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Impeachment: The Constitutional Problems. By Raoul Berger.

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BOOK REVIEW

IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS. By Raoul Berger.
Cambridge, Massachusetts: Harvard University Press. 1973. xii+
345 pages. \$14.95.

DAVID A. HIGLEY*

Impeachment. The very word stirs the emotions for it strikes at the essence of our constitutional republic: the separation of powers. To the layman, the procedure is rife with political factionalism. Moreover, there is widespread concern that resort to the process will rend the very foundations of our democracy.¹ The politician, must consider the intolerable time-consuming burdens of the process² and the need to maintain political credibility with his constituents. A definitive explanation of the meaning and parameters of the Constitution's impeachment provisions would help clarify the issues. Fortunately, at a time when analysis and explication of the removal process is sorely requisite, Harvard Senior Fellow Raoul Berger has published *Impeachment: The Constitutional Problems*. This text provides answers to perplexing problems and reopens for provoking discussion questions thought long settled by historical practice.

Mr. Berger relates that the American procedure for removal of corrupt public officials has its roots in the English impeachment and treason trials "when the Commons undertook to prosecute before the Lords the most powerful offenders and the highest officers of the

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The views expressed herein are those of the author and do not reflect Department of Defense or United States Marine Corps policy.

1. *E.g.*, during a demonstration before the White House on Sunday, October 21, 1973, one woman observed: "I don't have confidence in him [the President] any more, but I'm not sure I like the alternative. We don't even have a vice president." *Washington Post*, Oct. 22, 1973, § A, at 19, col. 8. Vice President Spiro T. Agnew had resigned on October 10, 1973, and Congressman Gerald R. Ford had been nominated on October 12, 1973, to fill the office of vice president. *See*, U.S. CONST. amend. XXV, § 2.

2. Mr. Justice Hugo L. Black referred to the procedure as "the admittedly difficult method of impeachment by the House of Representatives and conviction by two-thirds of the Senate." *Chandler v. Judicial Council*, 398 U.S. 74, 142 (1970) (dissenting opinion).

Crown."³ Reflecting at length upon the use, disuse, and revival of the procedure by the English Parliament prior to the American constitutional convention, Berger notes that impeachment became "a clumsy instrument"⁴ which was often supplanted by the bill of attainder⁵ and removal by Address of Parliament.⁶ Furthermore, according to the author, Parliament's power to declare treasons with retroactive effect was "untrammelled."⁷ The history of the English treason and impeachment trials "plainly" reveals that "an indictable treason was not the prerequisite of impeachment."⁸

The United States Constitution provides for impeachment in the case of "Treason, Bribery, or other high Crimes and Misdemeanors."⁹ Berger reports that the phrase "high crimes and misdemeanors," originated historically in an impeachment rather than an ordinary criminal proceeding and substantively encompasses "a category of *political* crimes against the state."¹⁰ Since English impeachment proceeded for offenses "not 'criminal' in the sense of the general criminal law,"¹¹ the phrase "high crimes and misdemeanors" must have a limited and technical meaning¹² and was so recognized by the framers of the Constitution.¹³ Thus, Mr. Berger is able to conclude that the boundaries of the

3. R. BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 1 (1973) [hereinafter cited as BERGER]. The king being "beyond their reach," Parliament sought to hold his ministers accountable, and this notwithstanding that the minister was carrying out the king's decree, for it was "intolerable for a minister, not merely to give unlawful advice, but to continue to serve a king whose policies were hateful to the nation . . ." *Id.* at 2, 44 n.209.

4. *Id.* at 2.

5. *Id.* "[A] legislative condemnation to death without a trial." *Id.*

6. *Id.* Berger provides the following definition: "[A]n Address was a formal request made by both Houses of Parliament to the King, asking him to perform some act." *Id.* at 145 n.104.

7. *Id.* at 44, 46, 48, 49, 52, citing 2 J. CAMPBELL, *LIVES OF THE CHIEF JUSTICES OF ENGLAND* 269 (1874). "[T]he two Houses of Parliament might retrospectively declare anything to be treason, according to their discretion and punish it capitally." BERGER 47.

