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Judicial Tenure and the Politics of Impeachment – Comparing the United States and the Philippines[1]

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Abstract: On May 11, 2018, Maria Lourdes Sereno was removed from office as the Chief Justice of the Supreme Court of the Philippines. She had been a vocal critic of controversial President Rodrigo Duterte, and he had labeled her as an "enemy." While she was under legislative impeachment investigation, Duterte's solicitor general filed a *quo warranto* petition in the Supreme Court to challenge her right to hold office. The Supreme Court responded to that petition by ordering her removal, which her supporters claimed was politically-motivated and possibly unconstitutional.

The story of Chief Justice Sereno should give urgency to the need for us to consider the proposition that maintaining the rule of law can be difficult, and that attacks on judicial independence can pose a grave threat to democracy.

The article presented here considers the impeachment of Chief Justice David Brock in the American state of New Hampshire in 2000, identifying the most significant institutional causes and consequences of an event that presented a crisis for the judiciary and the state. It offers a case study for the readers of this journal to reflect not only on the removal of Chief Justice Sereno, but also on the kinds of constitutional issues, such as judicial independence, judicial accountability, and separation of powers in any democracy, as arising from in conflicts between the judiciary and another branch of government.

> *Public office is a public trust. Public officers and employees must, at all times, be accountable to the people, serve them with utmost responsibility, integrity, loyalty, and efficiency; act with patriotism and justice, and lead modest lives.*
>
> -- Constitution of the Republic of the Philippines (1987)[3]

> *Ultimately of course this impeachment trial is not about Chief Justice Brock, even though his status, his interest, is very important, but I suggest to you that these proceedings transcend his interest and all of ours because this is really about the institutional integrity of the Supreme Court of New Hampshire.*
>
> -- New Hampshire Attorney Joseph Steinfield (2000)[4]

I. Introduction

Impeachment – typically involving charges brought by the lower chamber of a legislature for trial in its upper chamber – is a means for removal of judges and other government officials for serious abuse of official power and public trust. It is available under the constitutions of the United States[5] and 48 of its 50 sub-national state governments[6], the Republic of the Philippines[7], and a number of other countries[8].

1 This article is based in large part on research done for the book, *The Impeachment of Chief Justice David Brock: Judicial Independence and Civic Populism* (2017), by John Cerullo and David C. Steelman. The author is deeply grateful to Professor Cerullo for his contributions to the quality of this article.

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3 Const. art. XI, sec. 1.

4 This quote is from Steinfield's opening remarks in the Brock impeachment trial. Mary Brown, *The Impeachment Trial of the New Hampshire Supreme Court Chief Justice* (2001), 33.

5 U.S. Constitution, art. 1, sec. 2, 3 and 4.

6 See National Center for State Courts/American Judicature Society, "Methods of Judicial Selection>Removal of Judges," http://www.judicialselection.com/judicial_selection/methods/removal_of_judges.cfm?state.

7 1987 Constitution of the Republic of the Philippines, art. XI.

8 See, for example, Gretchen Helmke and Julio Rios-Figueroa (eds.), *Courts in Latin America* (2011); H. P. Lee, *Judiciaries in Comparative Perspective* (2011); H. P. Lee and Marilyn Pittard, *Asia-Pacific Judiciaries* (2017); and Anja Seibert-Fohr (ed.), *Judicial Independence in Transition* (2012).

By an overwhelming bipartisan vote on July 12, 2000, the New Hampshire House of Representatives impeached David A. Brock, Chief Justice of the Supreme Court of New Hampshire, seeking his removal from office as the leader of that court and of the state's entire judicial branch of government. Brock was the first state court chief justice in 70 years to be impeached, and only he sixth in American history[9]. In over two centuries since 1789, no U.S. Supreme Court chief justice has ever been impeached[10].

In the Philippines, by comparison, two supreme court chief justices have been impeached within the last decade. After being impeached on December 12, 2011, Philippine Chief Justice Renato Corona was removed and disqualified by the Senate on May 29, 2012[11]. Then on March 9, 2018, a legislative committee approved articles of impeachment against Philippine Chief Justice Maria Lourdes Sereno[12]. Before the articles of impeachment were transmitted to the Senate, however, Sereno was removed on May 11, 2018, by an 8-6 vote of the supreme court in proceedings on a petition of *quo warranto* filed by the Philippine solicitor general[13].

Critics have argued that the removal of Sereno by such means was extra-constitutional, in that impeachment is ostensibly the only means by which judges or other high government officials may be removed from office[14]. Indeed, one legislator observed that "[a]ny quo warranto petition questioning the authority or basis for Chief Justice Maria Lourdes Sereno to hold the position of chief magistrate is doomed to fail," and that "The quo warranto ruse is an admission that an impeachment trial will not prosper in the Senate."[15]

In New Hampshire, David Brock was easily acquitted in October 2000 at the conclusion of a trial in the state senate sitting as a court of impeachment. Yet the events before and after the impeachment proceedings show that there was much more at stake than any blameworthy behavior by Brock himself. Rather, Brock's impeachment arose because of problems in four critical areas: (1) judicial independence; (2) judicial rulemaking; (3) judicial review; and (4) judicial ethics and accountability.

The historical context and implications of the Brock impeachment warrant the attention of scholars and court professionals in all countries where impeachment is provided as a way to remove a judicial officer on constitutional grounds. Even in countries where impeachment is not among the means available for removal of judges for cause, the Brock impeachment offers a case study worthy of international and reflection about the judicial function and separation of powers in any democratic form of government, whether in the Philippines or elsewhere.

II. Judicial Power and Accountability in the Philippines

Provisions for judicial power and accountability under Philippine constitutional provisions have changed over time. The 1899 Philippine Constitution gave the judicial branch of government absolute independence from the legislative and executive branches, with judicial accountability provided only by authorizing any citizen to file suit against a judge for any crime committed in the discharge of the judicial office[16].

