

How Reckless Judicial Impeachments Threaten Rule Of Law

Dr Jan van Zyl Smit

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Developments in West Virginia and other US State Courts

What happens when legislators try to remove an entire Supreme Court bench? This is not a question about dictatorships or sham democracies. On 7 August 2018, the West Virginia House of Delegates [voted to impeach](#) all four sitting justices of the state Supreme Court on allegations including extravagant office decoration and furniture expenses, overpayment of senior status judges and misuse of vehicles. The Senate [met on 20 August](#) to prepare for three impeachment trials (one justice having resigned in the interim). A two-thirds majority in the Senate is sufficient to remove a justice, which the state Republican party can almost muster on its own: it holds 22 out of 34 seats.

Judicial impeachment fever seems to be spreading through the states. On 17 August, the chief executive of the North Carolina Republican party, Dallas Woodhouse, [threatened to impeach](#) the justices of that state's Supreme Court, unless they dismissed a forthcoming case about constitutional amendment [proposals](#) for the November state ballot. Republicans comfortably hold the majorities they need in both houses of the legislature to follow through on this threat. The majority leaders in the legislature initially gave a [non-committal response](#) to Mr Woodhouse's impeachment plans. Perhaps we will hear nothing more of this threat. But some damage has been done already. A credible threat of impeachment clearly has the potential to pressurise the state Supreme Court justices when they hear the ballot proposal case, and may undermine the public's confidence in their ability to decide that case and others independently and impartially as required by the Rule of Law.

The impeachment of judges by legislators is risky territory for the Rule of Law. While it is necessary to have some mechanism for dealing with the most serious judicial misconduct, entrusting this task to legislators carries obvious dangers. Legislators could abuse their power to punish judges for their decisions, and doing so would undoubtedly have a ["chilling effect"](#) on other judges. At federal level, this has long been understood, and Congress has shown remarkable restraint, which has become standard constitutional practice. It is unthinkable today that a US Supreme Court justice could be impeached for his or her opinions in decided cases. The impeachment but ultimate failure to remove [Justice Samuel Chase](#) in 1805 helped establish this.

State legislatures, however, seem to be losing sight of this wisdom in the post-2016 populist era. The New York Times recently warned that judges in state courts ["shouldn't be partisan punching bags"](#), citing initiatives in 16 states including court resizing bills, measures that would politicise judicial selections and [threats by Pennsylvania Republicans to impeach](#) most of their state Supreme Court justices when they struck down the state's Congressional voting map as unconstitutional.

The situations in West Virginia, North Carolina and Pennsylvania are very different from each other, but together they illustrate the three main challenges in reconciling the impeachment process with the Rule of Law.

First, the laying of charges (or "articles of impeachment") is open to partisan abuse. In North Carolina and Pennsylvania, the

threatened impeachment charges would penalise judges for their decisions, in clear contravention of the principle of judicial independence. In West Virginia the articles of impeachment relate mainly to alleged financial wrongdoing. However, their timing has been described as "[highly suspicious](#)". The House of Delegates voted through the impeachment resolutions as soon as the cut-off date for calling a special election to fill Supreme Court vacancies had passed, leaving the Republican governor to appoint any replacement justices and possibly an entirely new court.

Second, a legislative chamber is not well suited to providing a judge with due process. A state senate is larger than any court or jury, making it difficult for the questioning of witnesses and presentation of legal argument to proceed in the same focused manner as in a courtroom.

Third, public confidence in the impeachment process may be difficult to secure if there are due process shortcomings and legislators vote without issuing detailed findings of fact or even specifying the grounds of removal. Instead, the spectacle may damage public confidence in the administration of justice, which is essential to sustain the Rule of Law.

Thankfully, the impeachment of judges in US state courts has until now been a rare occurrence. In the 25 years to 2017, only [two](#) state court judges were impeached (and only one was removed). That figure sounds almost too good to be true, given the likely human failings of the [nation's nearly 30,000](#) state judges. In fact, significantly greater numbers of judges have been removed by the much less well known mechanism of state judicial disciplinary boards or councils. In [the period 1990-2001](#) alone, more than 100 state judges were removed by disciplinary routes.

Many state disciplinary bodies are modelled on California's pioneering [Commission on Judicial Performance](#), established in 1960. They typically consist of judges, lawyers and lay people, supported by specialist investigators. Judges are given a full hearing in a court or tribunal with due process guarantees before any findings are made and removal or other sanctions imposed. Most importantly, the disciplinary process is much less politicised than impeachment. Unlike elected politicians, disciplinary bodies have no incentive to remove judges in order to impress voters or to discourage other judges from striking down their laws.

In principle, these features make disciplinary bodies better suited to meeting the three Rule of Law challenges associated with impeachment. Yet impeachment is written into [nearly all](#) the US state constitutions. In West Virginia it is still the only method by which judges can be removed from office, as the state [Judicial Investigation Commission](#) is restricted to an advisory role. The House [resolution](#) opening impeachment investigations into the West Virginia Supreme Court mentions a Judicial Investigation Commission report in relation to only one of the four named justices, who also faces federal criminal charges. This casts some doubt on the decision to charge all four justices, and adds to the perception of political motivation. The impeachment threats in North Carolina and Pennsylvania are even more problematic than this - based on nakedly partisan opposition to court rulings, no disciplinary body would ever have endorsed them.

Normalising the ability of legislators to "go it alone" and impeach judges without proper investigations and inquiry procedures is undoubtedly dangerous. The experience of [Commonwealth countries](#) that share this element of their English common law heritage with US states offers some lessons in this regard. Countries like Australia, Canada, New Zealand and South Africa have modernised the removal procedures they inherited from the British Parliament, by establishing disciplinary bodies to assist the legislature. By contrast, the government of Sri Lanka in 2013 used an unassisted parliamentary procedure to remove the country's Chief Justice in a manner that was widely condemned by [international observers](#). The incident contributed to some heads of government [boycotting](#) that year's Commonwealth summit in Sri Lanka.

The Rule of Law requires legal systems to balance the demands of judicial independence with the need to remove judges for

proven misbehaviour that brings their institution into disrepute. Impeachment of judges by legislators is a dangerous tool for striking this difficult balance. It is open to partisan abuse. Until now, state legislatures have been commendably restrained in relying on disciplinary bodies to deal with judicial misconduct. If West Virginia, North Carolina and Pennsylvania are signals that impeachment of judges is on the rise, then we have reason to fear for judicial independence and the Rule of Law.

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