

IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS. By Raoul Berger. Cambridge, Mass.: Harvard University Press, 1972. Pp. XII, 345. \$14.95. Reviewed by R. H. Clark*

The current discussion about possible removal of high executive officials has revealed a general lack of knowledge concerning the origin, scope, and machinery of impeachment. Raoul Berger's *Impeachment: The Constitutional Problems* does much to clarify this relatively unfamiliar procedure through an analysis of the historical antecedents of American impeachment. While the volume is based primarily upon Berger's law review articles, the analysis is integrated and it reads smoothly. The narrative has been carefully researched and footnoted, and Berger has demonstrated the same mastery of historical materials and unique insight that characterized his earlier study of relations between Congress and the Supreme Court.¹ The book, then, is a historical treatment of the origin and evolution of impeachment, and it is not structured to serve as a treatise on impeachment law and procedure per se.

Impeachment came into significant usage during the 14th Century in England, at which time it represented but one of several devices employed to remove offending judges and ministers. The most expedient method then available was for the king to simply revoke the patent of an offending judge, since judges held their office at the pleasure of the crown. This was changed by the Act of Settlement in 1700, which established that judges served "during good behavior."²

A second device, the *bill of attainder*, was employed against public ministers,³ and required a legislative determination of treason and the imposition of punishment. As Parliament sought to develop devices to limit royal prerogatives, these two instruments proved insufficient. Thus a practice referred to as the Address of Parliament developed, whereby both Houses passed an act requiring the removal of an offending officeholder. Removal might be for whatever cause Parliament chose to specify, but since there was no way that the king could be compelled to comply with the Address, other than to recognize that a question of confidence was involved, this device too proved not completely effective.⁴

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¹ R. BERGER, *CONGRESS V. THE SUPREME COURT* (1969).

² See Gallo, *Removal of Federal Judges—New Alternatives to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A. L. REV. 1385, 1391 (1966).

³ For a complete discussion of *attainder*, see Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION* 90-161 (1956).

⁴ But see Feerick, *Impeaching Federal Judges: A Study of the Constitutional Provisions*, 39 *FORDHAM L. REV.* 1, 12, n.59 (1970), asserting that the king was "bound by convention to comply with the request."

Impeachment ultimately evolved as the most potent device to make the king's ministers as well as his judges accountable to Parliament. Since the king could, in theory, do no wrong, the power to remove his erring subordinates became a significant element in combating royal absolutism. Under English procedure Parliament had virtually unlimited authority to declare whatever behavior it chose the basis for removal. Moreover, as had been the case with the *bill of attainder*, the assent of the king was not necessary. English impeachment not only sought removal of the offender from office, but the Lords also imposed severe criminal penalties for conduct found to be impeachable.

The American framers were also concerned about the possible concentration of excessive executive power, but they specifically rejected all the English devices with the exception of impeachment.⁵ In addition they carefully restricted the availability of impeachment. First, the Constitution limited impeachable offenses to treason, bribery, and "high crimes and misdemeanors"; and second, the scope of congressional power was confined to removal (and possible disqualification from holding future office) and did not include the infliction of criminal punishment.

One of the most ambiguous aspects of impeachment is the nature of the offense, "high crimes and misdemeanors."⁶ Two key issues constitute the main points of contention. First, does the phrase limit impeachable offenses to indictable crimes? Second, if impeachment is not confined to crimes, what are the ascertainable limits of the offense? The argument that only criminal offenses can serve as justification for impeachment has been made extensively by counsel representing judges during impeachment proceedings.⁷ Berger demonstrates through an examination of the use of the identical phrase in English impeachment proceedings, that certain non-indictable offenses also provided the basis for impeachment: misapplication of funds, abuse of official power, neglect of duty, and encroachments upon or acts in contempt of legislative pre-

⁵ It is interesting to note that in 1805, during the Jeffersonian-Federalist squabble over the courts, John Randolph introduced a proposal to amend the Constitution in order to provide for a device similar to the Address, but the proposal met with little support and was rejected. See I C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 295-96 (1926). A similar proposal calling for joint removal by two-thirds of both houses was introduced and defeated in 1905. Turner, *The Impeachment of John Pickering*, 54 *AM. HIST. REV.* 485, 507 (1949).