The 1935 Constitution authorized the Supreme Court to declare any treaty or law unconstitutional if two-thirds of all its members concurred, giving the Supreme Court power to promulgate uniform rules for all courts, subject to being repealed, altered or supplemented by the Philippine Congress[17]. Supreme Court justices were among the high government officials subject to removal from office "on impeachment for any conviction of, culpable violation of the Constitution, treason, bribery, or other high crimes," based on a two-thirds vote to impeach in the House of Representatives and conviction by a two-thirds vote after trial in the Senate.[18]

The 1973 Philippine Constitution authorized the Supreme Court to declare any treaty or law unconstitutional if ten of its fourteen members concurred, and with Supreme Court rulemaking power still subject to being repealed, altered or supplemented by the Philippine Congress[19]. Supreme Court justices and other high government officials were subject to removal from office for graft and corruption along with any culpable violation of the Constitution, treason, bribery, or other high crimes; and only a one-fifth vote of all members of the National Assembly was required for impeachment, with a two-thirds vote of all members required for conviction.[20]

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9 Impeached state court chief justices before Brock were Edward Shippen (PA, 1803); John McClure (AR, 1871 and 1874); David Furches (NC, 1901); Frederick Branson (OK, 1927); and Charles Mason (OK, 1929).

10 See Federal Judicial Center, "Impeachments of Federal Judges," https://www.fjc.gov/history/judges/impeachments-federal-judges.

11 Corona was found guilty of a charge of failure to make public disclosure of his assets, liabilities, and net worth. See Maila Ager, "Senate votes 20-3 to convict Corona," *Inquirer.net*, May 29, 2012, available at http://newsinfo.inquirer.net/202929/senate-convicts-corona#ixzz5HI6zBhqF.

12 See Joe Torres, "Philippine legislators vote to impeach chief justice: Catholic bishops say move to oust top judge divisive," *UCANews.com*, March 9, 2018, available at https://www.ucanews.com/news/philippine-legislators-vote-to-impeach-chief-justice/81748.

13 See Erin McCarthy Holliday, "Philippines Supreme Court ousts Chief Justice," *Jurist*, May 11, 2018, available at http://www.jurist.org/paperchase/2018/05/philippines-supreme-court-ousts-chief-justice.php.

14 See Ellen T. Tordesillas, "Opinion: A lawyer-blogger's view on the quo warranto petition vs Sereno," *ABS-CBN News*, April 23, 2018, available at http://news.abs-cbn.com/blogs/opinions/04/23/18/opinion-a-lawyer-bloggers-view-on-the-quo-warranto-petition-vs-sereno; and Marvin Sy, "Senate body sets hearing on SC's quo warranto ruling," *MSN News*, May 25, 2018, available at https://www.msn.com/en-ph/news/national/senate-body-sets-hearing-on-scs-quo-warranto-ruling/ar-AAxL0lo?li=BBr8RiR.

15 Reina Leanne Tolentino, "Quo warranto or impeachment? Lawyers differ on ousting Sereno," *The Manila Times*, March 4, 2018, available at http://www.manilatimes.net/quo-warranto-impeachment-lawyers-differ-ousting-sereno/383868/.

16 1899 Const., title X.

17 1935 Const., art. VIII.

18 Ibid., art. IX.

19 1973 Const., art. X.

20 Ibid., art. XIII, sec. 2 and 3.

Under the current Philippine Constitution, enacted in 1987, the judicial branch is granted fiscal autonomy, and appropriations for the judiciary may not be reduced by the legislature below the amount appropriated for the previous year.[21] The Supreme Court may declare any treaty, international or executive agreement, or law unconstitutional by a simple majority vote of its members sitting *en banc*.[22] No longer subject to legislative override as in prior constitutions, the Supreme Court has exclusive power to:

> Promulgate rules concerning the protection and enforcement of constitutional rights, pleading, practice, and procedure in all courts, the admission to the practice of law, the integrated bar, and legal assistance to the under privileged. Such rules shall provide a simplified and inexpensive procedure for the speedy disposition of cases, shall be uniform for all courts of the same grade, and shall not diminish, increase, or modify substantive rights. Rules of procedure of special courts and quasi-judicial bodies shall remain effective unless disapproved by the Supreme Court.[23]

As in the 1935 and 1973 Philippine constitutions, impeachment is the only means provided for the removal of Supreme Court justices and other high officials from office. Grounds for removal are broader, however, with "betrayal of public trust" added to "culpable violation of the Constitution, treason, bribery, graft and corruption, [and] other high crimes."[24] And after the experiment in the 1973 Constitution with impeachment and trial conviction by votes of the entire National Assembly, the current impeachment process now calls for impeachment by the House of Representatives (by a one-third vote of all members) and trial in the Senate (with the vote of two-thirds of all members required for conviction).[25]

III. The Impeachment Crisis in New Hampshire

In January 1999, a New Hampshire state representative and a state senator co-sponsored a bill to have Chief Justice Brock removed from office by the governor who is authorized to remove a judge from office by a bill of address – that is, on a request by both chambers of the legislature on grounds warranting removal but insufficient for impeachment.[26] The legislators seeking his removal criticized Brock, as head of the judiciary, for trying to silence attorneys critical of court decisions, for concealing records of judicial misbehavior, for attempting to intimidate a legislator, for usurping authority of the other branches of government, and for "pro-active behavior in the realm of policy."[27] After it was referred to a joint committee comprising six representatives and six senators, committee members voted unanimously against the bill for "lack of specificity," after which the legislature decisively rejected it.[28]

Although the 1999 bill of address against Brock failed, it nonetheless served as the precursor of a much more tumultuous event. In February 2000, a catastrophe arose when the supreme court had to hear the appeal from a trial court decision on the divorce of one of its members, Associate Justice Stephen Thayer. All of the justices had to recuse themselves. In a conference of the justices, when Chief Justice Brock announced the names of the substitute judges that he had appointed to hear that case, Thayer objected vehemently to one of the replacement judges. Knowing that it was a violation of court procedures for one judge to discuss a case involving a colleague in the presence of the other judges and believing that this was not the first time that Thayer may have violated judicial ethics and perhaps even criminal statutes, the clerk of the supreme court reported the matter in a memorandum to the attorney general of the state. The response by the attorney general's office was disastrous for Chief Justice Brock, because it recommended that legislators to conduct an investigation of court practices.The house of representatives accepted the recommendation of the attorney general and referred the matter to its judiciary committee. After three months of committee investigation, the result was an overwhelming bipartisan vote by the full house in July 2000 to file four articles of impeachment[29] against Brock in the senate, alleging that he (a) perjured himself by lying under oath to legislators during their impeachment investigation, and (b) committed the impeachable offense of "maladministration"[30] by (a) improperly intervening in 1987 litigation involving a powerful state legislator[31];

21 Const. art. VIII, sec. 3.

22 Ibid., sec. 4(a).

23 Ibid., sec. 5(5).

24 Ibid., art. XI, sec. 2.

25 Ibid., sec. 3.

26 The New Hampshire Constitution's provision on judicial tenure and removal by address provides that judges hold their offices during "good behavior" until age 70, and that the governor may remove a judge from office by address. N.H. Const. Part 2, Article 73. Removal of judges and other high officials by address is part of the common law tradition and is available in England and Wales, Canada, Australia and New Zealand. See Anja Seibert-Fohr, *supra*, and H. P. Lee (ed.), *Judiciaries in Comparative Perspective* (2011). Yet its availability in America is now limited. See NCSC/AJS, *supra* note 4.