8. *Id.* at 52.

9. U.S. CONST. art. II, § 4. "[T]he word 'high' in 'high crimes and misdemeanors' modifies both 'crimes and misdemeanors.'" BERGER 74 n.108. See also *id.* at 161 n.178.

10. BERGER 61. Berger states that "misdemeanors" referred to "criminal sanctions for *private* wrongs." *Id.* "[P]olitical crimes describes misconduct in office as distinguished from ordinary crimes," but impeachment may "lie for out-of-office misconduct" if the misconduct "has a destructive impact upon confidence in public administration." *Id.* at 62 n.32, 71 n.92, 200.

11. *Id.* at 69. I do not read Mr. Berger as stating that an impeachable offense may not be a crime, only that it need not be. See *id.* at 79.

12. *Id.* at 71, 74, 76, 86, 163-64.

13. *Id.* at 71, 74.

impeachment power committed to Congress by the Constitution¹⁴ are to be ascertained by reference to the common law¹⁵ and that "impeachment was meant only for 'great injuries,' 'great misdemeanors.'"¹⁶ Furthermore, since English impeachment proceeded in the absence of an indictable offense, likewise could its American cousin.¹⁷

Mr. Berger's view of the impeachment process thereafter breaks down into three main areas: First, "high crimes and misdemeanors" means one thing when applied to the President and another when the conduct of a lesser official is called into question; second, impeachment is not the sole method for removal of a member of the federal judiciary; finally, a member of the judiciary may be "removed" from office upon becoming insane, disabled or senile.¹⁸ The remainder of this review will touch briefly on each of these three positions.

14. U.S. CONST. art. I, § 2; *id.*, art. I, § 3; *id.*, art. II, § 4. Article I, § 2 in part provides that, "[t]he House of Representatives . . . shall have sole Power of Impeachment." Article I, § 3 in pertinent part states:

The Senate shall have the sole power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article II, § 4 reads:

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.

15. BERGER 87.

16. *Id.* at 88, 91.

17. *Id.* at 58, 67, 78 n.127, 297. Mr. Berger comments at some length on the memorandum prepared by Simon H. Rifkind as counsel for Mr. Justice William O. Douglas and one comment by Mr. Berger deserves attention:

According to Mr. Rifkind, [Judge John] Pickering was charged "with three counts of wilfully violating a Federal statute relating to the posting of bond in certain attachment situations, and the misdemeanors of public drunkenness and blasphemy." . . . No federal statute made violation of the bond-posting statute a crime; nor did a federal statute make either drunkenness or blasphemy a crime. *To assume that either drunkenness or blasphemy might be a crime by State law would make impeachment turn on whether a judge blasphemed or was drunk in one State rather than another.*

Id. at 57 n.15 (emphasis added). I am not troubled, as Mr. Berger appears to be, by the italicized proposition. At least one federal statute provides for the assimilation of state law into federal law. Assimilative Crimes Act, 18 U.S.C. § 13 (1948). The provision has been held to be constitutional, *United States v. Sharpnack*, 355 U.S. 286 (1958), and it applies to federal court houses. *Battle v. United States*, 209 U.S. 36 (1908). *Cf. Miller v. California*, 93 S. Ct. 2607 (1973). Judge Pickering was "convicted . . . for presiding while drunk." BERGER 183-84.

18. There are at least three additional lesser positions. First, impeachment is a noncriminal proceeding (BERGER 78-85); second, impeachment is subject to judicial review (*id.* at 103-21); third, Senators and Congressmen are subject to impeachment (*id.* at 214-23). These propositions will not be discussed in this review.