⁶ Treason and bribery are also listed as grounds for impeachment in article II, section 4, of the Constitution, but their meanings are reasonably precise. Treason is defined with particularity in the Constitution itself (article III, section 3, clause 1), while bribery draws its content from common and statutory law.

⁷ See Fenton, *The Scope of the Impeachment Power*, in *IMPEACHMENT: SELECTED MATERIALS* 663, 664 n.7 (1973). See also Brown, *The Impeachment of the Federal Judiciary*, 26 *HARV. L. REV.* 684, 689, n.5 (1913).

rogatives.⁸ Indeed Berger argues that any type of activity which seriously destroyed confidence in governing officials could properly serve as the basis for an impeachment proceeding. Impeachment could not, however, be based on activities occurring before the assumption of office.

The great majority of law review commentators share Berger's conclusion that indictable offenses are not necessary to bring an impeachment proceeding. The use of the term misdemeanors would be superfluous if impeachment required an indictable offense, since crimes would encompass misdemeanors as well.⁹ Furthermore, the exception from both the executive pardoning power (article II, § 2) and the original provision guaranteeing a jury trial in criminal cases (article III, § 2, clause 3) does not indicate that impeachments were to be limited to crimes. It only demonstrates that some acts might jointly constitute crimes and impeachable offenses. In addition, an examination of the actual instances of impeachment in American history provides support for the proposition that "the misconduct *may*, but *need not*, amount to a violation of law."¹⁰

If "high crimes and misdemeanors" are not confined to criminal offenses, may Congress impeach for whatever reason it chooses? This position was advocated by Gerald Ford when he initiated a 1970 investigation of Justice Douglas. In an April 15, 1970 speech the then House minority leader declared that "an impeachable offense is whatever a majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office."¹¹ Berger strenuously rejects this view and maintains that the common law definition does indicate ascertainable limits to the scope of impeachment, for offenses not constituting crimes. History is his primary guide for establishing the parameters of activity constituting an impeachable offense.¹² Hence Berger concludes

⁸ Also see, Feerick, *supra* note 4, at 49-51.

⁹ Gallo, *supra* note 2, at 1387-88.

¹⁰ Yankwich, *Impeachment of Civil Officers Under the Federal Constitution*, in *IMPEACHMENT: SELECTED MATERIALS* 689, 695 (1973). A convenient and current summary of the eight completed judicial impeachments is found in Thompson and Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N. C. L. REV. 87, 92-107 (1970). For an earlier discussion see Ten Broek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1938).

¹¹ Quoted in *COMM. OF THE JUDICIARY, HOUSE OF REP. 91ST CONG., 2D SESS. ASSOCIATE JUSTICE WILLIAM O. DOUGLAS: FINAL REPORT BY THE SPECIAL SUBCOMMITTEE ON H. RES. 920-36* (Comm. Print 1970).

¹² For example, the unsuccessful impeachment of Justice Chase has often been cited to establish the proposition that mere differences of political or legal philosophy are not sufficient grounds for removal. See R. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 96-107 (1971).

that although the founders sought to place limits upon presidential authority by providing for a removal mechanism, it was intended that such a mechanism should only be invoked for serious acts of misconduct. Because the repercussions of executive removal would be shattering, the alleged misconduct had to be substantial to warrant the utilization of the impeachment procedure. Furthermore by requiring serious misconduct the potential for congressional abuse of the impeachment device was limited.