27 N.H. House Journal 18, 1999 Session (January 28, 1999), 272, House Address (HA) 1 bill text as introduced, http://www.gencourt.state.nh.us/legislation/1999/HA0001.html.

28 N.H. House Journal 77, 1999 Session (July 1, 1999), 2070-72, HA 1 vote on committee report, http://www.gencourt.state.nh.us/house/caljourns/journals/1999/houjou1999_77.html.

29 New Hampshire's constitution provides that impeachment must initiate in the lower chamber of the legislature, with trial in the senate, describes the powers of the senate and the procedural rights of defendants, and limits the effect of an impeachment conviction to removal from office. N.H. Const. Part 2, Articles 17, 38 and 39.

30 Grounds for impeachment in New Hampshire are bribery, corruption, maladministration or malpractice. During the Brock impeachment investigation, Attorney Joseph Steinfield observed that "maladministration" must involve intentional or reckless misconduct in a position of public trust. N.H. General Court, House Judicial Committee, *Investigation pursuant to House Resolution 50: Interim report of Special Counsel Joseph D. Steinfield* (2000), 5.

31 The case was later heard by the supreme court on appeal, as Home Gas v. Strafford Fuels, 534 A. 2d 390 (1987).

(b) engaging in ex parte discussions with Justice Thayer about the appeal of Thayer's divorce case; and (c) overseeing a practice allowing recused justices to comment on and influence decisions in the cases from which they had recused themselves. [32]

When those charges were filed in the senate, Brock became only the second judge in state history to be impeached, and the first ever to be tried.[33] Impeachment trial testimony began in September 2000, and proceedings were televised daily. In October, after three weeks of hearings, the Senate voted to acquit Brock of all of the charges.[34]

The proceedings against Brock involved far more than the allegations about his purported ethical violations relating to the Thayer divorce case or the 1987 trial-court case. They were the culmination of tensions between the legislature and the judiciary that had been building for decades and were the focus of important developments in further legislative-judicial relations after the conclusion of Brock's impeachment trial. Key developments before and after impeachment provide a context and explanation for the impeachment. They also shed light on critical concerns relating to judicial independence, court management, and separation of powers, which face the Philippines and many other democracies around the globe.

IV. Independence of the Judiciary

The removal of Philippine Chief Justice Sereno in 2018 reflects a crisis of judicial independence brought on by a fundamental conflict between the leaders of the judicial and executive branches of government. [35] By contrast, the most significant consideration leading up to the Brock impeachment in 2000 was a fundamental dispute over the proper scope of judicial independence from legislative oversight.

When the New Hampshire Constitution was adopted in 1784, it created a government that limited the executive power of the governor in favor of the people's elected legislative representatives. The governor's appointment of judges was subject to approval by a separately-elected executive council, and judges were to serve "for good behavior" rather than at the pleasure of the executive.

As a reflection of legislative supremacy, the 1784 constitution also granted the state legislature full and unfettered power to create all courts in the state and establish their jurisdiction.[36] In the exercise of that power, the legislature passed "court-clearing" statutes five times in the nineteenth century to abolish the highest court in the state, thereby removing all of its judges and allowing for the appointment of new judges by the political party that had come to power. [37]

In 1901, there was yet another judicial reconstruction involving the supreme court as the state's highest court and the superior court as its general-jurisdiction trial court. This time, however, the governor and the legislature agreed to retain all of the incumbent judges in those courts. A "gentlemen's agreement" was reached, under which the majority of the five supreme court justices would be nominees of the political party in power, while the remaining two seats would be held by appointees of the minority party. This arrangement brought stability to the judicial branch for more than 60 years. It was not until 1966 that the people of New Hampshire approved an amendment to the New Hampshire Constitution, indicating that they were "in favor of protecting the supreme court and superior court from possible political interference by establishing them as constitutional courts."[38]

Under the American national constitution of 1789, the federal judicial power of the country was vested in the United States Supreme Court and other courts established by Congress. Yet New Hampshire did not grant constitutional recognition to its court of last resort, free of any legislative power over the creation or abolition of courts, until 178 years after the enactment of its 1784 constitution. See Figure 1.

Figure 1 compares all American states in terms of the elapsed time from their respective statehood dates to the dates when their respective state constitution granted the highest court constitutional recognition, thereby freeing it from any legislative power to create or abolish courts. As Figure 1 shows, 43 states granted constitutional recognition to the highest court in the state at or even before admission to statehood. No other state permitted continuing legislature power over the very existence of its highest court as long as New Hampshire.

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32 N.H. House Journal 56, 2000 Session (July 12, 2000), 1667-1719 and 1755, House Resolution 51 bill text as amended, http://www.gencourt.state.nh.us/legislation/2000/HR0051.html.

33 In 1790, Justice Woodbury Langdon of the state's highest court was accused of "corruptly and willfully" neglecting his duty by refusing to hold court in three counties at appointed times, but he resigned his position before an impeachment trial began. See Nathaniel Bouton, et al., *Early State Papers of New Hampshire*, Vol. 22 (1893), 747-756.

34 For a detailed analysis of the impeachment process, see John Cerullo and David Steelman, *The Impeachment of Chief Justice David Brock: Judicial Independence and Civic Populism* (2017), 111-91.

