

# Disciplining Federal Judges: Is Impeachment Hopeless? †

Preble Stolz\*

Senator Tydings, Chairman of the Senate Subcommittee on Improvements in Judicial Machinery, recently introduced legislation which would empower a Commission on Judicial Disabilities and Tenure to recommend the removal of a federal judge from office.<sup>1</sup> His proposal, modeled on the California Commission on Judicial Qualifications,<sup>2</sup> would avoid using the impeachment process<sup>3</sup> specified in the Constitution and thus revives an old constitutional issue: Is impeachment the exclusive method of disciplining federal judges? Senator Tydings apparently thinks not; Justices Black and Douglas

---

† This Article is written on a subject thought when written to be of interest only to a handful. Its title then seemed descriptive and no more. The resignation of Justice Fortas has altered the context at least for that exceedingly rare beast who reads a law review when received. Fair warning to such readers requires notice that nothing in this Article speaks to any of the issues presented by the Justice Fortas affair.

\* B.A., 1953, Reed College; J.D., 1956, University of Chicago; Professor of Law, University of California, Berkeley.

1. S. 1506, 91st Cong., 1st Sess. (1969). A commission, composed of five federal judges and supported by a staff, would be empowered to investigate complaints, hold hearings and recommend to the Judicial Conference that a judge be removed from office for failure to comply with the constitutional standard of "good behavior" defined in the bill as including: "Willful misconduct in office or willful and persistent failure to perform . . . official duties." The Judicial Conference determination would in turn be reviewable in the Supreme Court by writ of certiorari. The commission also could investigate and determine if a judge was physically or mentally disabled from performing his duties in which event an additional judge could be appointed to the court. Senator Tydings had introduced substantially the same legislation in the 90th Congress. S. 3055, 90th Cong., 2d Sess. (1968).

2. CAL. CONST. art. 6, §§ 8, 18. The California procedure is described by Justice Bray, a member of the Commission, in Bray, *Judging Judges—the California Commission on Judicial Qualifications*, 33 NEV. ST. B.J., Jan. 1968, at 28. Its executive secretary, Jack Frankel, has described the process from his viewpoint in Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117 (1966).

3. The terminology of impeachment can easily confuse because the word *impeach* is used to describe three distinct steps in the process. Any member of the House may rise to "impeach" a judge or any civil officer. This is sometimes in the form of a memorial, sometimes not. It is typically referred to a committee for investigation and report. The House votes to "impeach" when it adopts Articles of Impeachment, roughly analogous to an indictment. Managers for the House are appointed who act as counsel in the Senate. At the conclusion of the trial the Senate votes to acquit or convict—if it convicts the accused has been "impeached." The full range of forms for this process are set out in 3 A. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2469-85 (1907) [hereinafter cited as HINDS' PRECEDENTS], in connection with the trial of Judge Swayne. (He was acquitted.)

recently said yes.<sup>4</sup> A flurry of law review notes provoked by *Chandler v. Judicial Council of the 10th Circuit*<sup>5</sup> are about equally divided;<sup>6</sup> all poach on some distinguished though partisan scholarship of about thirty years ago.<sup>7</sup>

Those who favor a non-impeachment process rest their case in large measure on the historic fact that impeachment has worked very badly. In essence their position is that the Constitution should not be construed to prohibit a rational method of improving the administration of justice. The argument rests on the assumption that impeachment is an unworkable process. This Article challenges that assumption; impeachment has a deservedly bad reputation, but it does not follow that the process could not be modernized to meet current needs.

# I

## THE CONSTITUTIONAL PROBLEM—BRIEFLY<sup>8</sup>

There are two relevant constitutional provisions. Article III, Section 1 provides:

The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the

---

4. *Chandler v. Judicial Council of the 10th Circuit*, 382 U.S. 1003 (1966). The Judicial Council of the 10th Circuit issued an order, allegedly pursuant to 28 U.S.C. § 332 (1964), prohibiting Judge Chandler from hearing any cases. The proceeding in the Supreme Court was on application by Judge Chandler for a stay of that order. The Court denied the stay on the ground that the order was interlocutory, explicitly reserving the issue of the Council's authority to issue it. Nonetheless Justice Black, with the concurrence of Justice Douglas, said: "I think the Council is completely without legal authority to issue any such order, either temporary or permanent, with or without a hearing, that no statute purports to authorize it, and that the Constitution forbids it." *Id.* at 1004. Ultimately the conflict was resolved without determination of the legal problems, see Comments cited note 6 *infra*.

