Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation

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HIGHLIGHTING A LOW POINT ON A HIGH COURT:
SOME THOUGHTS ON THE REMOVAL OF
PENNSYLVANIA SUPREME COURT JUSTICE
ROLF LARSEN AND THE LIMITS OF
JUDICIAL SELF-REGULATION

Charles Gardner Geyh*

I. INTRODUCTION

It ain’t over ‘til it’s over . . . . I’m confident all this will turn out for
the best in the end.1

—The Honorable Rolf Larsen

The decline and fall of Pennsylvania Supreme Court Justice Rolf Larsen
attracted national attention. For many, Justice Larsen’s suspension, prosecu-
tion, impeachment, and removal were simply good theater—a sordid story of
drugs, sex, crime, violence, and political corruption. For others, the Larsen
tale was compelling for its moral that judges should henceforth be selected
on the basis of merit, rather than in partisan elections.2

I do not pretend to be above lurid theater, and in part II of this article I
chronicle the events that captivated the regional and sometimes national me-
dia, culminating in Justice Larsen’s impeachment and removal from office.

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versity of Wisconsin Law School. Many thanks to John Gedid, Emily Field Van Tassel, and
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their able research support, and Tim Yuncker for his exceptional research and editorial
assistance.

I have served the Pennsylvania House of Representatives as a consultant on the impeach-
ment and removal of Justice Larsen, and am indebted to Speaker of the House H. William
Deweese, Judiciary Committee Chairman Thomas R. Caltagirone, and Special Counsel John
Moses for affording me that opportunity; without it, this article could not have been written. I
am especially grateful to Representative Frank Dermody, who chaired the Committee of House
Managers that prosecuted Justice Larsen in the Pennsylvania Senate; it was a pleasure and a
privilege to have served a legislator with his energy, evenhandedness, and dedication to
principle.

The views expressed in this article are mine alone, and not necessarily those of the Penn-
sylvania House of Representatives or any of its members.

1. Quoted in Bill Moushey, Larsen Out: Larsen Removed from High Court, PITTSBURGH

2. Bridget E. Montgomery & Christopher C. Conner, Partisan Elections: The Albatross of
Pennsylvania’s Appellate Judiciary, 98 DICK. L. REV. 1, 13-15 (1993) (characterizing merit selec-
tion legislation as response to “mandate for reform” precipitated by Larsen scandal and discuss-
ing “tendency to perceive judicial misconduct as the primary impetus for a move to merit
selection of judges”).
At the same time, as an academic, I am drawn inexorably toward matters more arid and obscure, and thus ultimately look to the Larsen imbroglio in search of the lessons it offers to students of state constitutional law. I remain unconvinced, however, that such lessons include an argument for merit-based judicial selection. Clairvoyance is not ordinarily identified as a prerequisite to service on commissions charged with assessing the merits of nominees for judicial office. Nothing short of that, however, could enable such a commission to divine that a judicial nominee who had not theretofore been disciplined for misbehavior is nevertheless destined to become a miscreant and should be disqualified on that basis. In Justice Larsen's case, that a more "qualified" candidate might have been selected in his stead is merely fortuitous, unless one is prepared to argue that the strengths of one's resume and one's moral fiber travel in lock-step.

I do not question the wisdom of merit selection as an alternative to elections. To the contrary, I am entirely persuaded by the Cecil B. DeMille cast of commentators who have made a compelling case for merit-based judicial selection as a means to improve the quality of the state bench. My only point here is that the link between Justice Larsen's misconduct and the absence of a merit-based judicial selection system is a tenuous one.

What the Larsen case does provide is a unique opportunity to re-analyze the role that a shared separation of powers plays, or ought to play, in a representative democracy. As discussed in part III, those who crafted the United States Constitution were convinced of the need for shared power among the branches to ensure that the independence created by a separation of powers would not degenerate into unaccountability. Thus, for example, regulating judicial administration and procedure is to a significant extent within the constitutional ambit of both the judiciary and the legislature. Similarly, the only constitutional method for removing an Article III judge from office is by impeachment, in other words, by the action of a separate branch of government.

In contrast, the Pennsylvania Constitution eschews shared power in favor of extreme separation, conferring upon the judiciary almost exclusive
control of court operations. Consistent with that philosophy, until very recently, two of the three methods of removing judges recognized by the Pennsylvania Constitution placed ultimate responsibility in the hands of its supreme court, and the one that did not—impeachment—had not been used since 1811.

As argued in part IV, the Larsen case exposed two weaknesses inherent in a tri-branch constitutional structure, such as Pennsylvania's, in which the powers of government are insufficiently blended. First, such a structure adversely affects institutional accountability. Article V of the Pennsylvania Constitution so insulated judicial administration and rule-making from legislative scrutiny that nothing short of the constitutional crisis created by Justice Larsen's impeachment prompted the Pennsylvania high court to implement reforms, the absence of which had made Justice Larsen's misconduct possible. The appropriate solution is to amend the Pennsylvania Constitution to give the General Assembly some form of shared responsibility with the judiciary over judicial administration and rule-making, akin to that responsibility given Congress under the United States Constitution.