The analysis becomes more complex, however, when dealing with judges, since they hold tenure "during good behavior," which is seemingly a less stringent standard than "high crimes and misdemeanors."¹³ In addition, the removal of a judge would not produce the serious ramifications that presidential impeachment would generate. The difficulty in identifying judicial conduct, which, while not criminal, still constitutes grounds for impeachment was evident in the impeachment of District Judge Ritter in 1936.¹⁴ The articles of impeachment drawn up against Ritter included seven counts; the first six alleged various criminal actions (tax evasion, conspiracy, accepting illegal compensation, etc.) sufficient to demonstrate "high crimes and misdemeanors." The judge was not convicted on any of these six counts, but was held liable under a seventh article, which alleged that Ritter was guilty of a "high crime and misdemeanor" because his behavior "would prejudice the public view of the court's fairness."¹⁵

The Ritter case has been cited for the "principle that even though upon specific charges amounting to legal violations, the impeaching body finds the accused not guilty, it may, nevertheless, find that his conduct in these very matters was such as to bring his office into disrepute and order his removal on that ground."¹⁶ This position would certainly comport with ethical concepts of the judicial role which demand that a judge must avoid even the appearance of impropriety.¹⁷ Ritter's impeachment and conviction is the most extreme example of judicial removal absent proof of criminal activity to be found in American precedents, but even

¹³ Fenton argues that the use of the term "misbehavior" in the four articles of judicial impeachment drawn since 1905 indicates a recent "reliance on the judicial tenure clause as an impeachment standard." Fenton, *supra* note 7, at 666.

¹⁴ H.R. Res. 422, 74th Cong., 2d Sess. (1936) *quoted in* IMPEACHMENT: SELECTED MATERIALS 188 (1973).

¹⁵ Feerick, *supra* note 4, at 46.

¹⁶ Yankwich, *supra* note 10, at 697.

¹⁷ For some judicial perceptions of this "Caesar's wife" orientation, see H. GLICK, SUPREME COURTS IN STATE POLITICS 60-61 (1971). It is doubtful whether this same fluid standard could be applied to the impeachment of executive officials.

here a substantial body of criminal activity was alleged, although not proven to the satisfaction of two-thirds of the Senate. Hence even the conviction of Judge Ritter does not seriously weaken Berger's argument that American history does not provide the basis for an open-ended impeaching power.

As an alternative to the impeachment of judges Berger suggests a procedure similar to the old common law writ of *scire facias*, whereby a special judicial court including judges from the District, Appeals, and Supreme Court would evaluate charges of misbehavior filed by an investigative branch of the administrative office of courts or the judiciary department itself. If the charges were sustained to the satisfaction of the composite court, the judicial office would then be forfeited. Such proposals have been periodically introduced in the form of congressional bills, the most recent example being the Tydings plan offered in 1966.¹⁸

Berger and his most influential predecessor, Burke Shartel¹⁹ provide several arguments in support of the constitutionality of such a procedure, without the necessity of a constitutional amendment. First, there is historical precedent. English judges after the Act of Settlement (1700) served "during good behavior" just as their American counterparts do today. There were two ways in which a judge could be removed. When Parliament impeached it alleged "high crimes and misdemeanors." Berger states that never "did an English impeachment charge a breach of 'good behavior'; instead the stock charges were 'high treason and other high crimes and misdemeanors.'"²⁰ Such an action, if successful, not only removed the offending judge but imposed criminal punishment as well. Lesser offenses, termed "misconduct," could be reached through a civil judicial proceeding—*scire facias*—which if successful resulted merely in a forfeiture of office. On the basis of this precedent Berger argues that if impeachment constitutes the sole method of judicial removal under the Constitution, a range of offenses lie beyond the reach

¹⁸ See Tydings, *The Congress and the Courts: Helping the Judiciary to Help Itself*, 52 A.B.A.J. 321 (1966). The proposal is comprehensively discussed in Holloman, *The Judicial Reform Act: History, Analysis and Comment*, 35 LAW & CONTEMP. PROB. 128 (1970). Similar bills were introduced in 1937, Note, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631 (1937), 1940 Comment, *Courts—Judicial Responsibility—Statutory and Constitutional Problems Related to Methods for Removal or Discipline of Judges*, 21 RUTGERS L. REV. 153, 162 (1966), and 1942 Comment, *Judicial Trial and Removal of Federal Judges: H.R. 146*, 20 TEXAS L. REV. 352 (1942). See generally Note, *Removal of Federal Judges—Alternatives to Impeachment*, 20 VAND. L. REV. 723, 727 (1967).