35 See Felipe Villamor, "She Stood Up to Duterte. Now She Faces Impeachment," *New York Times*, March 2, 2018, available at https://www.nytimes.com/2018/03/02/world/asia/philippines-chief-justice-duterte.html;

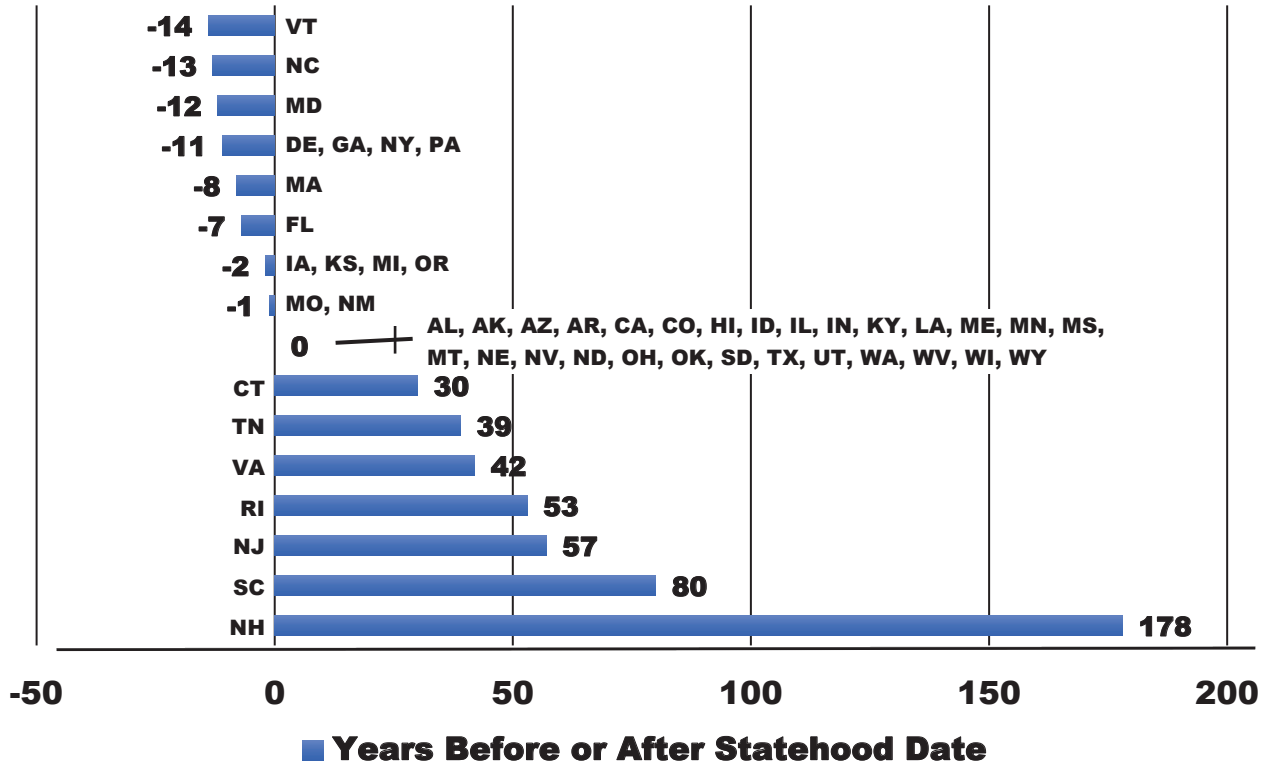
36 N.H. Const. Part 2, Article 4.

37 See Richard Upton, "The independence of the Judiciary in New Hampshire," 1 N.H. Bar J. 28 (1959).

38 The proposed constitutional amendment had been approved for submission to voters by the delegates at the 1964 constitutional convention. New Hampshire, *Convention to Revise the Constitution,* May 1964 (1964), 185–87. Voters approved the proposed amendment by a large margin. See New Hampshire, *Manual for the General Court, 1967* (1967), 522.

Figure 1*

Years from Statehood to Date Highest State Court was Given Constitutional Recognition



* Source: Calculation of years between statehood date and earliest date for constitutional recognition of highest state court, based on review of constitutional enactments, revisions, and amendments in all 50 states.

The achievement of institutional independence from the legislature in 1966 was followed by (a) administrative unification of all courts in the state in 1978 under the leadership of the chief justice and the supreme court,[39] and (b) budgetary unification in 1984, with virtually all court operating and capital expenditures funded by the state legislature.[40] These steps in New Hampshire were part of a national "court unification movement," comparable to similar steps in many other states.[41]

Yet such a transformation of the state judicial branch from 1966 to 1984 may have been a dramatically difference experience for state government in New Hampshire than it was for other states, where the institutional independence of the highest court had long been a given feature of the separation of powers. In New Hampshire, a state legislature long able to create or abolish all courts could not now do so.

Moreover, the costs for municipal and probate courts previously borne by local units of government had become a state-level responsibility. Legislators were now expected to fund a court system that was suddenly far less answerable to them than it had ever been. In addition, the newly-independent judiciary now resisted the legislative direction willingly accepted by most of the other state agencies that clamored for scarce public funds.

V. Rules Governing Court Practice, Procedure, and Administration

In that new environment, a source of growing tension between the legislature and the newly-independent judiciary involved the scope of authority to promulgate rules governing the judiciary. The constitutional amendment approved by voters in 1978 and

39 N.H. Const. Part 2, Article 73-a.

40 See Jeffrey Leidinger, "The Move Toward State Financing: A New Hampshire Approach," 7 Just. Sys. J. 103 (1982).

41 See Robert Tobin, *Creating the Judicial Branch: The Unfinished Reform* (1999), 139-48.

providing for administrative unification of the courts conferred power on the chief justice to enact rules with the force and effect of law to govern practice, procedure and administration in all courts.[42]

It is striking that subsequent New Hampshire events relating to rulemaking power, as part of the legislative-judicial tensions leading ultimately to the impeachment of Chief Justice Brock in 2000, had a parallel in the Philippines, where supreme court exercise of rulemaking power was among the factors provoking a "populist backlash" in that country.[43]

When the 1978 New Hampshire constitutional amendment affecting court rules had been under consideration in a constitutional convention, delegates were assured that the provision granting court-promulgated rules the force and effect of law would not eliminate or restrict the state legislature's long-recognized ability to provide by statute for court procedures in the future.[44] In New Hampshire and other states, control over court practice and procedure was traditionally subject to a concurrent exercise of power by both legislative and judicial branches of government.[45] In a nineteenth-century decision, for example, the New Hampshire supreme court acknowledged a constitutionally-valid legislative role in judicial rulemaking, without consistently assigning any clear or fixed priority to one branch over the other.[46]

Yet the constitutional amendment taking effect in 1978 created a new landscape with challenges for both the legislature and the judiciary. An opportunity to test the limits of judicial authority came in *State v. LaFrance*[47], which presented the question of whether the court's power to set rules for proceedings in courtrooms was independent of statutory oversight. The case involved a general-jurisdiction trial judge's enforcement of a court policy preventing police officers from wearing their firearms when they testified, or even when they were in a courtroom. The legislature had challenged that policy by passing a statute that explicitly stipulated that law officers would be permitted to wear firearms in any courtroom in the state, "notwithstanding any other rule, regulation, or order to the contrary."[48] When a criminal defendant claimed in July 1983 that his right to a fair trial would be violated if officers were permitted to testify against him while wearing guns, the constitutionality of the statute put in question. On appeal, the supreme court ruled in November 1983 that the statute was unconstitutional. It held that the separation of powers principle in general, and the established power to punish for contempt specifically, granted courts control over security measures within their own confines.

