# CASE No. 2023-09

## *APPEAL OF TE AARON MYERS*
## *v.*
## *ILLIANA PRESBYTERY*

## DECISION ON APPEAL
March 7, 2024

## CASE SUMMARY

This case involves the elevation of two different censures at the same time: (1) the elevation of suspension from office to deposition from office and (2) the elevation of suspension from the Sacraments to excommunication.

While both censures are weighty, excommunication is far more significant. J. Aspinwall Hodge rightly said, "Excommunication is the most severe penalty, and is inflicted only when all other methods have failed to reclaim the offender." *What Is Presbyterian Law?* (1882), p. 119. In this case, it appears that the deposition was imposed as an ancillary consequence of the Presbytery's finding excommunication to be appropriate. (Obviously, a man may not continue in office in the Church if he has been excommunicated.) Therefore, this decision examines the question of whether the Presbytery could elevate the censure of indefinite suspension from the Sacraments to excommunication without additional judicial process. We leave for another day whether the censure of suspension from office may be elevated to excommunication without further judicial process in the absence of excommunication.

For the reasons set out below, we hold that suspension from the Sacraments cannot be elevated to excommunication without additional process, reverse the judgment, and remand the matter to Presbytery for further proceedings.

## I. SUMMARY OF FACTS

10/24/20 TE Myers was tried and found guilty of "maltreatment of his wife" and "fits of anger."

11/21/20 Illiana Presbytery "imposed the censure of indefinite suspension from the office of Teaching Elder in the PCA until he demonstrates "satisfactory evidence of repentance" as exhibited by, "eminently exemplary, humble and edifying life and testimony."

01/16/21 Motion passed to "prevent TE Myers from exercising all functions of his office including the sacraments until case is decided *BCO* 42-6."

04/09/22 A committee was formed by Illiana "to shepherd TE Myers toward repentance and restoration to the Lord and to teaching elder." ("the First Committee").

06/15/22 TE Sean Radke emailed TE Myers asking when he is willing to meet with the Committee, and TE Myers responded that he believed it would be "unwise" for him to speak since his wife had filed divorce proceedings that remained pending, and asked for additional time before he meets with the First Committee.

06/22/22 Email from TE Myers to Radke: "There's no way I've repented of 100% of what I've done wrong in my marriage only bc as you pointed out, I don't know ALL the sin I committed (and never will in this life)- including not only sinful deeds and words, but thoughts and intentions (bc I lack the omniscience that only God possesses). But what I can say is that there isn't one sin I've committed of which I'm aware that I have not confessed to the Lord (and to Danielle if it was against her) and sought by His grace to turn from and fight against. This would include pride, selfishness, anger, arguing, bitterness, lust, hypocrisy, covetousness, envy, and unforgiveness. I'm sure there are more. I know I'm a sinful man saved only by the mercy and grace of God through Christ."

10/06/22 Radke proposed a meeting and asked, "since you are submitting to the censure of the presbytery (Lord's Supper), are you requesting that the censure be lifted?" TE Myers responded: "[S]ince I've submitted to Presbytery I am requesting the censure to be lifted."

10/15/22 The First Committee made three recommendations:

1. The committee unanimously recommends that Iliana Presbytery be satisfied as to the reality of the profession of TE Myers' repentance and restore him to the Sacraments of the Church, that he may receive all the means of Grace that the gospel affords to him (BCO 37-3).

2. The committee unanimously recommends that Iliana Presbytery consider the mandate of this committee fulfilled and be disbanded.

3. Given that the committee unanimously agrees that our brother, TE Myers, is in a state of repentance, we recommend that Iliana Presbytery form a new committee with the mandate to work toward shepherding our brother and his family to restoration both personally and publicly.

10/22/22 Presbytery met and directed the First Committee to "correspond with TE Myers commending his repentance on certain sins but requesting clarification on his repentance regarding his sin of mistreating his wife. ("Fits of anger" is not mentioned.)

12/20/22 TE Myers sent the following email to the Presbytery:

> Father and brothers, in 2020, I was accused and found guilty of offenses that the court claimed were substantiated by the specifications listed, but to which I could not (and still cannot) in good conscience concur. I explained this to the committee chaired by TE Radke, along with the fact that I have nevertheless recognized my responsibility to submit to Presbytery's censures by not engaging in any functions of the ministry nor partaking of the Sacraments. I believe I have demonstrated, both in my heart and my actions, the fruit of repentance.

> However, since I am now fully satisfied in my own conscience that God is not calling me to the ministry, I believe the proper course of action is this: I request that Presbytery divest me of my office without censure (BCO 38-2). As I understand it, there are no longer any charges pending against me since judicial process against me was completed with the judgments and censures inflicted on me. And further, I request that per BCO 46-8, the Presbytery assign me to the membership of Calvin OPC in Phoenix, AZ. I understand that my assignment to the Calvin OPC Session will include the continuation of the censure of indefinite suspension from the Sacraments.
>
> Respectfully,
> TE Aaron Myers"

01/21/23 Presbytery answered TE Myers December 20 written request in the negative. and formed a new committee "seeking to bring TE Myers to repentance, per 37-2 and report, if appropriate, at the April meeting."

03/10/23 A newly formed committee ("the New Committee") sent a letter to TE Myers including "a summary of the charges of which he was convicted, his lack of specific repentance for these sins, and a question on if he is willing to repent of those sins."

? The New Committee sent a letter to TE Myers stating that it had "one question," namely: "Are you willing to specifically repent for mistreating your wife and for your fits of anger?" The letter stated that the "first step in repentance involves acknowledging your guilt…"

TE Myers responded that he had "been through this with the previous committee over and over again, and I've got nothing to add." "I'm not guilty of the charges," he continued, and "I cannot in good conscience acknowledge that of which Illiana accused

me." He stated that he would "not be responding anymore" and that he had "long since moved on" from the matter.

03/31/23 The New Committee met and noted that it "met two times, sent a letter to TE Myers, received a response and based on the response received, the committee believes it can no longer perform fruitful work with TE Myers."

04/01/23 The New Committee reported: "Though we desired to frequently converse and pray with TE Myers, he made it very clear that this was his last communication with Illiana Presbytery. Based on TE Myers' response, we believe we can no longer perform fruitful work with TE Myers." The committee had no formal recommendations.

04/01/23 Presbytery deposed and excommunicated TE Myers stating that he had been "proved by sufficient evidence to be guilty of the sins of maltreatment of his wife and fits of anger."

04/15/23 The Stated Clerk of Presbytery posted a letter via certified mail to TE Myers informing him of the action of Presbytery.

04/21/23 The Stated Clerk's letter was delivered in person to TE Myers.

05/20/23 TE Myers filed his appeal with the SJC.

## I. STATEMENT OF THE ISSUE

Did the Presbytery err in elevating, without any additional process, the censure of suspension from the Sacraments and suspension from office to excommunication and deposition from office?

## II. JUDGMENT

Yes. In the absence of any specific procedure set forth in the *BCO*, due process principles must govern the elevation of indefinite suspension from Sacraments or from office, as a part of the court's continued oversight and care (*cf. BCO* 37-2). Because of the previous finding of guilt and imposition of censure, however, the censured person is not

> entitled to full process *de novo* for the court to find him "incorrigible and contumacious" (*BCO* 30-4).
>
> Accordingly, Presbytery's action is reversed in whole. This judgment returns the Appellant back to his previous disciplinary status: suspended from the Sacraments and suspended from office. The Presbytery may only increase the Appellant's censure after complying with this Decision. Further, the mere fact that a man will not agree with a guilty verdict is not *per se* evidence of being incorrigible or contumacious.