5. 382 U.S. 1003 (1965).

6. Impeachment probably exclusive: Comment, *Judicial Responsibility*, 21 RUTGERS L. REV. 153 (1966); Comment, *The Chandler Incident and Problems of Judicial Removal*, 19 STAN. L. REV. 448 (1967). Congress could establish non-impeachment machinery: Comment, *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 (1966); Comment, *Removal of Federal Judges—Alternative to Impeachment*, 20 VAND. L. REV. 723 (1967).

7. Shartel, *Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution* (pts. 1-3), 28 MICH. L. REV. 485, 723, 870 (1930); Otis, *A Proposed Tribunal: Is It Constitutional?* 7 U. KAN. CITY L. REV. 3 (1938).

8. Senator Tydings recently complained about the lack of scholarship on the problem of removal of federal judges. Tydings, *The Congress and the Courts*, 52 A.B.A.J. 321 (1966). His committee solicited memoranda from a number of law professors on the subject and at least one such memorandum has been published. Kramer & Barron, *The Constitutionality of Removal*

supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

Article II, Section 4 provides:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

The most elaborate argument in support of the constitutionality of non-impeachment machinery was developed by Professor Shartel.<sup>9</sup> He contended that the impeachment clause of Article II was a limitation on the power of the Congress to remove judges, and Article III a limitation on the executive power of removal. No constitutional limitation existed on the power of Congress to define "good behavior" in Article III and to provide a mechanism whereby the judiciary could try the fitness of its own members.<sup>10</sup> In other words, judicial power to try the fitness of judges was not prohibited though the executive was deprived of all power and the legislature limited to impeachment. Slight support for this conclusion can be found in the case law construing Article II with respect to non-judicial civil officers; in that context it has been held that impeachment is not the sole power of removal.<sup>11</sup> Additionally, the standard of "good behavior" in Article III is not self-evidently the obverse of "high crimes and misdemeanors" in Article II. There might be conduct less than good behavior that is not a high crime or misdemeanor, for example, insanity or senility where the judge's condition is morally blameless.

---

and *Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour,"* 35 GEO. WASH. L. REV. 455 (1967). This Article is a modification of a memorandum submitted to the committee in 1967. The Kramer and Barron piece and the law review material cited in note 6 *supra*, at least if taken collectively, cite all that is relevant and much that isn't. The problem may be of major importance and difficulty, as Senator Tydings asserts, but since Shartel's time no one can justly complain about academic indifference.

9. Shartel, *supra* note 7.

10. Some support for a judicial power to remove a judge in addition to impeachment is derived from a statute passed by the first Congress providing that a judge convicted of bribery should be disqualified from holding office. Act of April 30, 1790, ch. 1X, § 21, 1 Stat. 117. Until the 1964 codification 18 U.S.C. § 207 (Act of June 25, 1948, ch. 645, § 207, 62 Stat. 692) said that a judge "shall" be disqualified; the present 18 U.S.C. § 201(c) (1964) says that he "may" be disqualified. The constitutionality of the law as applied to judges has never been established in any of its mutations.

11. *Myers v. United States*, 272 U.S. 52 (1926); *see also Humphrey's Executor v. United States*, 295 U.S. 602 (1935). The case of judges, or even those exercising quasi-judicial powers as *Humphrey's Executor* indicates, is easily distinguished from other civil officers subject to impeachment by Article II. Judges alone are given constitutional tenure "during good behavior" and it is the combination of the two clauses that creates the problem.

Assuming that such a gap exists, the necessary and proper clause would give Congress power to define its content and to establish a mechanism for its determination.

The Article III language giving judges tenure "during good behavior" was a part of every proposal made to the Constitutional Convention. Undoubtedly it was derived from the Act of Settlement<sup>12</sup> and it was regarded then, as it is now, as a critical protection against undue influence over judges by the executive. That is how Blackstone<sup>13</sup> described it and his words are echoed in contemporary American documents.<sup>14</sup> At a minimum the words were inserted in the Constitution to make it abundantly clear that judges did not serve, as English judges did before the Act of Settlement, at the pleasure of the executive.