Impeachment: The Double Standard

According to the Constitution, impeachable offenses are "Treason, Bribery, or other high Crimes and Misdemeanors."¹⁹ On its face, this provision suggests that impeachment standards for any high government official are the same and that the gravity of the misconduct is irrelevant.²⁰ Offering a conflicting theory, Mr. Berger states "the 'great offenses' applicable to the impeachment of the President do not limit the common law scope of 'high crimes and misdemeanors' when the subject of impeachment is a judge."²¹ Admittedly, this is a retreat from an earlier position,²² for in the *Yale Law Journal* the author stated:

If the Framers intended to make judges impeachable for lesser crimes than the President and other civil officers, they chose a singularly inept way of articulating their intention, for they employed one and the same phrase, "high crimes and misdemeanors" for "President, Vice President and other civil officers" without naming judges at all, and without the slightest intimation that "high crimes and misdemeanors" was to have two different meanings, one for judges and one for the President and other civil officers. One who would give those words two entirely different meanings, turning on the person to whom they are applied, must demonstrate that such was the manifest intention of the Framers, a demonstration that has yet to be made.²³

The author's shift in position appears to be based on two factors: First, the framers were almost exclusively concerned with impeachment of the President, *and then only for "great offenses."* "There was no intimation that the restrictive standards deemed appropriate for removal of the President were likewise to apply to removal of judges."²⁴ However, in his prior article on impeachment, Berger failed to find historical foundation for his dual standard.

It is the record of the several Conventions rather than the "guilty" or "not guilty" verdicts of the Senate that constitute the index of Constitutional interpretation. Of a special concern that judges be

19. U.S. CONST. art. II, § 4.

20. See Berger, *Impeachment for "High Crimes and Misdemeanors,"* 44 SO. CALIF. L. REV. 395, 458 (1971): "Although the removal of judges was decidedly peripheral to concern with executive encroachments, being governed by the same language it is subject to the same limits." See also Berger, *Impeachment of Judges and "Good Behavior" Tenure,* 79 YALE L.J. 1475, 1511-12 (1970).

21. BERGER 93.

22. *Id.* at 91, 93.

23. Berger, *supra* note 20, at 1511-12.

24. BERGER 91.

held to “higher standards,” that is, be impeachable for lesser “high crimes and misdemeanors” than the President or other civil officers, there is not a trace.²⁵

A second factor adopted by the author to support the double standard theory is that “[r]emoval of the President must generate shock waves that can rock the very foundations of government,” whereas removal of a lowly district court judge or even a Justice of the United States Supreme Court “does not have nearly the same impact.”²⁶ Corollary to this theory is the notion that should the President bring his office into “disgrace . . . by a lesser offense . . . the people can remove him at the polls.”²⁷ Judges, on the other hand, are not removable by franchise, and the framers, by providing judicial “good behavior” tenure, “did not intend to shelter those who indulged in disgraceful conduct short of ‘great offenses.’”²⁸ The validity of this theory rests on the assumptions that (1) the President may be expected to disgrace his office *only* at the end of his term of office, (2) the people can appreciate the magnitude of their constitutional duty, and (3) the line of demarcation from “great” to “lesser” offense is clearly and constitutionally delineated. Since I doubt that any of these premises can be maintained with authority, I am unable to agree with the position. Of course, the “removal at the polls” doctrine will have no impact on a President who is serving in his second term of office, and it would be a wicked proposition to subject the electorate to the will of a President who has disgraced his office shortly after assuming the position of Chief Executive. If it is traumatic to remove a President from office by impeachment, the shock will be present without regard to the gravity of the offense. And if an individual may disgrace the Presidency by “greater” or “lesser” conduct, one wonders at the wisdom of a policy permitting removal for the former but not for the latter.

Adoption of the double standard might encourage development of multiple standards. Mr. Berger asserts that members of the federal judi-

25. See note 23 *supra* (emphasis added) (footnote omitted).

26. BERGER 91, 92.

27. *Id.* at 92.

28. *Id.* See U.S. CONST. art. III, § 1.

The Judges, both of the 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.

Id.

ciary may be impeached for conduct less onerous than that required for the impeachment of the President.²⁹ If one standard is established for the President, and another for the federal judiciary, is it not possible for the Justices of the Supreme Court to claim yet another standard to judge their conduct,³⁰ and members of the Cabinet not otherwise removed by the President³¹ to assert still a fourth? If "the rule of law implies equality and justice in its application,"³² the proliferation of separate standards cannot be justified.

