

A Book Every Judge and Lawyer Should Read

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

By John Cerullo and David C. Steelman
Lexington Books (2018)
Hardcover, 295 pages; \$110.

Reviewed by Bradford E. Cook

On July 12, 2000, by a vote of 253 to 95, the New Hampshire House of Representatives voted overwhelmingly to impeach the Chief Justice of the New Hampshire Supreme Court, David A. Brock. This vote, and the events and historic forces which led to it, as well as its aftermath, are the subject of *The Impeachment of Chief Justice David Brock: Judicial Independence and Civic Populism*.

The book's title, whether intentionally or not, reflects the fact that it contains two stories, and could in fact be two books. The first is a scholarly study by two scholarly authors, tracing the tension between popularly elected governmental bodies and courts, especially on the state level, and especially in New Hampshire. The second is the story of the very rare event of the impeachment of a particular judge, rare in the United States, and even rarer involving a chief judicial officer.

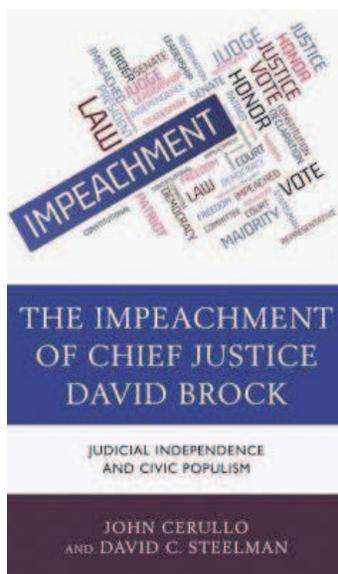
The authors are well-qualified to undertake this study, and their doing so is a contribution to the understanding of our state courts and their history, as this book provides an account of things which should be remembered and understood by New Hampshire citizens, especially its attorneys and

judges.

John Cerullo is a retired professor of history at the University of New Hampshire, where he taught recent New Hampshire history, with a concentration on citizens' rights. David Steelman is a UNH graduate who received his law degree from Boston University and spent his career at the National Center for State Courts, where he consulted on court management, among other accomplishments. This combination makes the pair uniquely qualified to report on and analyze the Brock impeachment matter. The result is valuable, if not perfect.

Evolution of New Hampshire Courts

The first book, or story, contained in the volume, is a scholarly history and political study of the evolution of New Hampshire courts. Unlike the federal system, which we all learned has three co-equal and separate branches of government, state courts are different. In New Hampshire, as in many if not most states, the courts were subservient to the legislative branch of government when designed. New Hampshire's government, the author's accurately report, was designed to be weak and close to the people and their



representatives. The court system's budgets, rules, facilities and processes largely were under the control of the 400-member House and 24-member Senate.

Indeed, the move to judicial independence in New Hampshire did not result in the Supreme Court becoming a "Constitutional Court," until 1966, when New Hampshire became the last state in the union to do so. Between then and 1978, when the chief justice became the head of state courts, there was much debate and dissension about the movement

toward independence and away from legislative oversight. Gradually, the non-attorney judges in local municipal courts were replaced by professional judges, which some "populists" thought took ordinary citizens and "common sense" out of the process, for example. Many legislators and some attorneys resented or were concerned about the change.

This change resulted in the courts setting their own rules, applying their own discipline, and asserting the rights the new status suggests. Chief Justice David Brock, a longtime Superior and Supreme Court judge, was the public face of this effort, and was accused by many of communicating the message to the legislature in a less than diplomatic fashion. Legislators used to the old system, or opposed to the new, resented these actions (and Brock as the messenger) and vowed to change it. The study of the changes, and the attitudes surrounding it, are not known to most attorneys practicing today. Indeed, a large percentage do not remember the impeachment proceedings themselves. Certainly, only a tiny number were practicing prior to the 1966 changes.

At the same time all this was going on, the authors report, the nature of cases coming before the courts changed. Cases based on "citizen rights," largely found in state and federal constitutions, and not legislation, challenged the acts of legislators and often courts found those laws unconstitutional. Legislators resented this "judicial activism," in New Hampshire and nationally.

All of this, the authors say, led to an "historic rupture" in the relations between New Hampshire courts and the legislature.

The authors also present an interesting historical review and study of impeachment as a remedy, and the constitutional grounds for it. Impeachment is one of only two remedies available to our legislature regarding judges — the other being "address" — and the book explains how they are more "political" remedies and actions than they are "judicial."

Scandal and Litigation Set the Scene

The second book contained in this volume is the story of what happened, in fact, to lead up to the impeachment. A series of unconnected events seemingly conspired against the courts and Justice Brock, and provided ammunition to the legislators, both those looking for an excuse to lash out at the court system, and its chief justice in particular, and those rightly concerned about what they perceived was going on.

The first issue was that of longtime district court judge and attorney John Fairbanks of Newport. Fairbanks, a prominent lawyer in a small town, it turned out, was a crook and perhaps a pedophile, who stole from his probate clients and was accused of using his judgeship to force defendants to provide sexual favors in exchange for light sentences.

The probate court in Newport was run by a longtime register of probate, finally from her nursing home bed, using her own rules (or none at all). The judge, with failing eyesight, did not detect problems with probate accountings by Fairbanks. People, including lawyers, talked, complained, and little or nothing was done for a long time. Finally, as the law was closing in on him, Fairbanks fled and wasn't apprehended until years later. As the scope of his crimes became clear, he eventually committed suicide in Las Vegas.