The Act of Settlement also provided that judges could be removed by vote of both Houses of Parliament.<sup>15</sup> No one contends that a comparable power exists in Congress, presumably because the Article II impeaching power states the sole method whereby the legislature may discipline judges.<sup>16</sup> That interpretation is consistent with the view that the drafters of the Constitution did not assume the Act of Settlement to be the law except to the extent they made it applicable by provision in the Constitution.

Those are narrow interpretations of the constitutional provisions. A more generous reading was current in the 18th and early 19th Century. Hamilton,<sup>17</sup> Story,<sup>18</sup> Kent,<sup>19</sup> and Tucker<sup>20</sup> all read the two clauses as giving judges life tenure subject to removal only by impeachment. If those men were aware of the possibility of removing judges by a judicial process such as *scire facias*,<sup>21</sup> or of the power of Congress to provide some such procedure, their writings do not reflect

---

12. 12 & 13 Wm. III, c. 2 § 3 (1701) effective after the death of Queen Anne (1714). The language of the act was: "[J]udges' Commissions be made *Quandiu se bene gesserint* [during good behavior], and their Salaries ascertained and established; but upon the Address of both Houses of Parliament it may be lawful to remove them." Professor Haynes reports that several judges were dismissed by the Crown after the act was effective. HAYNES, *SELECTION AND TENURE OF JUDGES*, 79 (1944).

13. 1 W. BLACKSTONE, *COMMENTARIES* 267-8 (1765).

14. See notes 17-20 *infra*.

15. Interestingly, the power has apparently never been exercised.

16. The possibility of removal by address was put before the Convention and rejected.

17. *THE FEDERALIST* Nos. 78, 79.

18. 2 J. STORY, *COMMENTARIES OF THE CONSTITUTION* §§ 1599-1635 (1833).

19. 1 J. KENT, *COMMENTARIES ON AMERICAN LAW* XIV (1826 ed.).

20. 1 ST. G. TUCKER, W. BLACKSTONE, *COMMENTARIES*, 353, 359-60 (App.) (Tucker ed. 1803).

21. For a discussion of the use of this writ, see Shartel, *supra* note 7, at 882 & n.33.

it. In short, they assumed that impeachment was the sole constitutional method of removing federal judges.<sup>22</sup>

The only authority on the subject has concluded that there is no difference between "high crimes and misdemeanors" and non-"good behavior." The Senate has twice convicted judges on articles of impeachment that did not charge indictable crimes,<sup>23</sup> and individual senators have given elaborate opinions holding that non-good behavior is grounds for impeachment.<sup>24</sup> That authority is ephemeral and not conclusive.

The question whether the impeachment power is exclusive cannot be resolved by scholarship. An authoritative resolution can come only from the Supreme Court after Congress has attempted to define good behavior and created the judicial machinery for implementation.<sup>25</sup> For

---

22. It is a nice historical question why the Constitution is ambiguous on whether impeachment is the exclusive method of removing federal judges. It is worth noting that a similar ambiguity is in the Act of Settlement, *i.e.*, is address the only way the English can remove a judge from office? A number of commentators assume that it is. *E.g.*, H. HANBURY, *ENGLISH COURTS OF LAW* 166-67 (2nd ed. 1953); T. ELIAS, *BRITISH COLONIAL LAW* 60 (1962); *see also* *Terrell v. Secretary of State* [1953] 2 All E.R. 490 (Q.B.). Others have suggested that it is not. *E.g.*, R. M. JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 258 n.3 (4th ed. 1964); Note, *Exclusiveness of the Impeachment Power Under the Constitution*, 51 HARV. L. REV. 330, 335 n.36 (1937). Although the question is now over 250 years old it has not yet been settled in England. Why is it that lawyers in the eighteenth and nineteenth centuries apparently did not see an ambiguity that to the modern mind would seem reasonably obvious to any careful draftsman? It is no more than speculation, but the explanation may lie in a subtle shift in attitude towards judges and courts; our willingness to perceive judges as subject to human frailties has created a problem out of something that an earlier time may well have regarded as essentially unthinkable. Current writing on judicial discipline is full of ghoulish anecdotes about judges who were lazy, or drank too much, or who had lost some of their powers through illness or age. A hundred or even fifty years ago such talk would probably have been regarded as in bad taste if not contemptuous—as tending to encourage disrespect for the courts. It may also be that we are more ready today than before to distinguish between the stupid judge and the judge whose incompetence is rooted in illness or age. Presumably a judge once appointed and confirmed is not subject to discipline because he is stupid even though the consequences of his thick-headedness are fully as damaging to the welfare of the system as the incompetence of the judge who has slipped through illness or age.