Judicial Enforcement of "Good Behavior" Tenure

The constitutional tenure of members of the Federal article III judiciary is during "good behavior."³³ Mr. Berger relates that at common law, tenure during good behavior was terminated by bad behavior³⁴ and that the framers of the Constitution employed the term "with no indication that they were employing it in a new and different sense," thus, the phrase was adopted from the common law and accompanied by all its incidents.³⁵ The most notable incident is the writ of *scire facias*, a proceeding to repeal a patent in case of forfeiture. Though "there is no English case wherein a judge comparable to a federal judge was removed in a judicial proceeding,"³⁶ the author nevertheless reports that "[e]minent scholars . . . consider that removal of judges by *scire facias* remains available in England," and "leading judges had recognized its availability for the trial of judicial misbehavior."³⁷ Mr. Berger, therefore, suggests that Congress enact enabling legislation to ensure

29. *Id.* at 92. "Serious infractions of 'good behavior,' though less than 'great offenses,' may yet amount to 'high crimes and misdemeanors' at common law." *Id.* Apparently, this view is not based upon some inflated ethical concept of the judiciary, for when Congressman Gerald R. Ford asserted that position, Mr. Berger renounced it. Berger, *supra* note 20, at 1511.

30. Berger notes that in England judges were tried or impeached "according to the rank of the offenders." BERGER 248.

31. *Id.* at 197 n.26. "[R]arely indeed would the President insist, for example, upon retaining a Cabinet officer who brought disgrace upon his office and therefore upon the administration. Practical politics would demand his immediate resignation or dismissal." *Id.* Apparently, there is room for exceptions, and one wonders if the misconduct of members of the Executive, Legislative or Judicial branches is always communicated to the Congress or the public.

32. *Papachristou v. Jacksonville*, 405 U.S. 156, 171 (1972).

33. *See* note 28 *supra*.

34. BERGER 124-26.

35. *Id.* at 131, 176.

36. *Id.* at 127. *See also id.* at 177. "[F]orfeiture upon breach of a condition subsequent was a judicial function. . . ." *Id.*

37. *Id.* at 130-31.

that "good behavior" is not to become an impotent formula.³⁸ Under the Berger scheme, trial by judges would be preferred to impeachment.³⁹ "[I]t would be unbecoming for a Justice [or judge] to complain of trial before such a court when his fellow citizens are daily being tried for life or deprivation of property before a solitary district judge."⁴⁰

Several difficulties arise with the removal of members of the federal judiciary by the process of judicial trial rather than impeachment.

First, a comment must be directed to the lack of any substantial discussion of the fundamental purpose of a separate and independent judiciary. As the late Mr. Justice John M. Harlan once stated, "the importance of an independent federal judiciary . . . holds a profoundly important place in our scheme of government."⁴¹ Mr. Berger fails to consider United States Supreme Court cases such as *O'Donoghue v. United States*,⁴² and *Evans v. Gore*,⁴³ which uphold the great underlying purpose of independence and tenure. Whether Berger's concept of judicial trial can be squared with these purposes remains undeveloped.

A second consideration which is certainly as important as the first is whether the Berger concept can be squared with the Supreme Court's announced view in *United States ex rel. Toth v. Quarles*,⁴⁴ another decision not mentioned by the author. In *Quarles*, a majority of the Court stated that impeachment is the exclusive means for removal of article III judges:

Article III provides for the establishment of a court system as one of the separate but coordinate branches of the National Government. It is the primary, indeed the sole business of these courts to try cases and controversies between individuals and between individuals and the Government. This includes trial of criminal cases. These courts are presided over by judges appointed for life, *subject only to removal by impeachment*.⁴⁵

38. *Id.* at 132-35.

39. *Id.* at 128.

40. *Id.* at 176. If the limited purpose of impeachment is removal from office, is there not a significant difference between impeachment and the criminal proceeding referred to by Berger? *See id.* at 79.