## IV. REASONING AND OPINION

In this case, Appellant argues that new steps for judicial process are required for "new censures" against the Appellant. Specifically, Appellant states:

> This specific judicial case, concluded on November 21, 2020, with the pronouncement of judgments and infliction of censures, and as such no further censures could be pronounced or added against the Appellant based on the now concluded judicial process.

### With Respect to *De Novo* Judicial Process

Appellant would have the court require an entirely new judicial process for any elevation of censure, which would include the protections of the Rules of Discipline (ROD) for one who is presumed innocent until proven guilty. Appellant's theory is that the sin of contumacy is a completely different sin from that which Appellant has already tried, convicted, and censured. The error in this thinking is that the proposed contumacy of the Appellant is *not* completely different and distinct from his censured sin. In fact, an accusation of contumacy in this context (as opposed to refusing to obey a citation (*BCO* 32-6) and being found contumacious without a trial) is directly related to the censured sin. While a censured person is entitled to some rights, clearly he is not entitled to all rights under the ROD. One who has been judged *guilty* by the court does not have the right to a presumption of innocence, for example.

Secondly, the initiation of *de novo* judicial process would begin with *BCO* 32-2:

> Process against an offender shall not be commenced unless some person or persons undertake to make out the charge; or unless the court finds it necessary, for the honor of religion, itself to take the step provided for in *BCO* 31-2.

However, as envisioned by the language of the *BCO*, there are no persons to make out a charge for the elevation of censure, and there is no *BCO* 31-2 common fame reports to provoke an investigation ("demand from such persons satisfactory explanations concerning reports affecting their Christian character."). The court itself has been intimately dealing with the accused for some time. The court's judgment of guilt and imposition of the censure of indefinite suspension is only inflicted on an "impenitent offender" and it lasts until "he exhibits signs of repentance, or until by his conduct, the necessity of the greatest censure be made manifest" (*BCO* 30-3). By its previous action, the court has already found the censured person impenitent.

A judgment of incorrigibility and contumacy (*BCO* 30-4) does not present a new *matter* before the court. On the contrary, before the court is the same *matter*, the sin with respect to which the subject was found guilty, now in a new *manner*, i.e., contumaciously and incorrigibly.[1] The first censure with respect to the matter/sin was indefinite suspension, because the manner was unrepentance. It is unreasonable to suppose that the elevation of censure from indefinite suspension to the censure of excommunication would require the *full process* for a showing of guilt with respect to the original allegation (as noted above), now in a new manner. However, that is just what would be necessary for the process to begin *de novo* according to the ROD as they stand.

**With Respect to the Elevation of Censure without any Process**

Alternatively, Appellee argues that it properly elevated Appellant's censure from indefinite suspension from the Sacraments and suspension from office to

[1] One can see this distinction between *matter* and *manner* clearly at work *BCO* 33-2: "When an accused person is found contumacious (cf. 32-6), he shall be immediately suspended from the sacraments … for his contumacy…. The censure shall in no case be removed until the offender has not only repented of his contumacy, but has also given satisfaction in relation to the charges against him."

excommunication and deposition from office without any new finding of impenitence. There is precedent for this position.[2] Can a court elevate a censure without any mechanism for the censured person to present evidence to the court of his repentance? The current language of the *BCO* is ambiguous at best, and the elevation of censure does not comport well with an act by legislative fiat. In any other circumstance, a majority vote of the court to censure a person apart from due process (stated charges, plea, right to face accuser, right to a defense, right to a record that would provide the basis for an appeal to a higher court, etc.) would be *illicit* and *unjust*.

Just as the censured person is not entitled to all the rights of one not found guilty, it would be contrary to our judicial principles to allow a court, not having found the grounds of excommunication at trial and judgment (*i.e.*, "incorrigible and contumacious"), and, having found grounds for indefinite suspension (*i.e.*, lack of repentance), to conclude later by a legislative declaration, without further process, a judgment that they have not found by due process. Preliminary Principle 8 asserts that "… [E]cclesiastical discipline…. can derive no force whatever, but from its own justice, the approbation of an impartial public, and the countenance and blessing of the great Head of the Church." Such a legislative declaration would certainly be unjust. And as such, it could not be seen to be just by an impartial public. It would amount to a bill of attainder, by justice-loving folk a hated device.[3] No such act of a court of the church could know the countenance and blessing of the great Head of the Church.

## A Way Forward

This presents us with a conundrum: if *de novo* judicial process is not required, and *some* process would be required by our judicial principles, how should an increased censure be imposed? An exploration of how the intrinsic powers of our courts, as set forth in the Constitution, and guided broadly by our current rules and regulations, might supply a more just and reasonable course to settle

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[2] See *Dallison v. North Florida Presbytery, M30GA* (2002), page 156, 160-161.

[3] A bill of attainder, legislation that imposes punishment on a specific person or group of people without a judicial trial, is twice forbidden in the United States Constitution, i.e., Article 1 Section 9, and Article 1 Section 10. The Framers adopted the constitutional prohibitions on bills of attainder unanimously and without debate. In the Federalist No. 44, James Madison observed that bills of attainder are contrary to the first principles of the social compact, and that their prohibition was a "bulwark in favor of personal security and private rights". https://constitution.congress.gov/browse/essay/artI-S9-C3-1/ALDE_00013186/

the matter. In the increase of a censure from indefinite suspension to excommunication and/or deposition from office, the court takes up that same original matter/sin, and adds the manner of incorrigibility and contumacy, which requires a decision to end the censure of indefinite suspension and to begin the censure of excommunication. The court's judgment of guilt, presumably for a "gross crime or heresy" (*BCO* 30-4),[4] and finding unrepentance, now must progress to finding the convicted person "incorrigible and contumacious". This is a new finding, and must be supported by due process considerations, but the finding itself is completely dependent upon the process that has already begun and had reached an intermediate stage in its progression.

Where then, might this Court look for a sound basis for resolution to this conundrum? What guidance might the Court find in the parliamentary rules of procedure that typically govern the court's proceedings in such a circumstance?[5] The censure of indefinite suspension must have been the result of a motion. The parliamentary setting for the motion was the conclusion of a judicial procedure. That motion would have been out of order had it not come in that setting. Under parliamentary law, to undo a motion for indefinite suspension requires a motion to amend a matter previously adopted, and surely that cannot be accomplished apart from the motion coming at the conclusion of due process before the court, as in the first instance.

All the courts of the PCA have intrinsic powers granted by Christ the Head of the Church in the Scripture,[6] not granted, foundationally, by the *BCO*, nor by the members of the church. This truth is enshrined in *BCO* 11-3:

> All Church courts are one in nature, constituted of the same elements, possessed inherently of the same kinds of rights and powers, and differing [in their administration, *BCO* 11-4] only as the Constitution may provide.

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[4] That presumption is vindicated in that the sin leading to indefinite suspension must be liable to elevation to excommunication.

