing from the bench content that contradicts the Constitution, or by a record of constitutional principle applied selectively along partisan lines. The six justices in the *Trump v. United States* majority present all three at once.

## The Objections Fail on Their Own Terms

Allegiance to the United States Constitution is already a condition of holding federal office, and two provisions of that Constitution establish it. Article VI requires senators, representatives, state legislators, and every executive and judicial officer of the United States and of the states to swear or affirm that they will support the Constitution. Under Section 3 of the Fourteenth Amendment, a person who took that oath and then engaged in insurrection, or gave aid or comfort to its enemies, cannot hold office, and no charge, trial, or conviction is required.

Two arguments are presented against removing a judge for membership in an organization whose aims are directed against the spirit and letter of the Constitution. One is that belonging to an organization cannot cost anyone a public position. The other is that judges are not removed over their rulings.

The first comes from *Keyishian v. Board of Regents*. New York required faculty at its state universities to certify that they were not Communists, and in 1967 the Court held that party membership, without specific intent to further its unlawful ends, could not cost them their positions. That is First Amendment doctrine for public employment. A federal judgeship is a constitutional office held during good behavior, on the two conditions stated above, and no employment protection attaches to a judge's participation in a political organization.

The second comes from Samuel Chase. The House impeached him in 1804 for how he ran trials and for partisan conduct on the bench, the Senate acquitted him in 1805, and that acquittal is the basis for the practice that judges are not removed over rulings. The practice covers judges who read the document differently, and the claim here is commitment to a different constitutional order. The acquittal was also a Senate judgment about what the standard means rather than a court holding, and a later Senate exercising the same power can reach a different judgment.

A judge who reads a clause differently is doing the job. A judge executing a project to replace the document is not.

## No Purge Was Necessary

Turkey, Hungary, and Poland had to remove judges who were already on the bench, through decrees, mass dismissals, forced retirement, and captured judicial councils. The United States needed none of that. A movement spent four decades placing its own people through nomination and confirmation, and the Court that resulted delivered what those governments had to take by force. Nothing illegal was required.

## The Framers Saw Judicial Capture Coming

Assessing a judge's constitutional commitments is already the Senate's work. A president nominates and the Senate confirms, and senators question nominees about their constitutional philosophy and vote on the answers. What changed the day after confirmation is life tenure, and the same clause granting life tenure states a condition on it. Two thirds of the Senate is the

threshold for enforcing that condition, higher than the majority required to confirm, which is the design accounting for removal driven by partisan motive.

The standard applies in both directions. An organization warrants membership-alone treatment only when installing an unratified constitutional order is its demonstrated function, proven through the doctrine's origin, its texts, its installation in specific rulings, and its selective application. Anyone claiming another organization meets that description must meet the same burden of proof.

A constitutional order that can be captured by an organization committed to replacing the document its judges swear to uphold, and that offers no correction short of amending that document, would contain a defect its authors failed to anticipate. They anticipated it.

The conclusion, then. The Federalist Society functions as the selection and installation mechanism for a constitution the United States never ratified. Commitment to that project violates the judicial oath. And a judge who joined fails the good behavior standard and should be impeached, tried, and removed from their role.

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## SUGGESTED CITATION

Armitage, Christopher: Impeaching a Judge for Federalist Society Membership: Unitary Executive Theory, the Good Behavior Standard and the Role of the Senate, Verfassungsblog, 24.07.2026, doi: 10.59704/3438e8eb63954e18.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20260724-190720-0.