¹⁹ Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution*, (pts. 1-3) 28 MICH. L. REV. 485, 723, 870 (1930). Shartel's argument is the most influential attack upon the concept of judges being removed solely via impeachment, and it is the one universally cited and relied upon in the more recent literature.

²⁰ R. BERGER, 125 (1972).

of correction. These lesser offenses can not be touched if they do not establish "high crimes and misdemeanors," yet in the parent British system they could be dealt with by the invocation of *scire facias*.²¹ Hence, the language of article III stating that judges shall serve "during good behavior," Berger concludes, was meant to convey this second method of judicial removal.²² Furthermore, "If the impeachment clause immediately followed the good behavior clause in article III, there would be warrant for claiming this was intended as a complete exposition of the tenure and removal of federal judges, but such is not the case."²³

Berger argues that *scire facias* was not used in the colonies simply because colonial judges were appointed by the king and removable at his pleasure. In the early state constitutions, however, there was no consensus on judges being removable solely by impeachment,²⁴ in fact, half of the states provided for removal by address. Nevertheless, Berger is unable to cite any instance of the actual utilization of *scire facias* in American experience, nor was any proposal made at the ratifying convention for any such type of instrument.²⁵

Even if *scire facias* was never adopted, Berger maintains that there have been instances when Congress at least tacitly recognized that it was constitutionally permissible to remove judges by means other than impeachment. For example, in 1790 the first Congress, which included many of the key participants in the Constitutional Convention, passed a criminal statute which provided that judges who were convicted of bribery were subject to fine, imprisonment, "and shall forever be disqualified to hold any office of honor, trust, or profit, under the United States."²⁶ Hence impeachment was not recognized as the sole method

²¹ See Otis, *A Proposed Tribunal: Is It Constitutional*, 7 U. KAN. CITY L. REV. 3 (1938).

²² The counter-argument is that in English experience the phrase "during good behavior" was used as a reference to the concept of lifetime tenure. Fenton, *supra*, note 7 at 666; Kramer and Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behavior"*, 35 GEO. WASH. L. REV. 455, 459 (1967).

²³ Note, *Removal of Federal Judges: A Proposed Plan*, 31 ILL. L. REV. 631, 639 (1937).

²⁴ Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135.

²⁵ The Federalist Papers specifically reject alternative methods of removal, deciding that impeachment "is the only provision on the point which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges." A HAMILTON, THE FEDERALIST NO. 79, at 493 (H. Lodge ed. 1888). *But see* Davis, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448, 463 (1967).

²⁶ II ANNALS OF CONGRESS 2219-20 (1834). For an argument that this act constituted an alternative way to remove a judge and hence the recognition that impeachment was not the only method of removal see Davis, *supra* note 25, at 460. *But see* Shepley, *Legislative Control of Judicial Behavior*, 35 LAW & CONTEMP. PROB. 178, 200 n.104 (1970): "It is no

for judicial removal. The weakness in this analysis is that the statute has never been enforced against judges. Moreover, at virtually the same time as the statute was under consideration, various congressional debates occurred in which impeachment was specifically recognized as the only method for removal of judges.²⁷

From a fundamental standpoint, Berger maintains that the institution of *scire facias* is compatible with the constitutional separation of powers, and that the independence of the judiciary is not threatened, since judges would be overseeing other judges.²⁸ The proposed panel of judges could be expected to possess at once not only the expertise to evaluate the more shadowy offenses constituting judicial misbehavior but also a vested interest in assuring that judicial removal would be only for sufficient cause.