[5] See "I. Government. 101- Rules of Order. The rules of parliamentary order shall be the standing rules herein and after provided. In matters not otherwise covered, Robert's Rules of Order (Revised) shall prevail." "Standing Rules of the Illiana Presbytery" (As of October 2022).

[6] See Preface to the *BCO*, "I. THE KING AND HEAD OF THE CHURCH".

These powers are summarized in *BCO* 11-4:

> . . . . Every court has the right to resolve questions of doctrine and discipline seriously and reasonably proposed, and in general to maintain truth and righteousness, condemning erroneous opinions and practices which tend to the injury of the peace, purity, or progress of the Church.

Among those powers:

> they possess the right to require obedience to the laws of Christ…. The highest censure to which their authority extends is to *cut off the contumacious and impenitent from the congregation of believers*. Moreover, *they possess all the administrative authority necessary to give effect to these powers*. (*BCO* 11-2, emphasis added)

The indefinitely suspended person has a right to a hearing in the matter: he must be charged by the court supervising the indefinite suspension with being "incorrigible and contumacious," he must be presented with the evidence to that effect, he must be called upon to plead before the court, and he would have a right to a defense before the original trial court. The court, upon completing its hearing, would be called upon to consider a motion to amend a matter previously adopted, to elevate the indefinite suspension to excommunication. Passage would require a two-thirds majority (2/3), unless previous notice were given of an intent to offer a motion to amend a matter previously adopted,[7] the notice framed in such a way as to avoid undermining the impartiality of the maker and thereby disqualifying him from participation in the hearing. Only such a process, just in itself, and seen to be just, could obtain the countenance and blessing of the great Head of the Church.

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The Summary of the Facts was written by Eggert and the Statement of the Issue, Judgment, and Reasoning was written by Greco. The SJC reviewed each part of the proposed decision and approved the final version of the Decision by vote of **21-1**, with 2 absent.

[7] RONR (12th ed.) 35:2 (7).

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| Bankson | *Concur* | S. Duncan | *Concur* | Maynard | *Concur* |
| Bise | *Concur* | Eggert | *Dissent* | Neikirk | *Concur* |
| Carrell | *Concur* | Evans | Absent | Pickering | *Concur* |
| Coffin | *Concur* | Garner | *Concur* | Sartorius | *Concur* |
| Dodson | *Concur* | Greco | *Concur* | Ross | Absent |
| Donahoe | *Concur* | Kooistra | *Concur* | Waters | *Concur* |
| Dowling | *Concur* | Lee | *Concur* | White | *Concur* |
| M. Duncan | *Concur* | Lucas | *Concur* | Wilson | *Concur* |

## CONCURRING OPINION

Case No. 2023-09*: Appeal of TE Myers v. Illiana*
TE Arthur Sartorius, joined by RE Dowling and RE Donahoe
March 27, 2023

The SJC Decision in this case well defines the issue before it:

> "Did the Presbytery err in elevating, without any additional process, the censure of suspension from the Sacraments and suspension from office to excommunication and deposition from office?"

The one-word initial answer to that stated issue is one in which I can fully concur: "Yes." It seems to me that there is no doubt that the Presbytery erred. Additional process is indeed necessary. Yet, that being said, I write this Concurrence because I disagree with the SJC's "Reasoning and Opinion" regarding which procedures should govern that additional process.

The conclusion of the SJC majority is that whatever additional process ought to be employed, when elevating a case from the censure of suspension from the Sacraments and suspension from office to excommunication, need not include all the protections of the *BCO* Rules of Discipline.

The SJC opinion even states that an Accused need not be afforded a presumption of innocence until proven guilty. If that is a part of the "due process" to be utilized – or if perhaps other due process rights are abrogated from what the BCO outlines, what will this due process look like that should now be followed? The answer to that question, in my opinion, because of the

SJC Reasoning and Opinion, has now been placed in a state of flux.

Is the Accused now required to testify against himself – though *BCO* 35-2 says he shall not be compelled? Shall testimony no longer be required to be recorded and transcribed – though *BCO* 35-9 states that it shall? Can the standards for who it is that might be a competent witness (*BCO* 35-1) change – or the number of witnesses required to substantiate a charge (*BCO* 35-4) be altered?

I could go on with other similar questions, but my point should be apparent. If new process is required for elevation of censure, but such process does not require the full protections of the *BCO*'s Rules of Discipline, what is that process?

Fortunately, the SJC Reasoning and Opinion gives some guidance in that regard. It is suggested in the section entitled "A Way Forward" that "intrinsic powers of our courts, as set forth in the Constitution, *and guided broadly by our current rules and regulations, might supply a more just and reasonable course to settle the matter*." (Emphasis added) Yet – where I differ from that statement, is that I see the "current rules and regulations" to be very much requirements, rather than guidelines.

Again, this case involves the elevation of a censure from a prior judgment, but to require a court to follow *BCO* judicial procedures in order to elevate the censure *is necessary* because the Appellant is faced with what truly are new charges. The issues raised in this case are in fact new and different from the first case – the case that led to the censure which is now sought to be elevated.

To find TE Myers guilty of a charge which would lead his to excommunication, he must also be found guilty of additional matters not adjudicated in the initial case. There are new offenses alleged – offenses different from those raised in his prior case. The Opinion of the SJC in part seems to acknowledge this. It is stated in the Opinion that the Appellant must "be charged by the court supervising the indefinite suspension with being 'incorrigible and contumacious,'" and "that he must be presented with the evidence to that effect. He must be called upon to plead before the court, and he would have a right to a defense before the original trial court." And yet, at the same time, because the SJC also rightly sees that these new charges are not entirely unconnected to the first case, it is proposed that the means of presenting those charges and evidence need not be bound, but only guided, by the BCO procedures. I cannot agree.

Excommunication is a censure "to be inflicted *only* on account of gross crime or heresy *and* when the offender shows himself incorrigible and contumacious." (Emphases added) Since excommunication was not imposed at the time of the initial trial of TE Myers, it could only follow that at the initial trial, the Appellant was not found guilty of committing a "gross crime"[1] and he was not found to be incorrigible and contumacious. The SJC Opinion has stated that a "gross crime" should be presumed. In a footnote of the Reasoning and Opinion it is stated that such a "presumption is vindicated in that the sin leading to indefinite suspension must be liable to elevation to excommunication."

While I might not agree with that assessment, that point need not be argued here. Before a court elevates a censure to excommunication, it is abundantly clear that new evidence must show that the man in question is "incorrigible and contumacious." This is, in fact, a new charge not dealt with in the prior case.

As such, that charge *must* now be substantiated with new facts – new facts which should be presented in a *full new trial* subject to *all* the Rules of Discipline of the *BCO*. To do otherwise – while attempting to follow the SJC Opinion in this and other cases -- could result in trial courts actually defining due process in manners that could then differ from court to court, rather than be uniform.

The "proposed way forward" of the Opinion, I would I argue, could easily be interpreted by differing church courts applying a court's own due process standards, choosing only select parts of the *BCO*, or even devising new standards – again, all of which could easily differ from session to session and presbytery to presbytery.

Certainly, we are denomination governed from the "bottom up" rather than top down, but we still are a denomination. We are not a confederation of autonomous self-ruling church courts. Under the "way forward" proposed by the whole SJC – it would seem to me that denominational disunity could be fostered, thus making it so that the only future way to regain a broader renewed healthy unity would either be through the necessity of new *BCO* amendments or some sort of attempt at "judicial legislation" by the highest court. Neither seems wise.