As a consequence of the *LaFrance* decision in 1983, delegates to the state constitutional convention in the following year offered resolutions for constitutional amendments aimed at what traditionalists saw as a judiciary spinning out of control. One of those resolutions proposed that supreme court rules should be effective only when not inconsistent with statute," thereby signaling that judicial leaders must not ignore the need for suitable legislative involvement in the court rulemaking process.[49] The resolution was supported by almost 60% of the voting delegates, but it failed to gain the necessary two-thirds majority required for its adoption. Although the resolution had not been adopted in the constitutional convention, its proponents had indeed sounded a "warning alarm."

The alarm was sounded again in January 1995, when a legislative bill was filed seeking to repeal the constitutional amendments granting constitutional recognition to courts and administrative power to the chief justice.[50] Supporters of the bill asserted that the judges have exempted themselves from the law, that they "ignore our rights," that "the courts are destroying this country," that New Hampshire citizens have been "victims of judicial arrogance," and that the judiciary "has usurped the power of the legislature."[51] The bill was referred for interim study, and in October 1996 the study recommended by an overwhelming vote that it not be adopted.[52]

Disputes over who controlled courtroom security and ordinary court procedures, however, were mere skirmishes compared to the dispute that arose over who controlled rules of evidence. In 1996, the supreme court justices were asked for an advisory opinion on legislation proposing that there be a "rebuttable presumption of admissibility" for prior sexual assault evidence in cases of adult criminal defendants charged with rape or related crimes. In their 1997 "Prior Sexual Assault Evidence, or PSAE") advisory opinion[53], the justices wrote that a proposed statute on the admissibility of prior sexual assaults by an adult criminal defendant would be an unconstitutional violation of the separation of powers, because the legislation would intrude on the exclusive authority of the court to regulate evidence in such matters.

The PSAE opinion helped to precipitate Chief Justice Brock's impeachment. Yet the impeachment proceedings did not resolve the problems over the legitimacy of legislative involvement in the promulgation of court rules. In 2002, 2004, and again in 2012, bills to

42 Article 73-a, *supra*.

43 Wen-Chen Chang (eds.), *Asian Courts in Context* (2014), 367-68.

44 New Hampshire, *Journal of the Convention to Revise the Constitution, May 1974* (1974), 261-62.

45 Leo Levin and Anthony Amsterdam, "Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision," 107 U. Pa. L. *Rev*. 1 (1958), 3.

46 Cater v. McDaniel, 21 N.H. 231 (1850).

47 A 2d 340 (1983).

48 N.H. Rev. Stat. Ann. §490:4(a) (1975).

49 New Hampshire, *Journal of the Convention to Revise the Constitution, May 1984* (1984), 27.

50 CACR5, N.H. House of Representatives, *Journal 11* (January 5, 1995), 159.

51 N.H. House of Representatives, Constitutional & Statutory Revision Committee, Public Hearing, CACR5 (January 25, 1995).

52 Constitutional & Statutory Revision Committee, Interim Study Report (October 16, 1996).

53 Opinion of the Justices (Prior Sexual Assault Evidence), 688 A.2d 1006 (1997).

amend the state constitution by giving the legislature concurrent power to enact statutes that would prevail over court rules in the event of a conflict, were passed in the legislature but failed as ballot questions to gain voter approval.[54]

Yet by 2012, new members of the supreme court were expressing public support for that year's proposed constitutional amendment. Despite the failure of the proposed amendment as a ballot question, the court held in a unanimous decision that (a) the language used in the 1997 PSAE advisory opinion was unnecessarily broad, and (b) the judiciary and legislature share concurrent authority over court rulemaking, except that the legislature must not enact procedural statutes that the supreme court would find unconstitutional[55]. Then in 2014[56], the court held that a statute on a criminal defendant's right to discovery does not necessarily violate separation of powers; and to the extent there is a conflict between a statute and a court rule, an otherwise-constitutional statute must prevail.

As we note above, the Philippine Supreme Court has experienced difficulties, comparable to those in New Hampshire, in its exercise of rulemaking power. Critics have characterized the court's broad use of its rulemaking power as "extrajudicial judicial activism," involving (a) the advancement of such substantive causes as human rights, environmentalism, and press freedom, "not by laying down precedent in the course of adjudication but by enacting rules purportedly in its administrative capacity over court procedure;" and (b) as in New Hampshire, a claim of exclusive judicial authority over court rulemaking, rejecting the validity of review by the elected branches of government.[57]

VI. Judicial Review and Constitutional Requirements for Legislative Actions

A common occurrence around the globe in recent decades has been the emergence of "a new method of pursuing political goals and managing public affairs," through an expansion of judicial power at the expense of elected government institutions by means of "constitutionalism and judicial review."[58]

Those who have studied American courts know that judicial review by the U.S. Supreme Court of the constitutional validity of legislative actions dates from the famous 1803 case of *Marbury v. Madison*.[59] Court review of legislation is also broadly exercised under sub-national state constitutions.[60] Judicial review in New Hampshire dates from 1786-87, when judges hearing the "Ten Pounds Act" cases declared that the statutes in question violated a litigant's constitutional right to a jury trial in civil cases.[61] After this successful assertion of judicial authority under the constitution to review legislative actions, the justices of the state's highest court then declared in 1818 that legislative review of court decisions in individual cases was an invalid intrusion on judicial powers under the state constitution.[62]

Though judicial review is now exercised in many countries through centralized "constitutional courts," the Philippines and other countries once subject to British colonial rule or American occupation have adopted a decentralized system with judicial review by both appellate and trial courts. In almost all countries, the exercise of judicial review has seen a common pattern:[63]

As has been the case in countries with centralized systems, the courts – especially the supreme courts – in countries with decentralized systems have in recent years exhibited varying degrees of judicial activism in invalidating unconstitutional statutes or expanding standing to sue to permit greater protection of individual rights or the public interest.