This scandal played out in the press, and the lack of action by attorneys and the court system to address the matter until too late, created calls from many quarters, including the legislature, for oversight of courts and judges who opponents said had failed to police themselves.

Meanwhile, for many years, the courts were considering the education funding cases, which challenged the way New Hampshire funded public education. In a series of cases, called the Claremont litigation, described in detail in the book, the Supreme Court found a constitutional duty to provide "an adequate education." These cases were seen by many legislators as a usurpation of power by the Court and legislating by it. Brock authored the key decisions.

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Finally, critics also focused on some internal matters at the Court, involving interactions between the judges, largely surrounding the divorce in which Associate Justice Stephen Thayer was involved. Allegedly improper communications took place between Thayer and Chief Justice Brock concerning judges assigned to hear the case or appeals of it and clerk Howard Zibel filed a complaint. In addition, the longstanding practice of the Court to allow recused judges to participate in discussion of the law of the cases involved, which predated Brock's tenure, became known and was widely criticized as inconsistent with good administration of the intent of recusal.

Attorney General Philip McLaughlin investigated the matter, found serious misdeeds, and threatened Thayer with indictment. (Thayer also was accused of not reporting serious financial relationships and was criticized for spending far too much time teaching in law schools.) Thayer resigned from the Court, apparently threatening to take other justices down with him. McLaughlin's report and how he handled it were criticized by many, but added to the bedlam.

All of these matters resulted in legislative investigation and the vote to impeach. Some of the most distinguished attorneys at the time, from outside the state, were involved, and the book recounts their participation. The Chief Justice testified before the House Judiciary Committee, and his testimony did nothing to deter them, but resulted in his being accused of perjury, as the book recounts in detail.

House Chooses Impeachment

The book examines the choices the House had at this point. It could take action against a particular judge or conduct a board

inquiry of judicial practices and possible reforms to it. The goal of many was to have the board inquiry, either instead of, or in addition to, impeachment. The House chose impeachment, and, the book suggests, squandered a significant opportunity in doing so.

There were four articles of impeachment: Article 1 involved alleged improper contact by Brock with Superior Court Judge Douglas Gray in a case which occurred 13 years earlier, and which came to light during the investigation; Article 2 concerned the *ex parte* communications with other judges on the Thayer divorce matter; Article 3 alleged perjury before the House Judiciary Committee; and Article 4 alleged "maladministration" in connection with the recusal policy. (Indeed, there were also attempts to impeach Justice Sherman Horton and Justice John Broderick for participating in the recusal policy, which failed.)

The House debate on impeachment is recounted in detail, pointing out that not just extreme members of the House participated and voted in favor of it, but responsible representatives, including attorneys, were on both sides of the debate. After the debate concluded, House Judiciary Committee Henry Mock solemnly marched to the door of the Senate and presented the four articles.

The Senate, headed by Beverly Hollingworth, a Democrat, retained expert counsel (former Sen. George Mitchell and colleagues from Maine) and grappled with many issues: the standard for conviction, the number of votes needed to impeach, the right of senators to ask questions, discovery, timing, etc. Ultimately, it decided all these issues. After extensive preparation, the Senate held a public trial, the proceedings of which were broadcast and followed by many in New Hampshire.

At the end, the Senate, by substantial

majorities, declined to convict the Chief Justice, and he returned to the bench to serve a couple more years prior to retirement.

The book concludes with a description of the efforts thereafter to reform policies and practices in the court system. Largely undertaken but undoubtedly influenced greatly by the processes of the impeachment crisis, reforms included the implementation of a chief administrator of the courts, judicial selection committees established by governors to screen candidates for the judiciary, and citizen participation in many judicial panels and conduct committees — not just attorneys and judges. This history is important to understanding today's systems.

Lessons Learned

What are the lessons to be learned from all this? There are many, but some of the primary ones are:

- No branch of government can operate without controls and checks, independent or not.
- The identity of individuals occupying positions matter and their selection is important.
- Attorneys should observe the advice: "When you see something, say something."
- Court processes and actions of judges, no matter how well-meaning, should be above reproach.
- There is constant tension between political and judicial branches.

Conclusion

This is a good book, and a thorough resource about a critical time in New Hampshire history which an increasing number of bar members did not experience. It is well-researched and the footnotes are sometimes

as interesting as the text.

If it falls down, it is in not conveying the tension and drama felt during the Senate trial, and the angst felt by attorneys as the trial was going on, when the bar as well as the bench was under attack.

The book also fails to develop fully and explain the backgrounds, lives, experience and personalities of many of the players, judges, lawyers and legislators. These details would have been a service to history and put into political and personal context the actions taken by representatives and senators. Many of these figures are significant to the state in many ways outside their roles in the impeachment.

The book gives way too much ink to quotations from some of the quirkiest, extreme and, frankly, nutty representatives, giving them equal weight with those of thoughtful and responsible solons on both sides of the debate. If these outliers were to be quoted, it would have been helpful to understand their backgrounds.

Finally, the pricing of the book appears to show the authors intend it as a textbook, which is too bad, as it is much more.

All that said, this is a valuable book, and should be required reading by all attorneys and especially all judges, who need to understand the historic and political context in which we work.

Brad Cook, a shareholder in the Manchester law firm of Sheehan Phinney Bass + Green, heads its government relations and estate planning groups.



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