23. Judge Archbald (1913) and Judge Ritter (1936). *See* tenBroek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185, 193 (1938); Brown, *The Impeachment of the Federal Judiciary*, 26 HARV. L. REV. 684 (1913). The question whether a judge could be impeached for noncriminal misconduct (or for criminal conduct not related to his official position) was contested in a number of impeachment trials. The arguments are set forth quite fully in 3 HINDS' PRECEDENTS, *supra* note 3, §§ 2008-23 (1907) and in 6 C. CANNON, *CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES* §§ 455-66 (1935) [hereinafter cited as CANNON'S PRECEDENTS]. The Archbald case would seem to have settled the question insofar as any congressional precedent can bind a future Congress.

24. See the memorandum opinions of Senator Pittman, Senators Borah, La Follette, Frazier and Shipstead, Senator Thomas and Senator McAdoo reprinted in the APPENDIX to the PROCEEDINGS OF THE U.S. SENATE IN THE TRIAL OF IMPEACHMENT OF HALSTED L. RITTER, S. DOC. NO. 200, 74th Cong. 2d Sess. (1936). Senator Johnson's view was perhaps *contra*.

25. The issue could perhaps be raised without a statute by a judicial proceeding brought

present purposes it is enough to know that non-impeachment machinery for removing federal judges runs a substantial risk of being held unconstitutional. If Congress accepts Senator Tydings' proposal, the nation can anticipate a prolonged and probably unpleasant lawsuit to determine its constitutionality.

## II

### THE ATTRIBUTES OF AN IDEAL SYSTEM FOR DISCIPLINING JUDGES

The design of new systems for disciplining judges is one of the more popular reforms in state judicial administration. It is not necessary here to describe the various systems that have been developed<sup>26</sup> but it is relevant to examine the characteristics of the best of these plans to determine whether the impeachment process can be modified for the federal courts. The best systems have four major characteristics: They are: antiseptically free of politics and partisanship; confidential at least up to the point of formal hearing; supported by a permanent staff for investigation and informal persuasion; and procedurally fair to the judge who is being investigated.

Judicial discipline in most of the new systems has been protected from political influence by putting power in the hands of a carefully selected group of high officials, primarily judges of the highest courts, who are relatively free of political concerns. Thus the California Commission on Judicial Qualifications is made up mainly of judges and the ultimate decision on removal is made by the California Supreme Court. The New York and Illinois systems use judges exclusively. The fear is that the removal power may be used to purge men whose views are inconsistent with the prevailing political majority and this danger is avoided by using officials least subject to political pressure. Use of men of this caliber results in a generally conservative

---

by the Attorney General to have a judge's office declared vacant because the judge had breached the "good behavior" clause. Attorney General Biddle thought he might have such a power, although he was most reluctant to exercise it. See *Hearing on H.R. 146 Before a Subcomm. of the Senate Comm. on the Judiciary*, 77th Cong., 1st Sess. 37-38 (1941). The *Chandler* case also potentially presented the problem, but the weight of law review opinion would have it that the 10th Circuit Judicial Council lacked statutory authority to issue the order and thus the constitutional problem would probably not be reached if a new *Chandler* case arose.

26. See, e.g., Allard, *Judicial Discipline and Removal Plans*, 48 J. AM. JUD. SOC'Y 173 (1965); Frankel, *Judicial Discipline and Removal*, 44 TEX. L. REV. 1117 (1966); Note, *Remedies for Judicial Misconduct and Disability: Removal and Discipline of Judges*, 41 N.Y.U.L. REV. 149 (1966).

administration of discipline. For the most part they will lead a program that proceeds cautiously, principally against judges who are inept through illness or age.

An unusual degree of confidentiality is important for a number of reasons.<sup>27</sup> Necessarily about half of the people who appear before a judge leave unsatisfied. Some bitterness and hostility directed at the judge are predictable. If those who lost their cases had the power of embarrassing the judge publicly, no doubt some would take advantage of the opportunity. No official agency should be created which would subject judges to any sort of public condemnation before the facts have been fully explored and analyzed. Complaints about judicial misconduct must be carefully screened before public proceedings are initiated.