Second, a constitutional structure that isolates the three branches of government adversely affects institutional credibility. By its terms, the Pennsylvania Constitution gives the General Assembly a role to play in the removal of judges through the impeachment process, and to that extent blends the separate powers of the legislature and the judiciary. Prior to Justice Larsen's removal, however, the General Assembly had not exercised this impeachment power in over 180 years, and its role in monitoring judicial conduct had been virtually non-existent. Rather, to the extent judges were disciplined or removed, it was by one of two other means provided for in the state constitution, which, consistent with a constitutional vision of a judiciary separate to the point of being isolated, made the supreme court the decision-maker of last resort. These supreme court-dependent removal mechanisms invite attacks on the judiciary's integrity and credibility, particularly when the respondent is a supreme court justice: those members of the supreme court

8. See infra notes 105-69 and accompanying text for a discussion of the separation of powers doctrine under the Pennsylvania Constitution.
12. See infra notes 170-242 and accompanying text for a discussion of the problems which arise from Pennsylvania's constitutional structure.
13. See infra notes 173-215 and accompanying text for a discussion of the lack of accountability that results from Pennsylvania's constitutional structure.
14. See infra notes 216-42 and accompanying text for a discussion of the lack of credibility that results from Pennsylvania's constitutional structure.
16. See supra note 11 and accompanying text (noting that impeachment has not been utilized since 1811).
who vote to remove can be accused of getting back at an enemy, while those who vote not to remove can be charged with protecting a friend. In such cases, impeachment by the House followed by conviction in the Senate remains the most satisfactory removal mechanism, precisely because of the intermingled separation-of-powers balance it maintains.

II. The Decline and Fall of Justice Rolf Larsen

He's like the (Energizer) bunny. He keeps going and going and going while everybody keeps shooting at him.17

—Attorney William Costopoulos describing his client, the Honorable Rolf Larsen

Rolf Larsen was elected to the Pennsylvania Court of Common Pleas in 1973.18 Four years later, he won election to the Pennsylvania Supreme Court.19 He wasted little time in attracting attention to himself. In December of 1980, press accounts linked him to an effort to organize a campaign against the retention of fellow justice Robert Nix, who, by virtue of his seniority, was the only justice standing between Larsen and the post of chief justice.20 The reports were particularly troubling in that Justice Larsen's purported strategy was to publicize, for the benefit of an uninformed electorate, that Justice Nix was African American.21 The Judicial Inquiry Review Board ("JIRB")—a body empowered by the supreme court to investigate claims of judicial misconduct and recommend sanctions for the supreme court to impose22—commenced an investigation into the allegations against Justice Larsen.23

After a two-year investigation, the JIRB recommended no disciplinary action against Justice Larsen.24 Despite howls of protest from both press and public,25 Justice Larsen weathered the storm, won reelection to a second ten-year term in 1987, and sued the state's two major newspapers for libel in connection with their reporting of the JIRB proceedings.26

On May 30, 1986, the year prior to his reelection, Justice Larsen met with Allegheny County Court of Common Pleas Judge Eunice Ross in her chambers.27 At the time, Judge Ross was presiding over a matter that had

17. Quoted in Moushey, supra note 1, at A1.
18. XVII Senate of Pennsylvania, Senate Impeachment Trial Comm., In re Impeachment Trial of Justice Rolf Larsen 3314, 3343 (Sept. 9, 1994) (testimony of Rolf Larsen).
19. Id.
21. Id.
22. PA. CONST. art. V, § 18(g), (h).
23. Lauter, supra note 20, at 1.
24. Id.
25. Id.
27. The events described in this paragraph are drawn from testimony taken before the JIRB, which is summarized, with citations to the relevant testimony, in the JIRB's findings of
taken a turn for the peculiar. She had been assigned to oversee administration of the estate of a man who had filed for bankruptcy shortly before he died. When the assets of the estate were tallied, there appeared to be a $500,000 shortfall. The administratrix of the estate moved the court to order the decedent’s bankruptcy counsel to return $17,500 he had disbursed for the decedent prior to death. In opposing the motion, the bankruptcy counsel was represented by his law partner, James Ashton, who was a friend of Justice Larsen.28

According to Judge Ross, Justice Larsen broached the subject of this pending motion in their May 30th meeting, advising Ross that two unidentified sources had informed him that another attorney, not the bankruptcy counsel, had improperly taken money from the estate.29 Judge Ross did not report the incident to the JIRB until the following year, after she learned that Justice Larsen may have had a motive to do Ashton a favor by interceding on behalf of Ashton’s client.30 It was then, she said, that she read a newspaper account of a favorable land purchase Justice Larsen had completed at Ashton’s instigation less than a week before her meeting with Justice Larsen the previous year.31 The purchase in question concerned a thirty-six acre parcel of land that Justice Larsen had acquired for $5,000 from Nikolai Zdrale, then a client of Ashton’s in a bankruptcy proceeding.32