41. *Chandler v. Judicial Council*, 398 U.S. 74, 129 (1970) (concurring opinion).

42. 289 U.S. 516 (1933).

43. 253 U.S. 245 (1920).

44. 350 U.S. 11 (1955). *See also* *Johnson v. United States*, 79 F. Supp. 208, 210 (Ct. Cl. 1948); *Clark v. United States*, 72 F. Supp. 594, 597 (Ct. Cl. 1947), *cert. denied*, 333 U.S. 833 (1948).

45. 350 U.S. at 15-16 (emphasis added).

The Court's opinion in *Quarles* was delivered by the late Mr. Justice Hugo L. Black, and was concurred in by Mr. Chief Justice Earl Warren, and Justices Felix Frankfurter, William O. Douglas, Tom C. Clark, and John M. Harlan, no novices in the area of constitutional adjudication.⁴⁶ Interestingly, no authority was cited for the italicized proposition, undoubtedly because these able jurists "assumed that the proposition required no citation."⁴⁷

Third, Mr. Berger recites that when construing the various passages of the Constitution, we should look to the explanations offered by the members of the various ratification conventions: "[A]s Jefferson and Madison emphasized, the meaning of the Constitution is to be sought in the explanation made to those who adopted it."⁴⁸ Yet it seems to me that the author was not faithful to this expressed view. Alexander Hamilton, "the recognized leader of the forces of ratification in New York,"⁴⁹ wrote in *The Federalist No. 79*:

The precautions for their [article III judges] responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives and tried by the Senate; and, if convicted, may be dismissed from office and disqualified for holding any other. *This 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.⁵⁰

Mr. Berger is aware of the view of Alexander Hamilton,⁵¹ but apparently considers it and other similar remarks by framers of the Constitution as mere convention-corridor gossip.⁵²

46. Of these jurists, three—Chief Justice Warren and Justices Black and Frankfurter—generally have been recognized as among the most outstanding Justices of the Supreme Court, and two—Douglas and Harlan—often have been described as "near great." Blaustein & Mersky, *Rating Supreme Court Justices*, 58 A.B.A.J. 1183, 1185 (1972).

47. BERGER 237.

48. *Id.* at 116. *See also id.* at 116 n.58, 219. "[T]he action of the Ratifiers carried even greater weight than the views expressed at the Convention . . ." *Id.* *See also id.* at 283-85.

49. THE FEDERALIST PAPERS ix (C. Rossiter ed. 1961).

50. *Id.* at 474 (emphasis added). According to Martha Ziskind, "Hamilton was a truthful propagandist." Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 152.

51. BERGER 137-38.

52. *Id.* at 149 ("passing assertions in the halls of Congress"). Mr. Berger notes the remarks of Abraham Baldwin, a framer of the Constitution: "The judges are appointed by the President but they are *only* removable by impeachment. The President has no agency in the removal." *Id.* (emphasis added).

A fourth difficulty is the lack of any historical precedent for this procedure. Berger notes that the United States Senate has embraced the notion that it must sit as a body to try impeachments, "a practice from which, despite the onerous burdens it imposes, it has never departed, and which constitutes a constitutional interpretation entirely in harmony with the constitutional design."⁵³ The author however cites not a single instance of judicial removal of an article III judge: "[I]n the 182 years since adoption of the Constitution only nine judges have been impeached and only four convicted and removed."⁵⁴ Has not the Constitution been interpreted by historical practice? Certainly, our history is not disharmonious with the constitutional design.

A fifth and by no means insignificant problem with the Berger proposal is defining the constitutional parameters of the judicial removal process. It seems to me that there is a substantial difference between being removed from office upon a vote of the entire Senate,⁵⁵ which requires the "concurrence of two-thirds,"⁵⁶ and the procedure for removal of federal judges recommended by Mr. Berger: "[A] mixture of circuit and district judges with perhaps one Supreme Court Justice in order to secure a cross section of judicial opinion."⁵⁷ Thus, while impeachment contemplates a vote of the Senate as a body, the Berger proposition permits removal of *any* judge or Justice at the behest of an ill-defined "court." Implicit in his definition of the body is that not all active judges need be present. And let it be very clear that further Supreme Court review of the judicial removal

53. *Id.* at 172.