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[1] An allegation or charge of heresy has never been involved in this case.

It would seem to me that the best "way forward" would be one in which the added charges of incorrigibility and contumaciousness needed to elevate a censure – be treated as truly new charges – new charges subject to existing Rules of Discipline.

The reluctance expressed in the SJC Opinion to take this approach seems largely to be based upon a view that since any such new charges have a connection to the prior charges for which the Appellant was found guilty – that following BCO procedures as a requirement for elevation of a censure becomes a process *de novo.*[2] The Latin phrase "de novo" has an intrinsic meaning which suggests doing something entirely "anew" or "from the start." It is a term fairly commonly used in the American civil legal system. The usage in the civil system often involves a situation where a higher court reverses a lower court for certain error(s). A remedy that could be imposed in such a case – at the higher court's discretion – might include a "de novo trial" – a new trial conducted as if the first trial were a nullity.

Yet, the Appellant has not suggested that he should be tried anew on the original charges – only that he should be tried according to the BCO process in regard to the new and unique charges. Yes, the new charges grow out of a prior concluded matter, but the prior concluded matter need not be heard again. The only question at this time is one of whether or not – since the first conviction and censure – TE Myers has now shown himself, by latter conduct, to be incorrigible and contumacious.

Allow me to return back to a statement I already mentioned which was included in the Reasoning and Opinion of the SJC – the statement: "One who has been judged *guilty* by the court does not have the right to a presumption of innocence." Really? Is TE Myers to come before his Presbytery on charges not previously litigated – those of being "incorrigible and contumacious" – and not be presumed innocent? Is he not presumed innocent of the new charges because he was once found guilty of "maltreatment of his wife" and "fits of anger?" While the guilt of the prior conviction may indeed be presumed when moving forward – that should *not* change the standard presumption of innocence in regard to alleged incorrigibility and contumaciousness. These

[2] "De Novo" is not a phrase found in any of our constitutional documents. It is found in the *OMSJC,* but there it is used in regard to the way the SJC commences a judicial trial coming before it "from the beginning" when a "judicial case is referred to and accepted by the Commission." It then is to be tried – from the beginning.

new charges must be shown to have occurred, and to have occurred after the prior first conviction.

In the SJC Reasoning and Opinion, it is opined that "as envisioned by the language of the *BCO"* in the case of elevation of censure "there are no persons to make out a charge for the elevation of censure, and there is no *BCO* 31-2 common fame reports to provoke an investigation." Certainly, if the majority of a presbytery is willing to elevate a censure to depose a minister with no process – one man of the presbytery might well be willing to level a charge of incorrigibility and contumaciousness. Certainly, if a second committee charged with the task of bringing a teaching elder to a sense of repentance concludes its work after sending just two emails and receiving two immediate responses from the Appellant over a period of time of a little more than one hour (ROC 21-22), and then surmise that it can do no further fruitful work in the matter – someone would be willing bring charges or make "common fame reports" so as to invoke *BCO* 31-2.

My conclusion is in agreement with the rest of the concurring members of the SJC that "additional process" is certainly required if this prior censure is to be elevated to deposition. But, in short, my difference with others, and which thus prompts this Concurrence, is that I see the due process principles of the *BCO* Rules of Discipline as being fully adequate, preferred, and required in such a matter. Process need not be subject to re-invention if the process stated in the BCO is simply applied and followed.

Respectfully Submitted,
Arthur G. Sartorius

# DISSENTING OPINION

Case No. 2023-09: *Appeal of TE Myers v. Illiana*
RE Jim Eggert
March 25, 2024

## *Summary*

I dissent because I believe that suspension of TE Aaron Myers from the Sacraments cannot be elevated to excommunication without additional *judicial* process as prescribed by the *Rules of Discipline*.

My Dissent and the Decision gladly agree that some manner of process is needed in order to elevate censure; we differ, however, on what *sort* of process is due. I take the view that elevation of censure requires *judicial* process, or what I will refer to in this Dissent as "Traditional Process," meaning a "case of process," as described in *BCO* 31 ("The Parties in Cases of Process") and as further articulated in *BCO* Chapters 32 through 37. In broad terms, Traditional Process requires an indictment, an appointment of a prosecutor, citation, and a trial. As I understand today's Decision, something less than a Traditional Process *(how much less* is not always clear) is required in cases of elevating censure.

The Decision advances a process different from Traditional Process, grounding the same on the "guidance" that it finds "in the parliamentary rules of procedure that typically govern the court's proceedings in such a circumstance," the "circumstance" referring to cases involving the elevation of censure. For clarity, and because the Decision's prescription does not appear to be strictly grounded in the *Rules of Discipline*, I will refer to the Decision's process as a "Parliamentary Process."

The Decision's and this Dissent's approaches are, I think, essentially different from one another, and are consequential to the fundamental rights of our members in elevation cases. In my view, elevation of censure in this case requires Presbytery to pick up where it left off in the judicial case that has already begun, resulting in the imposition of indefinite suspension. If it seeks to elevate censure, Presbytery must now allege and prove, via Traditional Process, such conduct that would now justify elevating Myers' suspension to excommunication. Presbytery must appoint a prosecutor, prepare an

indictment with charges and specifications, serve a citation and conduct a trial.[1] In order to excommunicate Myers, Presbytery must establish through formal judicial process (1) that he has committed a "gross crime or heresy," (2) that he "obstinately refuses to hear the Church, and has manifested no evidence of repentance," and (3) that he has shown himself "incorrigible and contumacious" (*See BCO* 36-6 and 30-4). In the meantime, TE Myers would be returned to his previous disciplinary status: suspended from the Sacraments and indefinitely suspended from office.

**I. Historical Review of our Polity Pertaining to Elevation of Indefinite Suspension.**

Whether elevating the censure of suspension to excommunication requires additional process is a subject of historical debate and seems to have exhibited different approaches at different points on Presbyterian history.

Prior to 1788 Steuart of Pardovan's *Collections of the Laws of the Church of Scotland* were accepted as authoritative in American Presbyterianism. In Book IV, title vi of that volume ("Of the Order of Proceeding to Excommunication") we can still today read the procedures in effect in late eighteenth century Scottish (and American) Presbyterianism for the elevation of suspension from the Sacraments (what they called "the lesser excommunication") to the "higher excommunication" (what we now simply call "excommunication"). Steuart at page 233. Those procedures provided that if a church Session desired to "proceed further" against a person who had lain "under the censure of the lesser excommunication for a considerable time," it was required first to obtain the approval of Presbytery, having found the offender "frequently relapsing in these vices he was censured for" as evincing "such a degree of contumacy, and so aggravat[ing] the crime as to found a process of the higher excommunication, which is to be inflicted or not, as may most tend to the reclaiming of the guilty person, and edification of the church." *Id*. at 233-234. Hence it appears that early American Presbyterianism required at least some kind of process before indefinite suspension could be elevated.

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[1] *BCO* 32-2 says, "Process against an offender shall not be commenced unless some person or persons undertake to make out the charge; or unless the court finds it necessary, for the honor of religion, itself to take the step provided for in *BCO* 31-2." Therefore, either an individual can make out the charge that excommunication is warranted, or Presbytery itself may deem it necessary to appoint a prosecutor to proceed with the case.