Despite Justice Larsen’s testimony that he met with Judge Ross for the purpose of discussing complaints that others had made against her, and his assertion that the matter of the estate never arose in their conversation,33 the JIRB found that an improper ex parte contact had occurred.34 Unconvinced, however, that a “bad motive” existed for the contact, the JIRB limited its recommended penalty to a public reprimand.35 The JIRB then submitted its

fact. See REPORT OF THE JUDICIAL INQUIRY REVIEW BOARD TO THE SUPREME COURT OF PENNSYLVANIA, IN RE: HON. ROLF LARSEN, ASSOCIATE JUSTICE, PENNSYLVANIA SUPREME COURT, Part I, No. 140 JIRB Docket 1987 (Complaint Dkt. No. 87-156), at 5-15 (July 17, 1991) [hereinafter “JIRB REPORT”].

28. Id.

29. Id. at 8; see also INVESTIGATING GRAND JURY REPORT No.1, IN RE: THE NINTH STATEWIDE INVESTIGATING GRAND JURY, Dauphin County Common Pleas, No. 110 M.D. 1993, Supreme Court of Pennsylvania, 88 M.D. Misc. Docket 1992, Notice No. 9, at 9 (Oct. 22, 1993) [hereinafter GRAND JURY REPORT]. The grand jury report was made public by order of the court, after it was determined that Justice Larsen had disclosed his own grand jury testimony. ORDER, IN RE: THE NINTH STATEWIDE INVESTIGATING GRAND JURY, Dauphin County Common Pleas, No. 110 M.D. 1993, Supreme Court of Pennsylvania, 88 M.D. Misc. Docket 1992, Notice No. 9 (Nov. 5, 1993).

30. JIRB REPORT, supra note 27, at 13-14.

31. Id. at 12-13.

32. REPORT AND RECOMMENDATION OF THE SUBCOMM. ON COURTS TO THE JUDICIARY COMM.: INVESTIGATION INTO THE CONDUCT OF SUPREME COURT JUSTICE ROLF LARSEN AUTHORIZED BY HOUSE RESOLUTION 205 OF 1993, at 36 (May 6, 1994) [hereinafter HOUSE REPORT].


34. JIRB REPORT, supra note 27, at 93.

35. Id. at 95-96.
recommendation to the supreme court, which adopted it on October 14, 1992, with Justices Cappy and Zappala voting in favor, a third justice dissenting, and the remaining four not participating.\textsuperscript{36}

This article might have been considerably shorter and more pointless had Justice Larsen simply endured the embarrassment of a public reprimand. But he did not. On November 24, 1992, he filed a petition for recusal of Justices Cappy and Zappala\textsuperscript{37}—the two justices who had voted in favor of his reprimand. In that petition, he made a series of remarkable allegations. Some of the more inflammatory charges were (1) that Justice Zappala received "indirect kickbacks" for assisting his brother's bond underwriting firm by fixing cases in favor of the firm's municipal clients;\textsuperscript{38} (2) that Justices Cappy and Zappala sought (unsuccesfully) to have Nikolai Zdrale perjure himself before the JIRB by recanting truthful prior testimony favorable to Larsen concerning the land sale;\textsuperscript{39} and (3) that Justice Cappy sought to reverse Zdrale's attempted murder conviction in exchange for Zdrale recanting his JIRB testimony in a statement to the Deputy Attorney General.\textsuperscript{40} On December 14, 1992, Justice Larsen filed a supplemental petition for recusal in which he added another allegation to the pile.\textsuperscript{41} It was a real humdinger: that Justice Zappala had "commandeered" a car and tried to run over Justice Larsen outside a Philadelphia hotel the previous week.\textsuperscript{42}

In March 1993, a statewide grand jury convened to investigate Justice Larsen's accusations against his brethren.\textsuperscript{43} Over the course of the eight-month investigation, staff attorneys interviewed nearly 200 witnesses, of whom twenty were called to testify.\textsuperscript{44} On October 22, 1993, the grand jury issued an investigation report, which was made public on November 5.\textsuperscript{45} The grand jury found "no credible evidence" to support any of the allegations in

\textsuperscript{36} In re Larsen, 616 A.2d 529, 529 (Pa. 1992), cert. denied, 114 S. Ct. 65 (1993). See also GRAND JURY REPORT, supra note 29, at 11. Justice Papadakos dissented, and Justices Nix, Flaherty, and Larsen recused themselves. The seventh justice—Justice McDermott—died after oral argument but before the final decision. Id.


\textsuperscript{38} Id. at 8-12.

\textsuperscript{39} Id. at 13-14. Zdrale testified before the JIRB that he was more than satisfied with the terms of his sale of land to Justice Larsen, and that those terms were negotiated at arm's length—testimony favorable to Larsen in that it undercut the suggestion that Larsen was so indebted to Ashton for orchestrating the land sale as to have an improper motive for his meeting with Ross. Id.

