



Book Review:

The Impeachment of Chief Justice David Brock – Judicial Independence and Civic Populism

John Cerullo and David C. Steelman, US: Lexington Books, 2018 ISBN 9781498565899. Reviewed by Markus Zimmer, IJCA Executive Editor

Abstract: *This article reviews *The Impeachment of Chief Justice David Brock – Judicial Independence and Civic Populism*, published in 2018 by Lexington Books, co-authored by John Cerullo and David C. Steelman. The book is an historic chronicle and analysis of events in the increasingly fractious relationship between the legislative and judicial powers of state government in the last four decades in the U.S. state of New Hampshire that culminated in an effort by the Senate Judiciary Committee to impeach Chief Justice David A. Brock. The narrative identifies, traces and documents the meandering sources of that effort against a national movement emphasizing enhanced institutional independence within state judicial systems by shedding the traditional constraints and controls over state courts exercised by elected bodies. Simultaneously, it scrutinizes growing resistance within populist pockets of the New Hampshire State Legislature in particular and the state's population in general against the presumptive hubris of the state judiciary to arrogate unto itself far-reaching decision-making authority and to demonstrate in its internal affairs a clear disregard of and even contempt for basic canons of judicial ethics. These tendencies are viewed as particularly egregious in the Supreme Court of New Hampshire as it migrates from adjudicating narrowly defined issues of law and fact on appeal to drafting judgments mandating, for example, broad public education funding initiatives grounded in its own views of what constitute fundamental human rights and the social policies that flow from them. Other misbehavior touching on judicial conduct prohibitions culminated in a variety of disciplinary proposals, including impeaching Chief Justice David Brock, and other initiatives seeking to rein in the excesses of the state judiciary.*

KEYWORDS: *judicial impeachment, judicial independence, legislative-judicial tension, judicial accountability, judicial reform and populism, state courts, New Hampshire chief justice, Philippines chief justice, legislative oversight of judiciary, legislative oversight of courts*

One of the core axioms of mainstream democratic theories of government is the supremacy of the rule of law. The axiom rests on the presumption that the laws of a democratic polity are anchored in constitutions whose originating principles recognize human frailty. That recognition prompts the incorporation into constitutions of structural safeguards in the functional framework of government, safeguards designed to minimize the mischief toward which such frailty historically inclines. A key structural safeguard compartmentalizes government power into a tripartite construct among whose elements such power is distributed. Each element serves three functions: first, as the accountable custodian of specific powers it is authorized to exercise; second, as the sentinel charged with ensuring that the other elements neither abuse nor exceed the exercise of their specified powers; and third, as a co-guardian serving jointly with the other two elements to collectively preserve, protect and defend the government and the people. Ideally, the relationships between the three reflect the appropriate balance of tension, cooperation and mutual respect. Contingent on the relative levels of maturity, integrity, professionalism, decorum, wisdom and ideological allegiances of the players, the functionality of those relationships will vary along a scale that traverses the extremes from constructive and beneficial to dysfunctional and damaging.

In the United States, the relationship between the legislative and the judicial elements has gravitated in recent years toward the dysfunctional extreme of the scale. On the federal level, the vetting of candidates for lifetime judicial appointments by the U.S. Senate has been politicized to the point that bipartisan cooperation to identify and confirm the most promising men and women of character, integrity, wisdom, moderation and respect for the rule of law has been largely abandoned. That model of vetting has been substituted for by a rigorous search process for and the promotion of young ideologues who lean predictably to the right or to the left, their sponsorship and marketing financed by substantial dark money, anonymously funneled, whose origins are scrambled through complex legal constructs. In this new morass, the value of character, integrity and moral fiber are subordinated. Mendacious media campaigns, also financed by dark money, hurl irresponsible charges that candidates advanced by one party are “extreme judges...hostile to religious liberty...and to our constitutional rights.”

On the state level, national campaigns inject dark money, anonymously funneled, into nefarious campaigns to discredit sitting judges whose rulings deviate from the prescribed norms, values and judicial roles of the preponderant majority dogma. In the first four months of 2018, the Brennan Center for Justice, affiliated with the NYU School of Law reported in “Legislative Assaults on State Courts – 2018,” that legislators in circa 16 states either had drafted or were considering legislation targeting both the institutional

independence of state court systems and the judicial independence of judges and justices. Specific legislative initiatives called for limiting supreme court jurisdiction (Kansas); impeaching four supreme court justices (Pennsylvania); increasing legislative participation in judicial selection (Oklahoma); mandating entry into courthouses for persons carrying weapons (Iowa); transferring court rule- and procedure-drafting authority from the judiciary to the legislature (New Mexico); authorizing the legislature to brand any decision by any federal court as unconstitutional (Idaho); and authorizing registered voters to determine whether federal laws are constitutional (Missouri).