We find that in 1825, the General Assembly reversed the Synod of Gennessee because "they passed a new and severe censure on the appellant … without a new and regular trial." (Minutes of 1825, page 124, cited in *A Collection of the Acts and Deliverances and Testimonies of the Supreme Judicatory of the Presbyterian Church From its Origin in America to the Present Tim*e, Philadelphia: Presbyterian Board of Publication: 1856, Samuel J. Baird), page 142. This would appear to refer to Traditional Process.

By contrast, sixty years later, F.P Ramsay, commenting on a previous version of the rule governing indefinite suspension from the Sacraments, stated that the court may elevate censure "without another trial, whenever it shall seem necessary to the court to proceed so far" F.P. Ramsay, *Exposition of the Book of Church Order* (1898, p. 183), on RoD, IV-3. Ramsay makes no reference to what, if any, other type of process was required if not "another trial" in the sense of Traditional Process.

Yet contrary to Ramsay, Morton Smith's *Commentary on the Book of Church Order* Section 30-3 states that a court must institute new process to elevate indefinite suspension to excommunication. "Such suspension," he wrote, "should be reviewed periodically," and, "[i]f the offender remains unrepentant, then the court should bring additional charges, and impose the greater censure of excommunication." Smith's phrase *bring additional charges* would seem to imply a trial under a Traditional Process.

To this we must add that the Standing Judicial Commission has in the past reasoned along the lines of Ramsay's approach, treating Presbytery's decision to elevate censure as a matter of its discretion without the necessity of further process. See *Dallison v. North Florida Presbytery*, M30GA 2002, page 156, 160-161. *Dallison* flatly denied that the Constitution requires a "new trial for new charges" for elevating censure. *Id*. at 161. *Dallison* held, "If the court determines in its mercy that it is going to inflict the lowest censure possible in the beginning and move to higher censures only if necessary, that discretion is within their authority and should not be overturned by the higher court 'unless there is clear error on the part of the court' (*BCO* 39-3)." Today's Decision mentions *Dallison* in a footnote, insisting on a Parliamentary Process prior to a court's elevating censure, a process that *Dallison* never mentioned and that seems inconsistent with the wide discretion afforded by *Dallison.*

I maintain that, for the reasons set out in this Dissent, Traditional Process is and should be required to elevate censure, and *Dallison* was wrongly decided.

**II. Traditional Process is Required to Elevate Suspension to Excommunication.**

*BCO* 30-1 identifies the four discrete censures the Church courts may impose.

> The censures, which may be inflicted by church courts, are admonition, suspension from the Sacraments, excommunication, suspension from office, and deposition from office. The censures of admonition or definite suspension from office shall be administered to an accused who, upon conviction, satisfies the court as to his repentance and makes such restitution as is appropriate. Such censure concludes the judicial process. The censures of indefinite suspension or excommunication shall be administered to an accused who, upon conviction, remains impenitent.

The sentence, "Such censure concludes the judicial process" invites further examination. Its placement in the section suggests that the imposition of the censures of admonition and definite suspension "conclude the judicial process," whereas the imposition of indefinite suspension and excommunication do not.

What does *BCO* 30-1 mean by "judicial process?" This becomes clearer when one considers the whole of the *Rules of Discipline*, and particularly the relation that "indefinite suspension from the Sacraments" bears to "excommunication."

***A. How Indefinite Suspension and Excommunication Are Similar.***

Suspension from the Sacraments and excommunication are the same in that they cut off an offender from the Sacraments. They are also the same in their duration, and the conditions for their removal.

Regarding duration, *BCO* 37-4 states, "When an excommunicated person shall be so affected with his state as to be brought to repentance" he is to be restored. Likewise, *BCO* 30-3 states, "Indefinite suspension is administered to the impenitent offender until he exhibits signs of repentance…" *BCO* 37-3 affirms

the same idea: "When the court shall be satisfied as to the reality of the repentance of an indefinitely suspended offender, he shall be admitted to profess his repentance..." The duration of both censures being *indefinite*, depending in both cases upon the spiritual condition of the offender, indefinite suspension from the Sacraments as well as excommunication are in these essential aspects the same as the other.

***B. How Indefinite Suspension and Excommunication Are Different.***

However, while *BCO* 30-1 tells us that suspension may be imposed upon "an accused who, upon conviction, remains impenitent," we discover that excommunication is imposed on different grounds. Excommunication is administered only where the offender "obstinately refuses to hear the Church and has manifested no evidence of repentance" (*BCO* 36-6). Furthermore, excommunication "is to be inflicted only on account of gross crime or heresy and when the offender shows himself incorrigible and contumacious" (*BCO* 30-4). From these provisions we derive a three-fold justification for excommunication: (1) that the offender has committed a "gross crime or heresy," (2) that the offender "obstinately refuses to hear the Church, and has manifested no evidence of repentance," and (3) that the offender has shown himself "incorrigible and contumacious." All three conditions must be satisfied before a court may impose excommunication.

As noted above, a court's finding at conviction that an offender "remains impenitent" is the only stated ground provided in the *Rules of Discipline* for imposing indefinite suspension (*BCO* 30-1). Therefore, the infliction of indefinite suspension adjudicates only that an offender is "impenitent" at that time, leaving *unadjudicated* the three-fold justification for excommunication.

The different grounds for the imposition of indefinite suspension and excommunication are relevant in considering whether further process is required to elevate suspension to excommunication.

***C. Restoration Does Not Require Traditional Process.***

*BCO* 30-1 implicitly tells us that excommunication does not "conclude the judicial process." This is curious since, obviously, where Traditional Process has ended in excommunication, there is no further "judicial process" that even *can* occur when an offender is excommunicated at the time of conviction (other

than to file an appeal). While in one sense we might say that the court of original jurisdiction repeatedly inflicts the censure of excommunication against an excluded offender who serially claims penitence and seeks readmission but fails to satisfy the court of his repentance, it is more accurate to say that his excommunication remains in place as a standing judgment of the Church, the burden thereafter resting on the offender to satisfy the court of the authenticity of his repentance.

Of course, a "judgment" of excommunication is never *final* in the sense that it cannot be revisited, one of the designs of this censure being "to operate on the offender as a means of reclaiming him" (*BCO* 30-4). Therefore, the court of original jurisdiction remains open to receive and restore the offender upon its satisfaction that he is repentant. Thus, while a court of original jurisdiction testing the authenticity of the repentance of the excommunicated offender does not proceed in the form of a Traditional Process, it is still right and fair to deem such evaluation as part of an "unconcluded judicial case" (*BCO* 30-1) in the sense that, should the court be satisfied of the offender's repentance, the standing judgment of excommunication will be lifted, and the offender will be restored to fellowship, bringing the "judicial process" to a glad conclusion. This is the only sense in which the "judicial process" is not "concluded" in the case of an excommunication for purposes of *BCO* 30-1.

### *D. Elevation of Censure Requires Traditional Process, which is a Continuation of "Judicial Process."*

*BCO* 30-1 likewise tells us that the "judicial process" is not "concluded" in the case of *indefinite suspension from the Sacraments*. When an offender is indefinitely suspended from the Sacraments that censure is to be "administered to the impenitent offender until he exhibits signs of repentance, or until by his conduct, the necessity of the greatest censure be made manifest" (*BCO* 30-3). Clearly, the "unconcluded judicial process" in the case of suspension includes at least the same informal evaluation that the court of original jurisdiction undertakes to *restore* an excommunicated offender. Such restoration does not involve Traditional Process.