\textsuperscript{40} Id. at 24-32; GRAND JURY REPORT, supra note 29, at 14-15.


\textsuperscript{42} Id. at 5-6.

\textsuperscript{43} GRAND JURY REPORT, supra note 29, at 3.

\textsuperscript{44} Id.

\textsuperscript{45} Id.
Justice Larsen's petitions for recusal.\textsuperscript{46} “To the contrary,” concluded the grand jury, “Justice Larsen made many of his allegations in bad faith and with a reckless disregard of the truth.”\textsuperscript{47}

In addition to the foregoing findings and conclusions, the grand jury indicated that its investigation had yielded “information regarding conduct by Justice Larsen and others that appropriately should be reported.”\textsuperscript{48} First, the grand jury found that from the late 1970s through 1991, Justice Larsen “systematically maintained a list of allocatur petitions to be afforded special handling.”\textsuperscript{49} “Allocatur petitions,” formally known as “petitions for allowance of appeal,” are the Pennsylvania equivalent of petitions for certiorari.\textsuperscript{50} “The cases on the list,” found the grand jury, “often were being litigated by friends and/or supporters of Justice Larsen. In every such case . . . Justice Larsen took some affirmative action to further the allocatur position being advocated by his friend and/or supporter.”\textsuperscript{51} Second, the grand jury found that from the early 1980s through 1993, Justice Larsen “obtained psychotropic drugs through improper means,” by causing “a physician to issue prescriptions for tranquilizers and anti-depressants in the names of members of Justice Larsen’s staff,” who would then deliver the medications to Justice Larsen for his own use.\textsuperscript{52}

On October 29, 1993, one week after issuing its report, the grand jury indicted Justice Larsen on sixteen counts of criminal conspiracy and violations of the Controlled Substances Act.\textsuperscript{53} Immediately thereafter, the supreme court suspended him with pay.\textsuperscript{54} The case proceeded to a jury trial in Allegheny County, Pennsylvania, and on April 9, 1994, the jury convicted Justice Larsen on two felony counts of criminal conspiracy to violate the Controlled Substances Act.\textsuperscript{55}

During the preceding months, the General Assembly’s interest in the Larsen case had become increasingly keen. The House of Representatives retained special counsel to advise it on impeachment and related matters.\textsuperscript{56} In November 1993, the Pennsylvania House of Representatives adopted House Resolution No. 205, authorizing its Judiciary Committee to investigate

\textsuperscript{46} Id. at 4-6.  
\textsuperscript{47} Id.  
\textsuperscript{48} Id. at 6.  
\textsuperscript{49} Id.  
\textsuperscript{50} PA. R. APP. P. 1112-1123.  
\textsuperscript{51} GRAND JURY REPORT, supra note 29, at 6.  
\textsuperscript{52} Id. at 7.  
\textsuperscript{53} HOUSE REPORT, supra note 32, at 51.  
\textsuperscript{54} Frank Reeves, New Court Takes Up Larsen’s Case: Suspension Would Halt Pay for Justice Already Relieved of Duties on State High Court, PITTSGBURGH POST-GAZETTE, Mar. 24, 1994, at D11.  
\textsuperscript{55} HOUSE REPORT, supra note 32, at 51-52.  
\textsuperscript{56} The House majority appointed John Moses, Esq., a private practitioner with his own firm in Wilkes-Barre, Pennsylvania, to serve as special counsel, and I was called in later to assist him. The House minority appointed Clayton Undercoffer, Esq., as special counsel, with assistance from David Moffitt, Esq., both of whom were private practitioners with Saul, Ewing, Remick and Saul in Philadelphia.
the conduct of Justice Larsen to determine if the House should initiate impeachment proceedings. On May 6, 1994, the House Judiciary Committee’s Subcommittee on Courts, chaired by Representative Frank Dermody, issued a report on its investigation into Justice Larsen’s conduct. It concluded that seven allegations of misconduct against Justice Larsen were serious enough to constitute “misbehavior in office” (the standard by which the Pennsylvania Constitution measured impeachable conduct) and were “supported by substantial evidence.”

Accordingly, the Subcommittee urged the adoption of seven articles of impeachment. Article I charged Justice Larsen with maintaining a special list of allocatur petitions for the benefit of friends and contributors; Article II singled out a pair of allocatur petitions on the special list that involved an attorney who testified as to his ex parte conversations with Justice Larsen concerning those petitions; Article III accused Justice Larsen of perjuring himself before the grand jury by denying that the conversations described in Article II took place; Article IV concerned the ex parte contact with Judge Ross; Article V accused Justice Larsen of making reckless, unfounded allegations against Justices Cappy and Zappala in his petitions for recusal; Article VI concerned the drug charges; and Article VII was a catch-all, in which it was alleged that the cumulative effect of Justice Larsen’s misbehavior brought the courts of the commonwealth into disrepute. On May 24, 1994, the House of Representatives voted 199-0 to impeach Justice Larsen on the seven enumerated articles.