In the Philippine context, the exercise of judicial review after the era of Ferdinand Marcos led in such cases as *Oposa v Factoran*[64] and *Kilosbayan v Guingona*[65] to a perception among critics that the courts had "jeopardized their legitimacy" by venturing too far into the political thicket," thereby provoking a backlash against the judiciary.[66]

Similar events occurred in New Hampshire, where decisions rendered as part of a national "rights revolution" also provoked a strong backlash. The "rights revolution" involved a judicial turn toward a stronger, often counter-majoritarian defense of constitutional rights (and, arguably, identification of previously-unrecognized ones). It was a movement associated with the civil rights movement of the 1950s and 1960s, when activists turned to the judicial branch of government for relief from conditions that elected officials were unable or unwilling to address.

Of all the events that precipitated the impeachment of Chief Justice Brock, the most immediate and inflammatory issue was a set of court decisions overturning New Hampshire's traditional method of financing its public schools almost entirely through local property taxes.

54 CACR 5 (2002), CACR 5 (2004), and CACR 26 (2012).

55 Petition of Southern New Hampshire Medical Center, 55 A.3d 988 (2012).

56 State v Carter, 106 A.3d 1165 (2014).

57 Pangalangan, *supra* note 30, 367-68.

58 Ran Hirschl, Towards Juristocracy: *The Origin and Consequences of the New Constitutionalism* (2004), 1.

59 5 U.S. (1 Cranch) 137 (1803).

60 See Laura Langer, *Judicial Review in State Supreme Courts: A Comparative Study* (2002).

61 See Richard Lambert, "The 'Ten Pound Act' Cases and the Origins of Judicial Review in New Hampshire." 43 *N.H. Bar J.* 37 (2002).

62 Merrill v. Sherburne, 1 N.H. 199 (1818).

63 Yeh and Chang, *Asian Courts in Context, supra* note 41, 14-15.

64 G.R. 101083, 224 SCRA 792 (1993).

65 G.R. No. 113375,232 SRA 100 (1994).

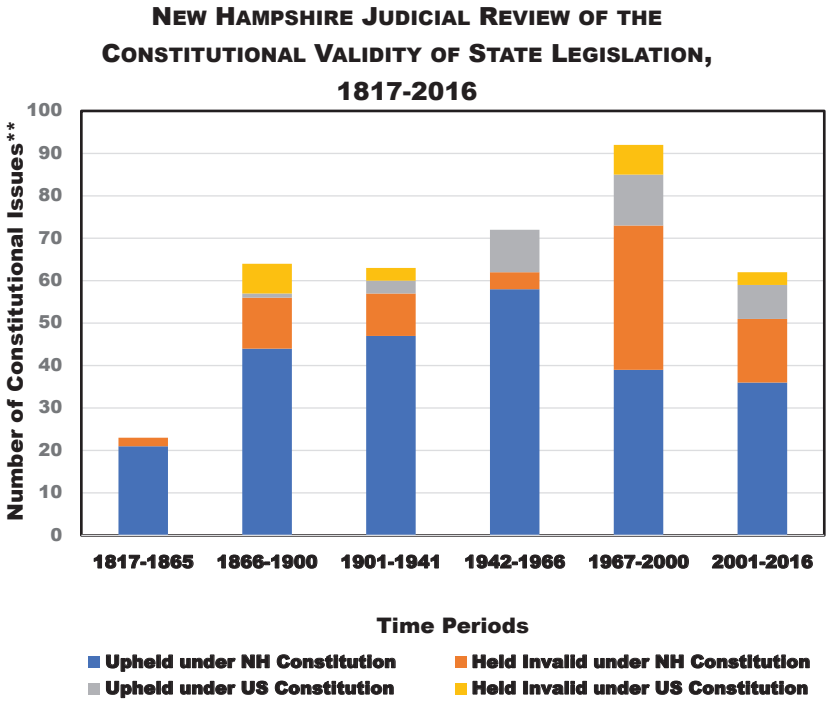
66 Pangalangan, *supra* note 41, 365.

The initial case was brought in 1993 by the Claremont school district and four others, all comparatively poor. The plaintiffs (a student and a property taxpayer from each school district) argued that the New Hampshire constitution established a state duty to provide an adequate education to all its citizens, which the state had illicitly shunted off to local taxing districts.

Chief Justice Brock himself authored the crucial decisions on those claims, known as *Claremont I* and *Claremont II*. In *Claremont I* (1993), the court concluded that New Hampshire's constitution conferred the right to an adequate public education on all citizens of the state, that the state had responsibility to provide that education, and that the state could not delegate it to local government units of widely varying financial means.[67] In *Claremont II* (1997), the court found that the state's initial effort at compliance with its prior ruling, conceding a larger state role in the provision of public education while avoiding state-level financing of it, simply did not pass constitutional muster.[68]

Between *Claremont II* and Brock's impeachment in 2000, his Court would issue a set of further decisions and advisory opinions rebuffing other schemes the elected branches put forward, as well as initiatives aimed at vitiating or mitigating the effects of earlier *Claremont* holdings.[69] With each new ruling, legislative frustration and rancor deepened. To its opponents, the court was systematically violating the separation of powers by meddling in policy questions (public finances, educational standards) that were clearly entrusted to the peoples' representatives. These decisions clearly contributed to the atmosphere that fueled Brock's impeachment.

New Hampshire's highest court has a long history of decisions in review of constitutional requirements bearing on legislative actions. Yet, as Figure 2 shows, the *Claremont* decisions were part of a flurry of judicial review decisions rendered between 1967 and 2000, in the wake of the constitutional amendments implementing judicial modernization in 1966-78.



* Source: Data from case-by-case analysis, on file with the author, of 293 decisions involving judicial review of the constitutionality of legislative actions from 1817 through December 2016.

** Some cases presented more than one state or federal constitutional issue, and the total number of issues here (376) exceeds the total number of cases (293).