There has been a very limited procedure for the removal or quasi-removal of a federal judge in existence for ten years. In 1964 Congress enacted a procedure whereby a district or circuit judge who is mentally or physically disabled, and who, while eligible to retire refuses to do so, can be certified as disabled by a majority vote of his judicial council. This certification is submitted to the President, who may then appoint another judge (subject to Senate confirmation) to take over the business of the disabled judge. The disabled judge continues to serve, albeit with no business.²⁹ Since the procedure involves minimal legislative and executive involvement, the key actor being the council, this procedure—as unwieldy as is the result—seems to avoid infringement on the separation of powers. But one may inquire, if judges could be *removed* other than by impeachment, why did Congress enact the complicated certification procedure?

The constitutionality of even a very limited *removal* procedure has been debated, and it originally appeared that a resolution of that issue might be forthcoming from the Supreme Court in the recent case of *Chandler v. Judicial Council of the Tenth Circuit*.³⁰ In 1965, the Judi-

doubt unconstitutional unless invoked after convicting a judge by the Senate on impeachment by the House."

²⁷ Ervin, *Separation of Powers: Judicial Independence*, 35 LAW & CONTEMP. PROB. 108, 118 (1970).

²⁸ According to Senator Sam Ervin, however, judicial independence has a broader meaning. Ervin defines judicial independence as being "free from outside influence of whatever kind and from whatever source," and this means equally "that each individual judge would be free from coercion even from his own brethren." Ervin, *supra* note 27, at 121.

²⁹ 28 U.S.C. § 372(b) (1970). Kramer and Barron, *supra* note 22, at 463.

³⁰ 398 U.S. 74 (1970). The asserted statutory basis for Chandler's removal is found in 28 U.S.C. § 332 (1970): "Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

cial Council of the Tenth Circuit Court of Appeals, consisting of all appeals judges for that circuit, found Judge Chandler either unable or unwilling to discharge the responsibilities of his district judgeship. Thereupon it ordered Chandler to take no further action on any pending or future cases and, by the same order, reassigned his cases to other judges. In Chandler's initial appeal to the Supreme Court, that body refused to render a decision because the Council's order was only interlocutory, since at a later point the judge would be allowed to appear with counsel before the Council prior to final determination. Justices Black and Douglas, however, in a dissenting opinion, declared the removal unconstitutional, because the only body with the power of removal was the Senate via impeachment proceedings.³¹ Following this initial defeat, Chandler apparently indicated to his fellow district judges that he assented to their taking over his new cases, but that he wanted to continue handling the cases already filed in his court. Chandler also refused an opportunity for a hearing before the Council, and eventually again sought Supreme Court review. With Justices Black and Douglas dissenting, the Supreme Court again refused to rule on the constitutionality of the removal procedure employed against Chandler—in this instance because he had not exhausted the remedies provided by the Council.³²

A vast amount of serious study has been devoted to the question whether or not impeachment is the sole method for the removal of judges.³³ The only unassailable conclusion is that the issue is so plagued with doubt that as a matter of wisdom any institution of a plan such as Berger has proposed must come about through constitutional amendment.³⁴

According to Berger's analysis, impeachment is a political action, not a criminal proceeding, but one which must operate within the vague lim-

³¹ Chandler v. Judicial Council of the 10th Cir. 382 U.S. 1003, 1005-06 (1966) (Black, J., dissenting).

³² Chandler v. Judicial Council of the 10th Cir., 398 U.S. 74 (1970).

Although Chandler's removal was based upon 28 U.S.C. § 332 (1970), there has also been doubt expressed as to the constitutionality of using the statutory basis of 28 U.S.C. § 372(b) to replace a judge who is not mentally or physically disabled but is nonetheless unable to adequately fulfill his responsibilities, as was apparently the case in *Chandler*. See Comment, *Courts—Judicial Responsibility—Statutory and Constitutional Problems Related to Methods for Removal or Discipline of Judges*, 21 RUTGERS L. REV. 153, 163 (1966). The role of the judicial councils in disciplining district judges is comprehensively discussed in P. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 398-426 (1973).