The JIRB, last heard from in 1991 when it recommended that Justice Larsen be reprimanded for his ex parte contact with Judge Ross, passed from the face of the Pennsylvania Constitution in May of 1993. Spurred by the embarrassment created by Justice Larsen’s escapades, the constitution was then amended to abolish the JIRB and establish an independent Judicial Conduct Board within the judicial branch that reported not to the supreme

57. HOUSE REPORT, supra note 32, at 1.
58. Id.
59. Id. at 2-3.
60. Id. at 3-5.
62. The move to amend Pennsylvania’s system of judicial discipline predated Justice Larsen’s second brush with the JIRB. Nevertheless, amid the final push to ratify the amendment, the media certainly sought to link this reform to the Larsen case. A good example is an editorial published by the Philadelphia Inquirer shortly after Larsen accused Justice Zappala of trying to run him down in an automobile:
This increasingly bizarre controversy began when Justices Zappala and Cappy voted to reprimand Justice Larsen . . . . [S]o for starters, the affair should serve as a driver’s manual for reforming the way judges are disciplined. A constitutional amendment pending before the legislature would, among other things, prohibit Supreme Court justices from ruling on each other’s conduct. Can there be any doubt at this point that such a change is needed?

Protect Larsen: Judicial Reformers Can’t Afford To Lose Him, PHILA. INQUERER, Dec. 17, 1992, at A30.
On March 12, 1994, the Judicial Conduct Board put a tentative first foot forward by urging the Court of Judicial Discipline to suspend Justice Larsen with pay pending the outcome of his criminal trial, an odd recommendation since the supreme court had already suspended him. On March 28, the Court of Judicial Discipline ruled against adopting the Board's recommendation, but revisited that ruling after Justice Larsen's drug conviction and suspended him without pay. Three days later, the Judicial Conduct Board officially charged Larsen with a range of misconduct that paralleled the Articles of Impeachment; this initiated the process by which the Court of Judicial Discipline could ultimately bring a range of sanctions to bear against him, including removal from office.

On June 13, 1994, two months after his conviction on drug charges, Allegheny County Court of Common Pleas Judge W. Terrence O'Brien sentenced Justice Larsen to probation and removal from office—the latter penalty being imposed pursuant to a little-used provision of the Pennsylvania Constitution. Justice Larsen vowed to appeal, and later did.

Senator Stewart Greenleaf, Chairman of the Pennsylvania Senate's Special Committee on Impeachment, expressed concern that Justice Larsen's criminal conviction or sentence could be reversed on appeal, and therefore saw no alternative to going forward with the impeachment trial. Accordingly, on August 8, the Special Committee heard opening arguments that began a five-week long evidentiary hearing. On October 4, after deliberating for six hours, the Senate mustered the necessary two-thirds majority to convict Justice Larsen and remove him from office on Article II: manipulating two allocatur petitions in favor of an attorney and political contributor.

63. PA. CONST. art. V, § 18. See infra notes 232-42 and accompanying text for a more detailed description of this disciplinary mechanism.

64. Reeves, supra note 54, at D11.

65. See id. at D11 (noting that Larsen was suspended with pay immediately after his indictment on criminal charges on October 29, 1993).


69. Moushey, supra note 1, at A1. Article V, § 18(d) of the Pennsylvania Constitution provides that "[a] justice... convicted of misbehavior in office by a court... shall forfeit automatically his judicial office." PA. CONST. art. V, § 18(d)(3). Article VI, § 7, in turn, provides that "[a]ll civil officers... shall be removed on conviction of misbehavior in office or of any infamous crime." PA. CONST. art. VI, § 7.


71. Moushey, supra note 1, at A1.


The Senate acquitted Justice Larsen on all remaining articles, although a majority favored conviction on all but Articles I and VII.\(^{74}\)

III. The Separation of Powers Under the Pennsylvania and United States Constitutions Compared

This is the first time ever that a citizen of the commonwealth has been prosecuted by all three branches of government at the same time.\(^{75}\)

—William Costopoulos

In sorting through the rubble amid the after-shocks of Justice Larsen's removal, there are a couple of chunks (to over-extend the metaphor) worthy of particular attention. First, a system of judicial discipline in which the ultimate disciplinary body is the court on which the miscreant judge sits inevitably creates an apparent, if not a real, conflict of interest. The presence of so obvious a potential conflict invites abuse of the sort described in Larsen impeachment Article V—a justice under investigation can seek to avoid disciplinary sanctions by targeting justices unsympathetic to his cause and exaggerating the extent of their conflict of interest as a means to force their disqualification.\(^{76}\) Regardless of the success of the tactic, the impact of his efforts on the integrity of the judiciary and the judicial process is significant and deleterious.

Had the disciplinary system not sported the equivalent of a sign saying "kick me," Justice Larsen would not have had reason to oblige by filing petitions accusing his brethren of gross misconduct in an effort to disqualify them. Had those petitions not been filed, the House and grand jury might never have initiated an investigation; and had there been no investigation, Justice Larsen's misconduct might never have been detected.