Official publication of decisions rendered by the highest state court of New Hampshire was not funded by the state legislature until 1817. From then until the end of the Civil War, judicial review of legislative action was limited, and legislative action was found constitutional in all but one. From the end of the Civil War to the end of the century, New Hampshire's participation in a dramatic expansion of the national economy caused many more judicial review cases than there had been in the antebellum period. Though some cases involved issues arising under the federal constitution, most presented state constitutional issues, and the court upheld the constitutionality of legislative action in about eighty percent of them.

From the beginning of the 20th century until well after World War II, most of the judicial review decisions in New Hampshire addressed still addressed state constitutional issues, although a growing number had to do with the validity of legislation under the federal constitution. Especially in the period from the start of World War II until 1966, when New Hampshire granted constitutional recognition to its highest court, judicial review cases showed high constitutional harmony between the legislature and the judiciary.

67 Claremont School District v. Governor, 635 A. 2d 1375 (1993).

68 Claremont School District v. Governor, 703 A. 2d 1353 (1997).

69 See John Lewis and Stephen Borofsky, "Claremont I and II—Were They Rightly Decided, and Where Have They Left Us?" 14 *U.N.H. L. Rev.* 1 (2015).

The time from 1967 until 2000 was strikingly different, however, with an explosion of claims arising under the federal constitution. This was a reflection of the "rights revolution" occasioned by the application of federal due process and equal protection provisions to the states by the U.S. Supreme Court. There was also a much higher percentage of New Hampshire judicial review cases during this period in which the court overturned the validity of legislative action. The court found a violation in almost half of all state constitutional questions and more than one-third of all federal questions.

Although too little time has passed since the Brock impeachment to support firm conclusions, data on the exercise of judicial review in New Hampshire are intriguing. Decisions to date in judicial review cases from 2001 through 2016 have been more favorable to the constitutionality of legislative action than they were in the preceding three decades. On both state and federal constitutional claims, the court has upheld the constitutional validity of legislation about seventy percent of the time.

This undoubtedly reflects changes in the makeup of the high-court bench, with a shift in judicial philosophies. The Brock impeachment crisis may have changed the dynamics of judge appointments by governor and council. It may also signal a broad transition in America and other countries to what might be called a "post-rights-revolution" atmosphere.[70]

VII. Judicial Ethics and Mechanisms for Judicial Accountability

Like Philippine Chief Justice Sereno,[71] New Hampshire Chief Justice Brock was charged with violations of applicable ethical requirements. Surely, the immediate and proximate cause for Brock's impeachment in 2000 was the set of ethical questions that had come to the attention of the state attorney general and the legislature in association with the assignment of substitute judges to hear the appeal of Justice Stephen Thayer's divorce case. Yet that was only the most recent among the questions concerning legislators about supreme court oversight of judicial behavior.

Decisions the court rendered on questions of judicial ethics and accountability took on a significance after 1966 that they might not have been accorded in earlier times. They were highly fraught now, testing the manner in which the judiciary would exercise new powers now that it was institutionally and operationally liberated from legislative control. Would the high court's exercise of administrative authority assure legislators that judges were being held accountable?

The supreme court's decision in the case of *In Re Mussman*[72] would trouble proponents of legislative supremacy long afterward. The case questioned whether the court had the authority to investigate the behavior of an individual judge and impose disciplinary measures short of actual removal from office. But the broader issue was whether the judicial branch leadership might police its own ranks, rather than having the exercise of supervisory power over judicial personnel be a power exclusive to the legislature through impeachment or address, and the executive through address. Although the court in *Mussman* explicitly re-affirmed that the power to remove a judicial officer belonged solely to the elected branches, its decision cited a statute confirming its responsibility to prevent and correct errors and abuses in lower courts, including approval of lower court rules and the establishment and enforcement of canons of judicial ethics.[73]

In 1977, the court took unto itself substantially more of the disciplinary function once held exclusively by the legislative and executive branches, by creating the state's first judicial conduct committee (JCC). Traditional means of dealing with misconduct by judges in American states had included impeachment, address, and popular election, which might be inadequate for dealing with misbehavior not rising to the level of overt corruption or criminality.[74] To address that shortcoming, proposals had been advanced in the 1940s and 1950s to incorporate permanent disciplinary commissions into state judiciaries, and in 1960 California voters had amended their constitution to adopt one.

The New Hampshire Supreme Court was among the first to adopt a code of conduct based on the American Bar Association's Model Code of 1972, and its eleven-member JCC was created to enforce it. The JCC in its original form was essentially an agency of the court, which appointed nine of its members and wrote the rules by which it functioned.[75] No one anticipated how controversial that body would prove to be.

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70 See Mark Tushnet, Weak Courts, Strong Rights: *Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009).

71 Chief Justice Sereno was accused by lawmakers of failure to declare her wealth in full from her 17-years as a law school professor. See R.G. Cruz, "Gadon complaint over SALN shows desperation," *ABS-CBN News*, January 29 2018, available at http://news.abs-cbn.com/news/01/29/18/gadon-complaint-over-saln-shows-desperation-sereno-lawyer.

72 289 A. 2d 403 (1972).

73 The court rejected Mussman's claim that it had no jurisdiction, arguing that the only remedy available under the constitution was either impeachment or address. This was the second of three cases involving Mussman. In 1971, the state bar association sought disciplinary action against Mussman for professional misconduct. Asserting inherent and statutory power to supervise attorney conduct for public protection and the maintenance of public confidence in the bar, the court suspended Mussman from the practice of law. Mussman's Case, 286 A.2d 614 (1971). After its 1972 decision, the court then heard a petition by the attorney general for an inquiry into Mussman's conduct as a part-time judge. Once again exercising its supervisory power, the court suspended Mussman from the bench. In re Mussman, 302 A. 2d 822 (1973).

74 See Charles Geyh, et al., *Judicial Conduct and Ethics*, 5th ed. (2013), 40, 761.

75 Aspirational standards of judicial conduct were first developed by the American Bar Association in 1924. In 1972, they were replaced with a model code of judicial conduct to serve as a guide for judges and a basis for disciplinary actions, with terms that were largely mandatory. See James Alfini, et al., "Dealing with Judicial Misconduct in the States: Judicial Independence, Accountability and Reform," 48 S. Tex. L. *Rev.* 890 (2007). By the 1980's, every state had its own judicial discipline commission. See Cynthia Gray, "Judicial Conduct Commissions: How Judicial Conduct Commissions Work," 28 *Just. Sys. J.* 405 (2007).