On the other hand, indefinite suspension leaves the judicial business of the court unconcluded in a way that excommunication does not. *BCO* 30-3 prescribes that suspension of an offender may be elevated to excommunication only when "his conduct" has made the "necessity of the greatest censure

manifest" (*BCO* 30-3). Clearly, it is the offender's conduct *after* imposition of suspension that may subject him to excommunication. And as explained above, excommunication, having different grounds for its imposition than suspension, those grounds must be evident ("manifest") before the court of original jurisdiction may elevate the censure. After all, if the grounds for imposing excommunication had been "manifest" by the evidence adduced at trial, then the court of original jurisdiction would have been bound to impose excommunication in the first instance. Therefore, after first imposing indefinite suspension, it must be assumed by the court of original jurisdiction (together with the higher courts) that the grounds for excommunication did not exist at the time of the original censure and remain unproven and unadjudicated until a "case of process" has settled the question.

The *informal* machinations of a "case under judicial consideration" described in *BCO* 37-8, while useful to consider the question of restoration, are wholly insufficient to justify imposition of the harshest sentence the Church can impose. For that, the "case under judicial consideration" may only elevate the censure in the same way that excommunication may have been imposed in the first instance: via Traditional Process, not by a Parliamentary Process. As it is still a "case under judicial consideration," if the court believes there is a ground to elevate the censure to excommunication, Traditional Process must continue from where it left off with an indictment, specifications, and a Prosecutor adducing such evidence at trial sufficient to justify the imposition of excommunication.

Therefore, I cannot agree with the Decision's claim that the "current language of the *BCO* is ambiguous at best" regarding the "mechanism" for elevating censure. There can be no reasonable doubt but that before a member of the PCA may be excommunicated -- which is the "greatest censure" that the Church of Jesus Christ can impose against an individual -- he must first be afforded Traditional Process to establish the warrant for its imposition. Whatever warrants first justified the imposition of indefinite suspension will *not* justify the imposition of excommunication without Traditional Process establishing the three-fold justification for excommunication, which is an entirely different censure.

The Parliamentary Procedure for adjudicating Myers' contumacy proposed by the Decision falls outside of our Constitutional norms without any Constitutional warrant. Our *Rules of Discipline* know how to prescribe such exceptional cases where parliamentary procedure may be substituted for

Traditional Process. For example, Presbyteries may divest a minister who habitually fails to be engaged in the regular discharge of his official functions. (*BCO* 34-10). It may do so via "judicial proceedings" if the cause of his dereliction is his "breach of his covenant engagement." By contrast, "if it shall appear that his neglect proceeds only from his lack of acceptance to the Church" the Presbytery may proceed by parliamentary procedure rather than a "case of process" by which a "majority of two-thirds (2/3)" of his Presbytery may divest such a man from office, "even against his will." A minister divested through this parliamentary process is nevertheless permitted to appeal "as if he had been tried after the usual forms." Today's Decision rejects the "usual form" of a case of process in favor of an *unusual* Parliamentary Process for the elevation of censure but does so with no Constitutional warrant at all. I see no reason why Mr. Myers' alleged contumacy and proposed elevation of censure should not be "tried after the usual forms" (Traditional Process) rather than the *unusual* form advanced in the Decision.

### *III. A "Case Under Judicial Consideration" Is A Continuation of Traditional Process, Not a "De Novo" Process.*

I agree with the Decision that in proceedings to elevate censure the case "before the court is the same *matter*, the sin with respect to which the subject was found guilty, now in a new *manner*, i.e., contumaciously and incorrigibly." But the Decision mistakenly claims that affording Traditional Process for elevation would require a "*de novo* process" (i.e., "from the beginning" or "anew").

The Decision rejects what it calls Myers' suggestion that "the court require an entirely new judicial process for any elevation of censure, which would include the protections of the *Rules of Discipline* (ROD) for one who is presumed innocent until proven guilty," calling such a procedure a *de novo* process. The Decision seems to assume that affording *de novo* process for elevation of censure would require that the charge of "maltreatment of his wife and fits of anger" would have to be proven against Myers again, but I do not believe that is the case.[2]

[2] To the contrary, *BCO* 35-15 specifically provides a mechanism to challenge an underlying conviction: "If after trial before any court new testimony be discovered, which the accused believes important, it shall be his right to ask a new trial and it shall be within the power of the court to grant his request."

In my view, proceedings to elevate censure (in the end, whether we call them *de novo* or simply Traditional Process doesn't matter) would necessarily begin with an offender's original trial and conviction as an established fact of record of which the court can (and should) take judicial notice - "the same matter." Whether it is the original court or a new court that takes up the question of elevating censure, the original record must serve as a point of beginning and context for evaluating any proposal to elevate censure.[3] In this case, the record of the trial is well over three years past, and therefore it would seem to be incumbent upon anyone participating in the decision who has not read the same (or was not present at the initial trial) to read the transcript and evidence in its entirety. In any given Presbytery, members come and go, and it is possible that some members of Presbytery asked to vote on the question of elevation may not have been one of those who heard the case personally or had the opportunity to read the record of the trial and therefore fully understand the *matter*. Since, as the Decision rightly insists, it is indeed the same *matter* presented in a new *manner*, the judges should familiarize themselves with the trial transcript so that they can rightly judge the *matter* in light of its new *manner*. And it is precisely because the same matter is before the court in a new manner that Traditional Process is required, for it is the character of the "new manner" that must be proved before the Church may impose its highest censure, just as would have been the case had excommunication been imposed as the initial censure.

The *new manner* is the heart of the case for excommunication. Myers' prior conviction for "maltreatment of his wife and fits of anger" is not the most relevant consideration as to whether his censure should be elevated because the justification for his excommunication cannot be grounded solely on the *matter* of the prior verdict against him or even based on his prior censure. I think all would agree that other than *incorrigible contumacy*, no sin whatsoever justifies excommunication. As scandalous as it may seem to the world (and daresay sometimes even to the Church), if they have been washed, sanctified, and justified in the name of the Lord Jesus Christ and by the Holy Spirit, the Church of Jesus Christ opens her arms wide to sinners, whether the

[3] *BCO* 37-7 provides: "When a person under censure shall reside at such a distance from the court by which he was sentenced as to make the continued exercise of spiritual oversight impractical (cf. *BCO* 37-2), it shall be lawful for the court, with the acquiescence of the offender and the concurrence of the receiving court, to **transmit a certified copy of its proceedings** to the court where the delinquent resides, which shall assume jurisdiction, take up the case, and proceed with it as though it had originated with itself." (Emphasis added.)

sexually immoral, homosexuals, idolaters, adulterers, thieves, the greedy, and all other sort, just as it does to angry men who have mistreated their wives. (*See* 1 Cor. 6:10-11). Our churches are stuffed to the rafters with redeemed offenders, only a fraction of which the Church courts have ever had the occasion to adjudicate. A man may be convicted of the worst of sins, but if he believes on the Lord Jesus Christ and is found repentant, grieving for and hating his sin "as to turn from them all unto God, purposing and endeavoring to walk with Him in all the ways of His commandments" (*WCF* 15.2), then he is deemed a part of the body of Christ.