That gives rise to the second problem. In the minds of many, the most serious charges against Justice Larsen included those in the first three Articles of Impeachment, which alleged that he manipulated the allocatur process for the benefit of personal friends, and then denied having done so before the grand jury, thereby perjuring himself.\(^{77}\) The task of detecting and proving such misconduct was complicated by the internal operating procedures of the supreme court, which enabled justices on the court to participate in the allocatur process, or not, in virtual anonymity.\(^{78}\) The net effect was that a justice

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\(^{75}\) Quoted in Megan O'Matz, House Votes To Impeach Larsen, 199-0, ALLENTOWN MORNING CALL, May 25, 1994, at A1.

\(^{76}\) See HOUSE REPORT, supra note 32, at 4-5 (noting that Article V charged Larsen with making unfounded allegations against two justices who voted in favor of disciplinary charges against him).

\(^{77}\) See id. at 3-4 (describing charges under first three Articles of Impeachment filed against Larsen).

\(^{78}\) The supreme court has since revised its internal operating procedures to address a number of these problems. See infra notes 204-08 and accompanying text for a discussion of these changes.
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could intercede on behalf of a friend representing a party in a case for which allowance of appeal was sought, influence the outcome of the petition without the public or the parties being aware, and then recuse himself from deciding the appeal if the petition was granted. Thus, only after the grand jury initiated an investigation into an unrelated matter—the disqualification petitions that Justice Larsen had filed against Justices Cappy and Zappala—did Larsen’s role with respect to a “special list” of allocatur petitions come to light.

As luck would have it in this case, the presence of the first problem avoided the second—in exploiting the vulnerability of the disciplinary process by filing outlandish petitions for disqualification of his colleagues, Justice Larsen attracted such attention to himself that his otherwise undetectable allocatur practices were exposed. The linkage between these two problems, however, is more than fortuitous. The roots of each are grounded in a state constitutional vision of a judiciary separate to the point of being isolated, a vision not shared by the federal constitution.

A. Separation of Powers and Judicial Independence Under the United States Constitution

In The Federalist No. 47, James Madison responded to the criticism that the proposed Constitution “violat[ed]...the political maxim, that the legislative, executive and judiciary departments ought to be separate and distinct” because it did not include an explicit separation-of-powers clause. Conceding that “the accumulation of all powers, legislative, executive, and judiciary, in the same hands...may justly be pronounced the very definition of tyranny,” Madison remained firm in his conviction that “the emphatical and, in some instances, the unqualified” separation-of-powers provisions included in various state constitutions were neither necessary nor sufficient to avoid over-concentrations of power. He viewed an express and absolute separation of powers as unnecessary, because the essential separation of functions among the branches was already embedded in the structure of the first three articles of the proposed Constitution. Moreover, explicit separation was not sufficient, because unless the powers of the three branches “be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”

79. See infra notes 195-201 and accompanying text for a discussion of the allocatur system in place prior to the 1994 revisions.
80. The Federalist No. 47 (James Madison).
81. Id.
82. Id.
83. Id.
84. The Federalist No. 48 (James Madison). For a historical analysis of the flexible, intermingled separation of powers contemplated by the Constitution’s framers, see Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 WM. & MARY L. REV. 211 (1989); John Gedid, History and Executive Removal Power: Morrison v. Olson and
As it pertains to the relationship between Congress and the judiciary, the text and structure of the Constitution reflect the interconnection and blending of powers that Madison deemed essential to preventing any one branch of government from gaining control over the others. One or both houses of Congress are empowered to appropriate monies for court operations, to confirm judicial nominees, to impeach and remove judges, to constitute the lower federal courts, to regulate the Supreme Court's appellate jurisdiction, and to make laws necessary and proper for executing all "[p]owers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." The judiciary, in turn, is empowered to decide all cases arising under the Constitution and the laws of the United States, and all controversies to which the United States is a party.

Congress, then, by virtue of its authority to establish the lower federal courts and to make any law necessary and proper for carrying into execution the judiciary's power to decide cases and controversies, may regulate judicial operations and procedures. At the same time, the federal judiciary's express authority to decide cases and controversies at least arguably subsumes the inherent authority to establish rules and procedures appropriate to deciding these cases and controversies. The extent of the Supreme Court's inherent rule making authority is an issue effectively mooted by the Rules Enabling Act, which has delegated that authority to the judiciary by statute.


In Federalist Nos. 18-20, Hamilton and Madison criticized the Articles of Confederation by comparing them to the failed efforts of other confederacies. In Federalist No. 20, for example, the Belgic confederacy was described as maintaining a clear separation of powers among the branches of government, "as delineated on parchment." In practice, however, they characterized the process as typified by "[i]mbecility in the government" and "discord among the provinces." Meaningful separation of powers, in other words, required an elevation of substance over form, which Hamilton and Madison thought the proposed Constitution achieved and the Articles of Confederation did not. The Federalist No. 20 (James Madison & Alexander Hamilton).