What state legislators did perceive, however, was that the court's administrative domain was expanding, arguably at their expense. Fears of a self-aggrandizing judiciary were clearly heightened in many legislators' minds by a spectacular scandal involving John C. Fairbanks, a probate lawyer who had served 33 years as a part-time first-instance judge. On December 28, 1989, Fairbanks was indicted by a grand jury for embezzling $1.8 million from probate clients between 1983 and 1989. He disappeared the very next day, then evaded the law for over four years until he was found dead in a Las Vegas hotel in March 1994.[76]

What concerned legislators was not just Fairbanks's own misdeeds, but the failure of the judicial branch's internal ethical monitors to act on them despite longstanding complaints. Legislative investigators were particularly frustrated by the confidentiality protocols of the JCC, which precluded access to information investigators deemed necessary to determine the full scope of judicial corruption. Successive investigating committees were empaneled, one of which heard Chief Justice Brock himself attribute the problems to such holdovers from the pre-1966 era as choosing local notables lacking professional training to serve as part-time judges and elected probate registers without adequate supervision.[77] Then-Governor Steve Merrill, however, provided an alternative interpretation, one more congenial to some legislators' views. He argued that judicial modernization had gone too far, removing judges from the necessity of public accountability.[78]

The residual shame of the Fairbanks scandal, together with the problems of judicial ethics in the Thayer divorce case, ensured that there would be changes relating to judicial ethics and mechanisms for judicial accountability after the Brock impeachment trial. There was general agreement that changes were required in how the judiciary related to citizens and other branches of government. Starting in 2001, efforts to make such changes took different directions based on competing perceptions of what would be required.

A critical issue involved revision of judicial discipline practices to enhance their credibility with citizens and elected officials. In January 2001, a blue-ribbon task force created by the supreme court delivered a report recommending that compliance with the code of judicial ethics be mandatory, with failure to comply being a potential basis for disciplinary action. They urged the establishment of a new "conduct commission" independent of the court in terms of membership, physical location, staffing, and budget.[79] In response, the supreme court entered an order creating that new conduct commission, as recommended by the task force, with the pre-task-force JCC remaining temporarily in existence to complete action on all pending matters until after legislative funding was available to support the new commission.[80]

The legislature had different expectations, however, and it established a conduct commission of its own by statute.[81] Then in 2003 it enacted another statute, requiring that all complaints against judges and court clerks under the 2001 statute be heard by the new statutory commission rather than the holdover JCC.[82] The JCC thereupon filed a court petition challenging the constitutionality of the 2003 statute. In June 2004, the supreme court ruled the statute unconstitutional, holding that the regulation of court proceedings and officers, including power to discipline judges, is an inherent and exclusive power of the judicial branch.[83] With the acquiescence of the legislature, the court then took steps to resolve the issue by following task force recommendations and creating a new JCC, with membership including executive and legislative appointees, formal independence from the supreme court, and its own separate office location, staff and budget.[84]

VIII. Conclusion

As the administrative head of a court system subject to major institutional changes, New Hampshire Chief Justice David Brock faced the challenge of addressing the full scope of their unanticipated consequences. Almost two decades later, we can see that judicial practices and behaviors tolerated before the constitutional amendments of 1966-78 were no longer acceptable in terms of expectations that citizens and their elected officials might have for judges. The achievement of institutional independence for the New Hampshire judiciary did not and could not entail complete autonomy from the state legislature.

Brock's impeachment in 2000 presented a crisis of historic dimensions for the government and citizens of New Hampshire. Yet its gravity may fall far short of the potentially-existential national crisis presented for the Philippines by the much more recent removal of Maria Lourdes Sereno from office as the Chief Justice of the Supreme Court of the Philippines in May 2018.

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76 The Fairbanks story generated considerable public interest. See Royal Ford, "Scandalous Judge's Legacy Won't Die: Rural N.H. town reels from tale of disorder in the court," *Boston Globe*, September 18, 1997, B1, http://www.scribd.com/doc/229520210/John-C-Fairbanks-Scandalous-Judge-s-Legacy-Won-t-Die-Rural-n-h#scribd, and Paul Montgomery, "Small-town Scandal Still Casts a Long, Dark Shadow," *New Hampshire Magazine* (July 1999), 13, available on line at http://www.gnbtaxpayers.com/FAIRBANKS,%20JOHN,%20JUDGE%20-%20SCANDAL%20&%20COVER-UP.pdf.

77 Fairbanks and his family had been respected members of the community for some time. See Donna Chiacu, "Ex-Judge's Problems Mystify Newport Neighbors, Associates," *Concord Monitor*, October 30, 1989; and Roger Talbot, "Fairbanks' Delinquency Tolerated; Officials Trusted Ex-Judge," *Manchester Union-Leader*, April 30, 1995.

78 See Paula Monopoli, *American Probate: Protecting the Public, Improving the Process* (2003), 21.

79 Jonathan DeFelice and Wilfred Sanders, Task Force for the *Renewal of Judicial Conduct Procedures, Report to Supreme Court of New Hampshire* (2001).

80 N.H. Supreme Court Order (May 7, 2001), https://www.courts.state.nh.us/supreme/orders/ordr0507.htm.

81 N.H. Laws 2001, Ch. 267.

82 N.H. Laws 2003, Ch. 319:171.

83 Petition of JCC, 855 A. 2d 535 (2004).

84 N.H. Supreme Court Order, R-2004-004 (January 25, 2005), https://www.courts.state.nh.us/supreme/orders/20050125.htm.

Nonetheless, the Brock impeachment story provides us with a comparative story to help assess events with Sereno in the Philippines and other episodes that may come in the future. Both situations involved claims of individual ethical violations, which were the ostensible basis for each judge's removal. But deeper factors were at play, involving claims by critics that the judiciary had overstepped its legitimate constitutional powers in two critical areas:

1. authority to make rules governing court practice, procedure and administration; and
2. judicial review of the constitutional validity of legislative actions.

The recent removal of Philippine Chief Justice Sereno provides grounds for serious reflection by judges, justice officials and scholars about judicial independence and separation of powers in a democracy. New Hampshire Chief Justice Brock's impeachment can aid such reflection by providing a story that can be compared or contrasted with the events in the Philippines.