³³ For a counterweight to Berger's position by a noted constitutional authority see Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665 (1969). It is a serious weakness in Berger's discussion that, although mentioning Kurland, he does not squarely seek to offset his historical analysis.

³⁴ One suggestion is for a *scire facias* proposal within an amendment to deal with disability. I. BRANT, *IMPEACHMENT: TRIALS & ERRORS* 199 (1972).

its of "high crimes and misdemeanors" and fairness of procedure. This position raises the question of who is to enforce these limitations, and Berger argues that the judiciary has the authority to review impeachment proceedings. There is, of course, little historical support for such an assertion and Berger is forced at this point to abandon historical precedent and to rely on recent unrelated judicial decisions. He concludes that the jurisdiction of the Court to review an impeachment to determine if Congress acted within the constitutional boundaries of that procedure is fundamentally no different than the jurisdiction which the Supreme Court exercised in *Powell v. McCormack*,³⁵ when it considered the power of Congress to expel one of its own members. Nor is impeachment a political question in light of the criteria the Court developed in *Baker v. Carr*.³⁶ Under Berger's scheme, Congress would retain the power to initiate impeachment proceedings, which, if successful, would be tried in the Senate, with the possibility of appeal to the Supreme Court. Certainly this procedure would strengthen the system of checks and balances, although undoubtedly most such judicial reviews would be of judicial and not of executive impeachments.

Nonetheless, Berger seems to have taken an indefensible position in advocating judicial review of impeachments. There appear to be neither parliamentary practices or common law precedents indicating that any such review ever took place,³⁷ and the Constitution itself provides no means for review following a conviction by the Senate.³⁸ Furthermore, the courts have specifically refused to exercise this power. After his impeachment, Judge Ritter sued for back salary, arguing that the Senate had exceeded its jurisdiction in trying him for charges which did not constitute criminal behavior and in finally removing him on the basis of discrediting his court. The Court of Claims, in *Ritter v. United States*,³⁹ refused to entertain the suit, explicitly stating that the Constitution gave exclusive jurisdiction to the Senate relative to impeachment. Therefore, the court had no jurisdiction to inquire into any aspect of the

³⁵ 395 U.S. 486 (1969). The *Powell* case demonstrates the Court's willingness to inject itself into a dispute involving one of the most prized prerogatives of Congress, the power to expel its own members. For extensive analyses of the case, see K. WEBBS, ADAM CLAYTON POWELL AND THE SUPREME COURT (1971), and P. DIONISOPOULOS, REBELLION, RACISM, AND REPRESENTATION: THE ADAM CLAYTON POWELL CASE AND ITS ANTECEDENTS (1970).

³⁶ 369 U.S. 186, 217 (1962). The Court emphasized the availability of definable criteria for decision and of an appropriate remedy in determining that it had jurisdiction in cases involving reapportionment.

³⁷ Thomas, *The Law of Impeachment in the United States*, 2 AMER. POL. SCI. REV. 378, 393 (1908).

³⁸ Simpson, *Federal Impeachments*, 64 U. PA. L. REV. 803, 809 (1916).

³⁹ 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1937).

impeachment process, including allegations that the Senate had exceeded the constitutional limits of its impeachment power.⁴⁰

Another proposal of Berger's contrary to traditional concepts of impeachment calls for the exercise of impeachment against members of Congress. Berger finds some support for this position in English history, since most English impeachments were undertaken against peers. Furthermore, Berger cites scattered references in the state ratifying debates indicating that impeachment of members of Congress was discussed,⁴¹ but the various references considered together are ambiguous at best.⁴²