Conversely, lawyers who practice before a judge find it difficult to report even the most flagrant sorts of judicial misconduct for fear that they may be subject to retribution in later appearances. Confidentiality is essential to permit and encourage lawyers and others who appear before the judge to report genuine instances of misconduct.

Confidence is also necessary if the system is to work effectively to promote improved conduct and voluntary retirement. A judge is far more likely to react constructively to criticism if he is confident that others will not know about it. One of the virtues of the California system has been its ability to persuade a number of judges to step down voluntarily. The same success might not have been achieved if the proceedings had been publicized.

If freedom from political influence requires that discipline be assigned to persons of high importance in government—for example members of the Supreme Court or other judges—those men will not be able to devote the necessary time to screening and investigation of alleged misconduct. If a staff is available, they will use it, and the better the staff is, the more likely the program is to succeed. Permanence is important to avoid the characterization *ad hoc*. It is critical that the system not be created to respond to a particular case or judge, and it is very little better if the system is energized only occasionally in response to a particular situation.<sup>28</sup> A permanent staff whose sole responsibility is judicial discipline is also free of the

---

27. Government personnel proceedings are generally conducted in considerable secrecy. The reasons for secrecy generally are fully applicable to judges who need protection from unfounded charges and whose service will be prejudiced by public exposure of false charges.

28. This is the defect of the New York Court on the Judiciary which has apparently been convened only twice in the 19 years of its existence. *But cf.* Note, 41 N.Y.U.L. REV. 149, 186-89

pressures that will trouble any agency that appears as a litigant. The Department of Justice, for example, is put in a difficult position if it is asked to investigate claims of judicial misconduct. The Department will be reluctant to initiate investigation and, once into an investigation, may be reluctant to pull back.<sup>29</sup>

A permanent staff would have an office and be visible. The office would be a place where complaints could be sent with some honest expectation that the matter would be fairly evaluated. The staff would also be in a position to maintain some kind of regular, but informal, surveillance of judges and to initiate proceedings on its own where, for one reason or another, people are reluctant to file complaints.

Finally, the formal and informal procedures obviously must be fair. The judge must be given notice of the charges, an opportunity to defend himself, the right to confront his accusers and the right to present evidence on his own behalf in a dignified proceeding.

### III

#### MODERNIZING IMPEACHMENT

Impeachment has been universally condemned as a method of disciplining federal judges. That is not surprising when its history is measured against the system described above. It has been used for political purposes; the trial of Justice Chase was conceived as the first in a series designed to remove Federalists from the Supreme Court because their views were hostile to those of President Jefferson.<sup>30</sup> Even the more recent impeachment trials have been influenced by politics.<sup>31</sup> Filing articles of impeachment is far from confidential and has no screening process other than conscience of the individual members of

---

(1966) pointing out that the Court on the Judiciary has no jurisdiction over judges below the Supreme Court level (who are subject to discipline by the Appellate Division) and hence statistical comparisons with California are not meaningful.

29. See the testimony of Mr. Justice Jackson before the subcommittee considering the Sumners Bill in 1941. He there made the point that as Attorney General he was most reluctant to start an investigation of a judge because of possible repercussions either for or against the government, but once having started an investigation, the dilemma was even worse: "You have investigated Judge so-and-so, it is well known in the community, so what are you going to do? If you keep still and do nothing, people will think something has happened; the judge has some friends. You almost force yourself to start something in order to clear yourself of the charge that you have investigated and quieted the thing." *Hearing, supra* note 25, at 28-29 (1941).

30. See Blackmar, *On the Removal of Judges: The Impeachment Trial of Samuel Chase*, 48 J. AM. JUD. SOC'Y 183 (1965).

31. tenBroek, *Partisan Politics and Federal Judgeship Impeachment Since 1903*, 23 MINN. L. REV. 185 (1938).



the House.<sup>32</sup> No responsible Representative would introduce them unless he were thoroughly satisfied with the validity of claims of the grossest kinds of misconduct, but even then he would be reluctant to take up the time of leaders of the House and Senate with a trial. The system has not been used for 30 years, and never was except in extreme instances. Although a number of judges may have retired rather than suffer the process,<sup>33</sup> they may well have done so for reasons other than a sense of guilt.<sup>34</sup> Impeachment procedure does not look fair. The Senators who are sworn wander in and out of the chamber during the taking of evidence and ultimately vote ambiguously to convict or acquit without exposing their views as to the law or the facts. The precedents are few and it is not even clear whether the standard of proof is beyond a reasonable doubt, by a preponderance of the evidence, or something else.