54. *Id.* at 166. Mr. Berger continues:

That, however, does not tell the whole story of the fifty-five judges who were investigated by the House, "eight [and one Justice] were impeached, eight were censured but not impeached, seventeen others resigned at one stage or another in the conduct of the investigation, while the rest were absolved of *impeachable misconduct*. Added to this are the undetermined number of judges who resigned upon the mere threat of inquiry; for them there are no adequate records." This after sifting "the hundreds of complaints that have been registered" over the years. That the adequacy of the sifting leaves something to be desired is revealed by the House's own records.

Id. (footnotes omitted). It seems to me that congressional inefficiency is quite beside the point. Regardless of the need for the Senate to sit as a body to try impeachments, is there any reason why the House may not maintain a staff of legal advisors to whom complaints may be forwarded and who may be empowered to conduct a preliminary investigation of the allegations of misconduct? Congressional inefficiency is certainly no reason to shift the burden to the judiciary.

55. *Id.* at 172.

56. U.S. CONST. art. I, § 3.

57. BERGER 175.

process will *not* serve to reduce this substantial difference, for that relief, according to Mr. Berger, is likewise to be permitted for those impeached by the House of Representatives and convicted by the Senate.⁵⁸

In this regard, let me posit a few more questions. To be convicted by the Senate requires a two-thirds vote; what is the vote of the Berger court requisite to removal? What is the standard of proof (*i.e.*, preponderance, clear and convincing, beyond a reasonable doubt), especially if the procedure is civil in nature?⁵⁹ What is the standard of Supreme Court review (*i.e.*, substantial evidence, etc.)? Who has standing to raise the issue?⁶⁰ What types of offenses justify removal?⁶¹ If each coordinate branch of the federal government cannot be left to determine the scope of its own powers,⁶² who then reviews the judicial process of removal? Are there constraints for action motivated by differences in philosophical viewpoints? Consider the remarks of Mr. Justice Douglas with respect to the latter question:

[T]here is no power under our Constitution for one group of federal judges to censor or discipline any federal judge and no power to declare him inefficient and strip him of his power to act as a judge.

The mood of some federal judges is opposed to this view and they are active in attempting to make all federal judges walk in some uniform step. What has happened to petitioner is not a rare instance; it has happened to other federal judges who have had perhaps a more libertarian approach to the Bill of Rights than their brethren. The result is that the nonconformist has suffered greatly at the hands of his fellow judges.

The problem is not resolved by saying that only judicial administrative matters are involved. The power to keep a particular judge from sitting on a racial case, a church-and-state case, a free-press case, a search-and-seizure case, a railroad case, an antitrust case, or a union case may have profound consequences. Judges are not fungible; they cover the constitutional spectrum; and a particular judge's emphasis may make a world of difference when it comes to rulings on

58. *Id.* at 103-21. *Cf.* *Powell v. McCormack*, 395 U.S. 486, 507 n.27 (1969).

59. *Cf.* BERGER 172. "Jefferson mistakenly conceived the American impeachment to be criminal in nature." *Id.*

60. One wonders whether losing litigants should be permitted to press the issue of judicial "bad behavior."

61. Mr. Berger suggests the standard: "[R]emoval should be for cause, for serious cause." BERGER 213. Is this more precise than the "maladministration" rejected by James Madison and the framers of the Constitution as a measure of impeachable offenses? *Id.* at 74, 86, 107.

62. *Id.* at 110.

evidence, the temper of the courtroom, the tolerance for a proffered defense, and the like. Lawyers recognize this when they talk about "shopping" for a judge; Senators recognize this when they are asked to give their "advice and consent" to judicial appointments; laymen recognize this when they appraise the quality and image of the judiciary in their own community.