Even Berger concedes that the point appears to have been settled with the impeachment of Senator Blount in 1797, and he frankly admits that he is calling for a reconsideration of the issue. Blount was impeached after he had been expelled from the Senate. Counsel for Blount argued successfully that Congress lacked jurisdiction because article II, § 4, of the Constitution limited impeachment to "the President, Vice-President, and all civil officers of the United States;" that the term "civil officers" was designed to exclude members of Congress,⁴³ and in any event Blount was no longer a member of the Senate.⁴⁴ Although this congressional recognition that it lacked the power to impeach Blount has been consistently cited in support of the proposition that Congress cannot impeach its own members, a recent commentator has argued that the actual issue resolved in the Blount proceeding concerned the impeachability of a private citizen. Hence the issue of impeaching members of Congress was rather "casually disposed" away, a circumstance which would add support to Berger's argument for reconsideration.⁴⁵

Berger contends that if Congress is able to impeach its own members

⁴⁰ There are, however, a few cases on the state level in which courts have acted as a board of review for impeachments. Note, *The Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 330-31 (1937).

It is possible to distinguish an impeachment proceedings against a non-judicial officer from the situation in *Ritter*. In *Ritter* and in any judicial impeachment it can be argued that judicial review would serve to undermine a legislative check against judicial irresponsibility and thus impede the system of checks and balances. Judicial review of the impeachment and conviction of an executive officer would not have this effect.

⁴¹ J. ELLIOTT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION*, (2d ed. 1907) at II: 45, 168-69, 477; III: 202, 307, 402, 661; IV: 265, 276.

⁴² J. ELLIOTT, *supra* note 41, at III: 219-20; IV: 33, 34, 124.

Feerick's analysis of the ratifying convention debates provides quotations indicating that some participants clearly believed the susceptibility of members of Congress to regular criminal prosecution would be sufficient. Feerick, *supra* note 4, at 24-25.

⁴³ See *The Library of Congress* (N. Small ed.) *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION* 556 (1946): "A Member of Congress is not a civil officer within the meaning" of the Impeachment Clauses.

⁴⁴ C. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION* 86 (1922).

⁴⁵ I. BRANT, *supra* note 34, at 37.

its ethical standards would be raised. The difficulty with this argument is that Congress already has the power to expel or punish its own members by a two-thirds vote. Since the expulsion procedure is far less cumbersome and time-consuming than impeachment, if it is not sufficient, the device of impeachment seems unlikely to offer much of a remedy.

Berger strikes this reviewer as deficient in the slight attention he devotes to reforms of the impeachment mechanism. Although some commentators argue that the present device has worked well, if only in forcing some judges to retire for fear of conviction,⁴⁶ the general consensus of opinion is that the mechanism requires some substantial modifications. One commentator has suggested the following changes: "(1) Creation of a bipartisan House Committee on Judicial Fitness; (2) creation of a permanent professional staff as an adjunct to the Committee; (3) use of a master or masters to conduct formal evidentiary hearings for the Senate and to prepare proposed findings of fact and conclusions of law which would be the basis of argument and decision in the Senate."⁴⁷

The key defects in the volume pertain to the author's focus and emphasis. For example, the in-depth case studies of the impeachment of Chase and Johnson cover material already abundantly analyzed by others.⁴⁸ Moreover, Berger's focus within the case studies is at times inadequate, such as his concern with the constitutionality of the Tenure of Office Act in Johnson's trial, rather than with the impeachment process itself. Furthermore, Berger's infatuation with history often leads him to devote an excessive amount of space to certain tangential points: his forty-three page chapter on retrospective treason being a prime example. Nonetheless, these blemishes do not seriously detract from the superior scholarship, exhaustive research, and explicit prose which are evident in every aspect of the volume. Any discussion of impeachment to come must certainly benefit from Berger's analytical framework. Though impeachment will probably remain an unusual constitutional operation, there is no excuse after this fine book for it to remain a mysterious one.

⁴⁶ See Thompson and Pollitt, *Impeachment of Federal Judges: An Historical Overview*, 49 N. C. L. REV. 87, 118-21 (1970).

⁴⁷ Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CAL. L. REV. 659, 667 (1969).

⁴⁸ See, e.g., M. BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1972).