86. Id. art. II, § 2, cl. 2.
87. Id. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6.
88. Id. art. I, § 8, cl. 9.
89. Id. art. III, § 2, cl. 2.
90. Id. art. I, § 8, cl. 18.
91. Id. art. III, § 2.
92. See supra notes 85-91 and accompanying text for a summary of Congress's enumerated powers over the judiciary.
94. 28 U.S.C. §§ 2071-2077 (1994). The Rules Enabling Act empowers the Supreme and lower courts to "prescribe rules for the conduct of their business," provided that such rules are
decades, if not for centuries, control over [court] practice and procedure has been the subject of a concurrent jurisdiction.\textsuperscript{95}

Madison's vision of blended powers as a means to keep the branches of government in check is alive and well in the concurrent jurisdiction of the judiciary and Congress over judicial administration. The judiciary is acutely aware that if it promulgates rules, it must do so with care and political sensitivity, lest it invite Congressional intercession—for better or worse.\textsuperscript{96} The judiciary is equally aware that if it does not promulgate rules, Congress may jump into the breach—again, for better or worse.\textsuperscript{97} Judge Patrick Higginbotham, Chairman of the Judicial Conference Advisory Committee on Civil Rules, underscored the point in a recent interview:

The federal rules are the legitimate concern of Congress and the courts. The procedures for notice, comment, meticulous drafting, and review that produce high quality rule amendments as contemplated by the Rules Enabling Act have usually persuaded Congress to resist direct amendment and to listen to the judges and lawyers who work daily with the real world of the rules. We, in turn, must listen and consider.\textsuperscript{98}

\textsuperscript{95} Levin & Amsterdam, supra note 93, at 3.

\textsuperscript{96} See, e.g., Paul D. Carrington, Making Rules To Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2079-82 (1989). Professor Carrington, then Reporter to the Judicial Conference Advisory Committee on the Civil Rules, argued that judiciary is best equipped to promulgate rules that are trans-substantive, i.e. general in their applicability and politically neutral, in part because such rules are less likely to invite Congressional interference.

\textsuperscript{97} The Civil Justice Reform Act furnishes a useful illustration. Senator Joseph Biden introduced legislation to rectify what he perceived to be the judiciary's failure to manage civil litigation aggressively enough. Federal Courts Study Comm. Implementation Act and Civil Justice Reform Act: Hearing Before the Subcomm. on Courts, Intellectual Property and the Administration of Justice of the House Comm. on the Judiciary, 101st Cong., 2d Sess. 597-601 (1990). The judiciary responded with howls of protest, arguing, among other things, that the matters the legislation sought to regulate were better addressed by judiciary-adopted rules pursuant to the Rules Enabling Act. Id. at 109, 378-91, 417-26, 431-36 (letters and commentary from various federal judges in opposition to the act). In an attempt to dampen the ardor for legislative reform, the Judicial Conference announced that it was implementing its own 14-point plan that embodied the essence of the Civil Justice Reform Act. Id. at 103-08. The Senate Judiciary Committee Report quoted from the testimony of a witness in explaining the need for legislation, despite the judiciary's 14-point plan: "[T]he objectives of this bill could be achieved without legislation. . . . The question is will they be, and regrettably, I do not think they will be without this sort of catalytic push to it." Id. at 31.

The role played by intermingled powers is equally obvious in the area of judicial removal. Impeachment by the House and removal from office upon conviction by the Senate is the only mechanism the United States Constitution provides for removal of Article III judges.\textsuperscript{99} Although the constitutionality of intra-judicial and other methods of removal is sometimes discussed,\textsuperscript{100} the discussion will likely remain theoretical, as long as impeachment continues to be accepted as a viable (if cumbersome) means of removal.\textsuperscript{101} To date, the House of Representatives has undertaken fifty-eight impeachment investigations and impeached thirteen judges, three in the past decade alone.\textsuperscript{102} Of those investigated but not impeached, twenty obviated the need for impeachment proceedings by resigning.\textsuperscript{103} Of the thirteen judges impeached, the Senate convicted and removed seven, acquitted four, and two resigned before trial.\textsuperscript{104} In short, as with judicial administration and rule-making, the role of the legislature in judicial removal has been and remains significant in the federal system.