These are subtle, imponderable factors which other judges should not be allowed to manipulate to further their own concept of the public good.⁶³

The Justice concludes, "it is time that an end be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution."⁶⁴

These and other problems come to mind when reflecting upon the Berger proposal for removal by judicial trial. This author is of the opinion that the position does not accord sufficient respect for the essentiality of independence of the federal judiciary and each of its members. Prior to the enactment of any enabling legislation permitting such procedure, "further analysis"⁶⁵ and deliberation are necessary.

"Removal" for Insanity, Disability or Senility

Mr. Berger concludes "that removal of the President by impeachment was not to include his removal for 'disability.'"⁶⁶ However, Berger argues that the impeachment provisions should be "construed to comprehend removal both of insane and incapacitated judges,"⁶⁷ and that the judiciary should be permitted to remove an incapacitated jurist.⁶⁸

It must be questioned whether the procedure espoused by Mr. Berger is either wise or necessary. Certainly, in view of the unfortunate and noncriminal aspects of dementia and disability, the wisdom of subjecting a judge so afflicted to the disapprobation associated with removal is questionable. Furthermore, as the following opinion of the Comptroller General of the United States indicates, less drastic means are available for handling the removal of an insane judge.

63. *Chandler v. Judicial Council*, 398 U.S. 74, 137 (1970) (dissenting opinion).

64. *Id.* at 140.

65. BERGER 298.

66. *Id.* at 182.

67. *Id.* at 187.

68. *Id.* at 191.

To the Director, Administrative Office of the United States Courts,
March 10, 1965:

Your letter of March 1, 1965, with enclosure, asks our opinion whether a district judge, found to be disabled within the purview of the act of June 25, 1948, 62 *Stat.* 903, as amended, 28 U.S.C. 372(b), may continue to receive full pay if the President finds it is necessary to appoint an additional judge for efficient dispatch of business.

Your letter encloses a copy of a memorandum opinion, dated February 5, 1965, from the Assistant Attorney General, Office of Legal Counsel, to the Acting Deputy Attorney General which, in part, reads as follows:

"2. *Failure of disabled judge to retire.* 28 U.S.C. 372(b) controls the situation of a judge who could retire under 28 U.S.C. 372(a) but fails to do so. If the judge is a district or circuit judge, a majority of the Judicial Council of his circuit (*i.e.*, the Chief Judge and the circuit judges for the circuit in regular active service, 28 U.S.C. 332) may present to the President a certificate of the judge's disability. If the President finds that the judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability, and that the appointment of an additional judge is necessary for the efficient dispatch of business, the President may make such appointment by and with the advice and consent of the Senate. Where an additional judge is appointed, the vacancy subsequently created by the death, resignation, or retirement of the disabled judge shall not be filled. The judge, whose disability causes the appointment of an additional judge, remains a judge, entitled to full pay, since under the Constitution he can be removed only by impeachment.

"Since a certificate of disability, even if accepted by the President, does not accomplish the retirement of a judge, he would, as mentioned above, be entitled to full pay. Thus there can be no violation of Article III, § 1, of the Constitution, and the question of half-pay is not involved."

We concur in the above-quoted view of the Assistant Attorney General. Therefore your question is answered in the affirmative.⁶⁹

Consequently, if insanity, disability and senility are problems for the federal judiciary, there appears to be an available remedy to alleviate the strain. Resort to the stringent process of removal is simply unnecessary.

69. 44 *COMP. GEN.* 544 (1965). See *Proceedings in the Supreme Court of the United States in Memory of Mr. Justice Black*, 405 U.S. xi (1972).

Conclusion

Before closing this review, it is important to turn to a subject that has remained unmentioned. Raoul Berger's manuscript, *Impeachment: The Constitutional Problems*, is an excellent presentation of constitutional philosophy. The arguments of the author are often buttressed by irrefutable authority; his positions are concisely stated, handsomely supported and convincing in detail and logic. The problems I have discussed above should not be viewed as detracting from Berger's scholarly contribution to understanding of the "supreme law of the land." His ability to frame the issues and present strongly structured arguments in support of his views is often refreshing, and always appreciated. Without reservation, the work is recommended.