"Purposing and endeavoring to walk with Christ in all the ways of his commandments," even if imperfectly, is the antithesis of an "incorrigible and contumacious" person, and it is the happy business of the Church to shepherd such souls, not cast them out. Excommunication cannot stand against those who show they have been washed by the Lord Jesus Christ and as a result are "purposing and endeavoring" to walk with Christ, however grievous their prior offenses, and despite their imperfect repentance. Hence, those "having a new heart and a new spirit created in them, are further sanctified, really and personally, through the virtue of Christ's death and resurrection, by His Word and Spirit dwelling in them; the dominion of the whole body of sin is destroyed, and the several lusts thereof are more and more weakened and mortified, and they more and more quickened and strengthened, in all saving grace to the practice of true holiness…" (*WCF* 13.1).

The Christian life inevitably produces forward progress, even if halting. That is why to be excommunicated, one under indefinite suspension from the Sacraments must show himself both "incorrigible and contumacious." Contumacy is stubborn resistance and willful contempt for the authority of the Church. To show that Myers is "incorrigible and contumacious" requires the court to demonstrate both that he is incapable of being corrected or amended *and* that he holds the Church in contempt. *TE Rhett Dodson, et. al. v. Ohio Presbytery*, M48GA 2021, 2019-01, Page 649, at 663 ("The finding of contumacy as a basis for excommunication requires separate evidence in the Record at or before the point at which the decision is made to excommunicate the individual.")

If Myers had been found "incorrigible and contumacious" from the start, then Presbytery would have imposed excommunication at the first. Therefore, it is Myers' conduct *after* his conviction and censure that is now under scrutiny,

and in settling that question he is entitled to: (1) present a defense to the claim that the evidence adduced against him at trial demonstrated a "gross crime or heresy" justifying excommunication, (2) a presumption of innocence with respect to any claim that he, since being censured, "obstinately refuses to hear the Church, and has manifested no evidence of repentance," and (3) a presumption of innocence with respect to whether he has, since being convicted, shown himself "incorrigible and contumacious."

While the Decision is correct to note that "[b]y its previous action, the court has already found [Myers] impenitent," this cannot fairly be understood as a determinative *condemnation* of Myers since indefinite suspension is only imposed upon an "impenitent" until he "exhibits signs of repentance" (*BCO* 30-3), which *assumes* that he might repent at any time after the initial infliction of the censure. Indeed, since a person under indefinite suspension has not been cast out of fellowship by excommunication, shouldn't a court of the Church assume a posture of hopeful expectancy that he *will* repent, graciously expecting the Holy Spirit to realize the censure's intended effect of reclaiming the sinner? After all, the discipline of the Church "is to be exercised as under a dispensation of mercy and not of wrath," the Church acting "the part of a tender mother, correcting her children for their good, that every one of them may be presented faultless in the day of the Lord Jesus." (*BCO* 27-4).

Moreover, the indefinite suspension can only be elevated if "by his conduct, the necessity of the greatest censure be made manifest" (*BCO* 30-3). This "conduct" is different from the "impenitence" found at the first. "*Conduct,*" just as it was in the first imposition of censure, is exactly what must be proven to *elevate* censure, and by definition the conduct in view must have occurred *after* the infliction of the censure.
Surely before a man is excommunicated, the burden of proof is on the *court* to demonstrate via Traditional Process when and in what manner such conduct has been discovered since the time the court imposed the initial censure (in this instance more than three years ago). To excommunicate the man, the conduct must "be made manifest," not by Parliamentary Procedure, but by the Traditional Process prescribed by our *Rules of Discipline*.[4] We surely would

[4] Sometimes the contumacious will refuse to appear for a citation at all, and if he fails to appear twice he is subject to excommunication for his contumacy without further trial. (*BCO* 32-6; 33-2; 34-4). There is no reason this rule would not apply in the case of elevation. This is not a heavy burden for a court to bear. On the other hand, if a man does appear to contest the claim of his contumaciousness and obstinacy he is entitled to see and test the evidence against

have insisted that such conduct was proven by Traditional Process had excommunication been imposed at the first, so why should we stop insisting on proof via Traditional Process before a court later imposes the greatest censure?

The Decision's claim that there "are no persons to make out the charge" is not plausible. Obviously if, as the Decision proposes, there is any person or persons to compose a "motion to amend" the indefinite suspension previously adopted, then there is most certainly someone to "make out the charge."[5] Presumably the Presbytery would have articulable, substantial, and justifiable *grounds* to move to amend the indefinite suspension to elevate the same to excommunication. If they do, then such would easily frame an indictment via Traditional Process. But if there are no such grounds, then what could possibly justify the motion? Indeed, the Decision insists that in its Parliamentary Process that Myers must be "*charged* (emphasis added) … with being incorrigible and contumacious" and be "presented with the evidence to that effect." If that be true, how can it plausibly be claimed that there is "no person to make out the charge" in exactly the same way that would satisfy Traditional Process?

Some might contend that requiring Traditional process for the elevation of censure is too onerous, burdening the courts with a "second trial," cynically suggesting that our courts will thereby be incentivized to impose excommunication rather than assume the risks and burdens of a later formal proceeding that might arise out of indefinite suspension. By that logic, I suppose one might argue that even the Decision's Parliamentary Procedure, arising as it does out of "parliamentary law" might be regarded as too burdensome. But I think better of our courts, fully expecting that they will not calculate the appropriate measure of censure based on their own convenience, but as guided by the Scriptures, the wisdom of the Holy Spirit, and the ***Rules of Discipline***, all as applied to the particular circumstances of each case, gladly assuming the risks and burdens of such proceedings for the good of the Church, the offender, and the glory of God.

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him in a case of process before he is excommunicated, and the process is salutary because, if the claim of obstinacy be demonstrated, it affords the court a pointed opportunity to demonstrate the fact and call him to repent, which is one of the fundamental purposes of discipline.

[5] What is more, even without a person to make out the charge, *BCO* 32-2 authorizes the court to "take the step provided for in *BCO* 31-2" on its own recognizance if it "finds it necessary, for the honor of religion."

## *IV. The Murky Path Forward.*

Today's Decision insists that "further process" for Mr. Myers is ultimately grounded not strictly in our Constitution, but in a hazy penumbra of "parliamentary law" arising out of our Constitution. The Decision summons an "exploration of how the intrinsic powers of our courts, as set forth in the Constitution, and guided broadly by our current rules and regulations, might supply a more just and reasonable course to settle the matter." The Decision extrapolates these "intrinsic powers" from the "administrative authority" proclaimed in *BCO* 11-2 to "cut off the contumacious and impenitent from the congregation of believers." The noun "exploration" invokes images of an expedition into the unknown. The Decision insists that our Constitution is "ambiguous at best" as a chart and compass through the "conundrum" of what sort of process should govern the elevation of censure, reassuring us that "parliamentary law" marks our path rather than the *Rules of Discipline.*

I disagree. It seems to me that the "just and reasonable course" is simply to follow Traditional Process as set forth in the *Rules of Discipline,* the only rules that the Church has ever clearly agreed to follow before "the contumacious and impenitent" are "cut off from the congregation of believers."