If impeachments can be conducted only as they have been, some other procedure must be devised to make any progress. But why cannot impeachment be modified so that the process will be fully consistent with the characteristics of an ideal system? Courts could not dispose of their business today if they had to use the forms and methods of the early 19th century, nor could Congress or the Executive. The impeachment process has not similarly developed because of its infrequent use, but quite conceivably it could be restructured to play a revived role in modern government. The essentials would include: (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. With these reforms incorporated in the Rules of the House and Senate<sup>35</sup> the essentials of an ideal system would be created without raising any new constitutional problems.<sup>36</sup>

---

32. Article I gives the House sole power to impeach and the Senate sole power to try impeachments; a two-thirds vote is required to convict.

33. Shartel, *supra* note 7, at 820 n.2.

34. See 6 CANNON'S PRECEDENTS, *supra* note 23, at § 547 (resignation of Judge English); § 550 (resignation of Judge Winslow).

35. Probably a statute would be desirable so as to ensure permanence and continuity from session to session, perhaps in the form of amendments to the Legislative Reorganization Act.

36. There is an argument that judges can be impeached only for criminal misconduct falling within the class of "high crimes and misdemeanors." As noted earlier, that argument has been apparently rejected by the Senate in favor of the view that any non-good behavior is grounds for impeachment of judges. See authorities cited note 23 *supra*. Were the contrary view

The revisions on the House side are probably the more important. Surely it is possible to create a small bipartisan standing committee not dominated by political concerns.<sup>37</sup> The committee would be charged with the special function of receiving and evaluating complaints concerning the fitness of judges. If necessary and desirable, the committee's charge could be narrowed to permit it to consider only specified kinds of judicial misconduct—e.g., physical or mental disability, dishonesty, unethical conduct—or the committee could be denied jurisdiction if the gravamen of the complaint related to correctness of a judge's decision rather than his behavior.<sup>38</sup>

The day-to-day work of the committee would be in the hands of a staff selected on a nonpartisan basis and appointed to permanent positions. The success or failure of the scheme would depend, as most government programs ultimately do, on the quality of the people who do the staff work. If conscientious and careful, they should be able to handle tactfully and quietly most of the complaints that come in from all sources. The Department of Justice and the Administrative Office of the Courts should be encouraged to refer complaints routinely to the committee for staff analysis. Both staff and committee work should be privileged and confidential unless the judge who is being investigated wishes to reveal it. The Rules might well require that, before the committee votes to recommend that Articles of Impeachment be filed, the draft articles be submitted to the judge involved and opportunity be given him to appear before the committee in executive session.<sup>39</sup> The committee might be authorized to write letters of censure in those instances in which the judge's conduct was felt not to be sufficiently grave as to warrant removal.<sup>40</sup>

---

adopted, judges could not be impeached for non-willful misconduct, e.g., incapacitating illnesses such as insanity, senility and perhaps alcoholism.

37. Perhaps four members, selected for their "judicial" temperament and perhaps also as members of the judiciary committee, might be appropriate. Congress has many members fully sensitive to the importance of judicial independence who would exercise the powers given them with the utmost responsibility.

38. Historically articles of impeachment have usually been referred to a committee which conducts an investigation (often away from Washington) and reports back to the House. See 6 CANNON'S PRECEDENTS, *supra* note 23, at §§ 526-529, 542, 544, 549-552 (1935). Sometimes the committee has been a subcommittee of Judiciary, sometimes a special select committee, depending, apparently, on whether the House would be in session during the investigation. This proposal would eliminate the necessity of introducing a resolution creating such a committee.

39. House subcommittees on impeachment historically have often granted the accused the right to be present, with counsel, and to question the witnesses before the subcommittee. See, e.g., 6 CANNON'S PRECEDENTS, *supra* note 23, at §§ 526, 527.

40. The absence of a power of informal censure was thought to be a defect in the California system, Frankel, *Judicial Discipline and Removal*, 44 TEXAS L. REV. 1117, 1129 (1966). In the revision of the judicial article of the Constitution in 1966 the Commission was given this power.

The existence of the committee and the work of its staff will do most of the good. That seems to be the experience in California. Indubitably this committee assignment would take up a significant portion of the time of a few members of the House, but the same criticism could, of course, be levelled at any alternative scheme which would use up the time and energy of important members of the judiciary. The bulk of the work, however, would be done by the staff and the committee member's role should be limited to surveillance and the exercise of judgment in the relatively few cases in which federal judges seem on the basis of substantial evidence to be guilty of misbehavior.