The context of such initiatives is often more complex and byzantine than a cursory review reveals, but grasping the issues and comprehending the often inordinate and intertwined levels of emotional, political and legal conundra in which such initiatives end up being swathed is not the bread and butter of even the best journalism in the U.S. It is more focused by necessity on snapshot exposure, stitched together over time. For those of us in pursuit of a more profound understanding, we depend on those willing to engage in extended and detailed research, carefully analyzing and reconstructing chains of events, then weaving them into multi-dimensional historical narratives that chronicle the milestones and, if well done, meticulously mortar together the large and the small, the more and the less evocative, filling in the inevitable gaps by painstakingly immersing themselves into the minutiae of detail and, where accessible, extended interviews with behind-the-scenes stakeholders.

The duo co-authoring this scholarly inquiry into the impeachment of Chief Justice Brock complement each other in important ways. David Steelman's career has been one of nearly total immersion into the governance, operational and administrative domains of myriad state court systems as a senior-level official and researcher at the National Center for State Courts. His experience also includes occasional forays into foreign judicial systems as an advisor and consultant. John Cerullo is an emeritus professor of history and former core faculty member of the Justice Studies Program at the University of New Hampshire. Together they have produced a work that succeeds well as a vehicle facilitating access to the jungle of political intrigue of power-writhing in inter-branch competition. The journey one embarks on with this work is less like a cruise and more like a moderately rigorous trek, but attending to the detail and processing the occasionally dense academic text reaps a level of understanding that nicely landscapes the actual drama. Unlike many efforts to characterize the sometimes-caustic interplay between unelected judges and elected politicians, which reveal authors' biases and predilections, Cerullo and Steelman assiduously seek throughout the narrative to fairly reflect the facts and to objectively frame the competing arguments as they emerge over time.

The work is organized into helpful segments that begin with an examination of New Hampshire's civil culture that, reaching back into the latter decades of the 18th century, reflects a proud tradition of personal independence and local self-government exercised by elected representatives directly accountable to the people. The logic of having the operating framework of unelected judges overseen by accountable politicians makes sense at one level. By the 20th Century, however, a new version of civic logic emerged in which allegiance to the rule of law and the administration of justice began to trump what came to be viewed as subtle and not so subtle political intrusion in the adjudicative process, intrusion anchored in suspect motives and interests often disingenuously spun as the will of the people.

The narrative tracks the genesis of exacerbating tension between the peoples' politicians and their judges through a judicially-spawned scandal and a confrontation involving severe funding inequities among school districts comprising the state's public education system. Resolving those inequities migrated from the legislative hall, where they presumptively were addressed as a local resources issue, to the courtroom, transmuting themselves along the way into basic inherent rights issues. The court-imposed resolution, invoking remedies neither anticipated by nor acceptable to the legislative bodies, compounded the inter-branch mistrust and rancor. The resulting frenzy prompted the New Hampshire House to support overwhelmingly a proposal authorizing its judiciary committee to review the attorney general's investigative report and to determine by its own investigation whether sufficient inculpatory evidence existed to merit drafting and filing with the Senate articles of impeachment against Chief Justice Brock and/or any of the associate justices. By the time the formal charges were lodged with the Senate, they had been narrowed to focus exclusively on Brock. As the impeachment trial progressed, considerable time elapsed as senators deliberated myriad procedural issues, wrangled over what evidentiary standards should govern the proceedings, and struggled with defining precisely what competing policy objectives of an impeachment process take priority.

The trial's conclusion left unaddressed underlying issues in the ongoing inter-branch conflict. These spawned new and ultimately unsuccessful legislative initiatives intended to constrain or counteract what populists viewed as a self-indulgent stew of judicial activism laced with hubris luxuriating on the bedrock of unaccountable independence. Such initiatives ran the gamut from appointing laypersons to judicial positions to eliminating supreme court oversight and regulation of the bar to vacating mandatory membership requirements in a bar or other professional organization for practicing lawyers. More responsible reform proposals advocated a greater role for elected officials in proposing and endorsing the rules governing court process and procedure, in ensuring enhanced judicial accountability based on more rigorous merit selection and independent performance assessment. To its credit, the judiciary responded in more measured and conciliatory fashion, acknowledging the need and agreeing to jointly pursue appropriate reforms, thereby deflating the rancor and malevolence defining inter-branch relations and spawning a new era of cooperation.

The narrative's value as an historical account is enhanced by its portrayal of the eventual changing dynamic of interbranch relations, culminating in the softening of embedded political culture of mutual contempt and intransigence. Acknowledging the extreme polarity that divides us as a nation, as a world, we might take pause and follow the trail New Hampshire painfully blazed.