### *A. The General Assembly Has No Clear Authority to Police Undefined "Parliamentary Rules."*

The Parliamentary Procedure proposed in the Decision raises more problems than it solves.

As a reviewing court, the SJC is called upon to interpret and enforce the *Constitution* of the PCA, not *Robert's Rules of Order* or nascent parliamentary law. Being solely a court of review, it is doubtful that the SJC is or should be the final arbiter of the interpretation and application of local parliamentary law serving to fill in the alleged gaps left by our Constitution in the procedure for elevating censure, particularly as against a lower court's interpretation and exercise of its own administrative authority, exercised, as the Decision insists, pursuant to the lower court's "intrinsic powers."

Today's Decision assumes that the SJC has a warrant on behalf of the General Assembly to invoke, declare, and enforce against a lower court "parliamentary

rules of procedure that typically govern the court's proceedings in such a circumstance." The Decision states:

> The indefinitely suspended person has a right to a hearing in the matter: he must be charged by the court supervising the indefinite suspension with being "incorrigible and contumacious," he must be presented with the evidence to that effect, he must be called upon to plead before the court, and he would have a right to a defense before the original trial court. The court, upon completing its hearing, would be called upon to consider a motion to amend a matter previously adopted, to elevate the indefinite suspension to excommunication. Passage would require a two thirds majority (2/3), unless previous notice were given of an intent to offer a motion to amend a matter previously adopted, the notice framed in such a way as to avoid undermining the impartiality of the maker and thereby disqualifying him from participation in the hearing.

But, given the rationale of the Decision, the General Assembly (through the SJC) cannot possibly authoritatively declare that the above procedure must govern the way the case against Myers shall proceed. If we take the Decision's fundamental premise as true, unless prohibited by the Constitution, Presbytery has "intrinsic power" to shape its own self organization, including the adoption, amendment, or suspension of any standing rules governing the elevation of censure where the Constitution's prescription is supposedly "ambiguous at best." "Intrinsic power" means belonging to the essential nature or constitution of the body in question, in this case the Presbytery. But when any court acts pursuant to its "intrinsic powers," by what warrant can any other court review that exercise? If, for example, a Presbytery or Session writes its own rule (or even adopts an unwritten practice) to prescribe the mechanism for the escalation of censure in those gaps that our Constitution has allegedly left open, by what authority does any higher court interpret that local rule or practice, especially where the lower court never agreed that another Church court could enforce a contrary rule or interpretation to that adopted by itself? The General Assembly has never adopted any "parliamentary rules of procedure" for the SJC to interpret as governing our Presbyteries and Sessions, and the Presbyteries and Sessions of the PCA have never agreed to be governed by such "rules of parliamentary procedure" pursuant to a

Constitutional amendment process (*See BCO* 26-2). It seems, therefore, that the Decision's mandated procedure is no more than judicial fiat. Is the SJC's "intrinsic power" to interpolate alleged Constitutional gaps better or more binding than that of the lower courts, particularly where it is asserted that the Constitution provides no clear answer?

### *B. The Implementation of the Parliamentary Process Dangerously Consolidates Power in the Higher Courts, and Especially the SJC.*

And this leads to yet another conundrum: the Decision's commitment to the "intrinsic powers" of the courts in theory permits as many different procedures for elevating censure as there are Sessions and Presbyteries in the PCA, opening the door to a lack of uniformity in the standards for imposing the Church's highest censure in elevation cases.

It is also concerning that the SJC's invocation of its "exploration" of "parliamentary rules" seems to promise a future where the SJC will hold itself out as the final arbiter of such "parliamentary law" in cases that may arise before it. But the PCA has never adopted a definitive written body of "parliamentary law" to govern the elevation of censure, leaving a vacuum of authority.

The SJC will fill this vacuum, promising as it does to be "guided broadly by our current rules and regulations," thus issuing itself a license (perhaps grounded in its own "intrinsic power") to regulate the lower courts at or beyond the border of our Constitutional boundaries. *BCO* 42-3 lists the first ground for an appeal as "any irregularity in the proceedings of the lower court," which I have always presumed referred to the regulations afforded by our *Rules of Discipline* in Traditional Process. Today's Decision opens wide the field of "irregularities" to include the breach of uncodified "parliamentary rules," anything that the SJC deems a breach of "parliamentary law" in the elevation of censure. As it reviews the decisions of lower courts, the SJC assumes to itself the power to declare whether a procedure utilized was a "just and reasonable course," whether it sufficiently satisfied amorphous "due process considerations," and was "guided broadly" -- be sure to emphasize *broadly* -- "by our current rules and regulations." I am very concerned that, unshackled from any rules adopted by the Assembly, the vague rules announced today leave the SJC vulnerable to judicial activism under the

umbrella of undefined and extra constitutional "parliamentary law" in its review of elevation cases.

Apart from Traditional Process under the *Rules of Discipline*, future parties (including Mr. Myers) will struggle to anticipate what will pass as adequate grounds for appeal should they be excommunicated by the elevation of censure. For example, if the offender must be "charged by the court" as the Decision prescribes, should the court be bound to apply the rules governing citations and indictments (*BCO* 32-4 & 32-5) as well as the rules governing citing the offender two times, affording a prescribed number of days for notice (*BCO* 32-6 & 32-7)? The Decision seems to conclude that such protections do not apply since Traditional Process does not apply.

Consider also, for example, whether breach of any of the following *BCO* rules clearly prescribed in cases of process could lead to a successful appeal under today's new Parliamentary Procedure guided by undefined "due process considerations":

- 32-13. Requirement that the witnesses shall be examined in the presence of the accused (as permitted by *BCO* 32-8), or at least after he shall have received due citation to attend. Witnesses may be cross-examined by both parties, and any questions asked must be pertinent to the issue.
- 32-15. Prescribing the order of the trial.
- 32-18. Prescribing how records are to be kept of the proceedings. (This is particularly interesting, since it will be difficult indeed for a higher court to review an appeal of an excommunication where no transcript of the proceedings was kept -- does "parliamentary law" require it?)
- 35-2 The accused party is allowed, but shall not be compelled, to testify; prohibition of compelling a spouse to testify against the other spouse. Are these protections erased in the Parliamentary Process? Can TE Myers be compelled to address the court regarding the claim that he has become "incorrigible and contumacious?"
- 35-6. The exclusion of a witness from being present during the examination of another witness on the same case, if either party objects unless a member of the court.

- 35-10. The requirement that all testimony be transcribed so that the higher courts have it available for their review.

Will the SJC, being "guided broadly by our current rules and regulations" find that omitting any of the above (or other provisions of the *Rules of Discipline*) was a "just and reasonable course," satisfying "due process considerations?" Will a breach of any of them be an "irregularity" sufficient to overturn a censure? Who can say? And if they are, then why shouldn't elevation of censure simply be governed by Traditional Process as I propose?

***Conclusion***

In sum, contrary to the Decision, I understand the *Rules of Discipline* to require the courts of the Church to follow the prescriptions of Traditional Process when elevating censure from indefinite suspension to excommunication.

Considering today's decision, I would expect and encourage our Presbyteries to propose amendments to our *Rules of Discipline* to bring clarity and uniformity to this area, especially in light of the uncertainties and local variations inevitably resulting from the "intrinsic powers" of the courts advanced by today's Decision.

I respectfully dissent.