Senate involvement should be much less. Probably not more than one or two judges in a decade would have articles of impeachment filed against them. In such a case the Senate Rules should call for the selection of one or more masters to hold a hearing.<sup>41</sup> Again it is crucial that a master be selected in a nonpartisan manner. He could be a Senator, he could as well be a retired member of the judiciary of either the federal or state courts. The hearing should be conducted with full rights of counsel, confrontation and cross-examination accorded to the impeached judge, and rules analogous to those in the Administrative Procedure Act<sup>42</sup> should be developed to guide the proceedings. Ultimately the master would report proposed findings of fact and conclusions of law in a form in which they could be voted on by the Senate as a whole.

The Senate must reserve the power of ultimate decision on facts and law. That can easily be done. The hearing before the Senate would consist of a procedure comparable to that now common before agencies such as the NLRB or the FTC. The hearing would be limited to argument based on the record made before the master and focused on his recommended decision. That kind of a hearing need not be time-consuming—the issues are focused, the critical portions of the record identified by counsel. What remains is the exercise of judgment. This is not to say that the exercise of judgment is simple or

---

House subcommittees have recommended abandonment of impeachment proceedings in reports that criticize the judge's conduct. *See, e.g.*, 6 CANNON'S PRECEDENTS, *supra* note 23, at §§ 527, 542, 552. S. 1506 as presently written has no provision for a sanction other than removal.

41. At present the Senate Rules call for the creation of a special 12-man Committee to hold the evidentiary hearing, Rules of Procedure & Practice in the Senate when Sitting on Impeachment Trials XI, SENATE MANUAL, S. DOC. NO. 1, 90th Cong., 1st Sess. § 110 (1967). Apparently such a Senate Committee has never been used, although it was suggested as early as 1904. 3 HINDS' PRECEDENTS, *supra* note 3, at § 2217. Jefferson's Manual seems to contemplate an evidentiary hearing before a committee. SENATE MANUAL § 753.13 (1965).

42. 5 U.S.C. §§ 551 *et seq.* (Supp. III, 1965-67).

easy, it may be painfully difficult, but the issue whether to remove a federal judge from office is surely one which is worthy of the Senate's attention.

Revision of the rules on impeachment could simplify many problems and improve the procedure. For example, it is not clear that a judge will lose retirement benefits on conviction.<sup>43</sup> The rules might well provide that he *not* lose them. The burden of proof surely should not be on the judge but, on the other hand, proof beyond a reasonable doubt seems excessively protective. Careful thought in advance of a particular case should anticipate and resolve impartially many comparable kinds of procedural problems.

### CONCLUSION

Senate Bill 1506 is a plausible proposal which takes full advantage of the accumulated experience of the states. In an ideal world perhaps all would agree that the judging of judges is best left to the judiciary rather than the legislature.<sup>44</sup> Unfortunately that cannot be for federal judges without confronting head-on, as Senate Bill 1506 does, a serious constitutional issue which could be avoided by improving the impeachment process. If, as seems likely, most of the work will be done by the staff, the essential difference between an improved impeachment process and Senate Bill 1506 is that in one instance the staff would report to busy congressmen and in the other to preoccupied judges. Impeachment, of course, also presents a risk that professional politicians will not be able to resist the temptation to abuse their power despite a structure designed to discourage that kind of abuse. The framers apparently thought that risk minimal. The historic fact that we have had no impeachments in more than 30 years when there has been no procedural protection against politicized impeachments should support the framers' confidence in the good judgment of legislators. Perhaps respect for the framers also suggests that, before trying to evade what is at least a strong constitutional preference for impeachment, an attempt should be made to make it work.

---

43. Article I § 3(7) of the Constitution provides that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any other Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." In the trial of Judge Ritter the Senate removed him from office but did not disqualify him from holding other offices in the future. Certainly that would suggest that it is possible to permit judges to maintain their retirement benefits after impeachment. Conversely, unless a pension could be described as an "office of . . . profit" it seems doubtful that Congress could make a judgment of impeachment without more grounds for removal of retirement rights.

44. See Traynor, *Who Can Best Judge the Judges*, 53 VA. L. REV. 1266 (1967).