B. Separation of Powers and Judicial Independence Under the Pennsylvania Constitution

Many state systems, like the federal one, provide for an intermingled separation of powers that gives the judiciary less than exclusive control over court procedure and practice.\textsuperscript{105} Not so the Pennsylvania Constitution, as interpreted by its supreme court.\textsuperscript{106} Article II of the Pennsylvania Constitution does not itemize and thereby limit the powers of the legislature, as does its federal counterpart.\textsuperscript{107} Rather, it states only that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly."\textsuperscript{108} Accord-

\textsuperscript{99} U.S. Const. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6.
\textsuperscript{100} On a theoretical plane, the debate continues as to whether other methods of removal might be consistent with the Constitution. See, e.g., Raoul Berger, Impeachment: The Constitutional Problems 122-37, 181 (1973) (arguing that certain common law removal mechanisms are constitutional); Peter Shane, Who May Discipline or Remove Federal Judges? A Constitutional Analysis, 142 U. Pa. L. Rev. 209, 239 (1993) (discussing whether intra-judicial removal would be constitutional).
\textsuperscript{101} See infra notes 196-202 and accompanying text for a discussion of the viability of impeachment.
\textsuperscript{103} Id.
\textsuperscript{107} Ruano v. Barbieri, 400 A.2d 235, 239 (Pa. Commw. Ct. 1979) (explaining that, unlike Congress, whose powers are specified and therefore limited, General Assembly has jurisdiction over all matters not otherwise prohibited by constitution).
ingly, this section has been interpreted to confer upon the General Assembly all powers of a legislative character that some other provision of the constitution does not otherwise remove from its purview.109

Article V, section 10(a) of the Pennsylvania Constitution provides, in relevant part, that "[t]he Supreme Court shall exercise general supervisory and administrative authority over all the courts."110 Section 10(c), in turn, states:

The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts . . . including the power to provide for . . . admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court . . . . All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions.111

Confining oneself to the text of the constitution, article V, section 10 arguably says no more than that the Pennsylvania Supreme Court's power to regulate court operations is concurrent with that of the General Assembly. Creating rules of general applicability to litigants and courts across the commonwealth is a task legislative in character and therefore within the ambit of the plenary legislative power conferred upon the General Assembly under article II, unless article V takes that power away.112 The last clause of article V, section 10(c) clearly implies that the General Assembly retains law-making power over court practice, procedure, and conduct. If "[a]ll laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions,"113 the unavoidable corollary is that legislation consistent with such rules is valid and proper.114

As to the suspension of laws inconsistent with court rules, the question becomes whether a court-promulgated rule preempts inconsistent legislation enacted before and after the rule's adoption, or merely supersedes prior legislation that is inconsistent with a subsequently adopted rule. In the federal system, a comparably-worded statutory provision has been given the latter interpretation—meaning that when the Supreme Court promulgates a rule, it

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109. Kotch v. Middle Coal Field Poor Dist., 197 A. 334, 338 (Pa. 1938); Ruano, 400 A.2d at 239. See also Luzerne County v. Morgan, 107 A. 17, 17 (Pa. 1919) (explaining that legislature may do whatever it is not expressly forbidden to do by state or federal constitutions).
110. PA. CONST. art. V, § 10(a).
111. Id. art. V, § 10(c).
112. See, e.g., Ruano, 400 A.2d at 239 (holding that General Assembly could assign senior judges since article V of Pennsylvania Constitution does not prohibit such action).
113. PA. CONST. art. V, § 10(c).
supersedes prior inconsistent legislation but does not affect the legislature's power to enact a new statute reinstating the earlier legislation.115

Courts construing Pennsylvania's article V, however, have interpreted section 10(c) to confer upon the judiciary the sole power to regulate its affairs. In Garrett v. Bamford,116 the United States Court of Appeals for the Third Circuit interpreted section 10(c) to mean that "the state's supreme court [has] exclusive power to establish rules of procedure for state courts; although the legislature makes substantive law, it is without power to control procedure." 117 The court failed to support its interpretation with anything more than a citation to section 10(c) itself, and made no attempt to reconcile its edict with the text of that section, which at the very least would seem to give the legislature concurrent power to make procedural law that is consistent with supreme court rules.

In a 1978 letter of address to the governor and General Assembly, captioned In re 42 Pa. C.S. § 1703,118 the Pennsylvania Supreme Court, relying in part upon the Third Circuit's opinion in Garrett, declared that the state's public meeting law was unconstitutional as applied to the judiciary.119 The high court deemed the law, which would have prohibited the court from conducting its rule-making meetings behind closed doors, "inconsistent with the Pennsylvania Constitution's grant of Power to the Supreme Court 'to prescribe general rules governing practice, procedure and the conduct of all courts'" within the meaning of section 10(c).120 "Notwithstanding the explicit language of Article V, § 10(c)," the court reasoned, "[i]t could be argued that . . . [the grant of rule-making authority to the judiciary] is not exclusive and allows the General Assembly to exercise concurrent power in the area." 121 The court rejected that argument in light of section 61 of title 17 of the Pennsylvania Statutes, a repealed statute that had been the "predecessor statute" to section 10(c).122 That statute provided, in relevant part, that "[f]rom and after the effective date of any rule promulgated under this Section . . . [i]t operation of any act of Assembly relating to practice or procedure . . . and inconsistent with such rule, shall be suspended insofar as

115. 28 U.S.C. § 2072(b) (1990). The Rules Enabling Act provides that "[a]ll laws in conflict with such rules [promulgated by the Supreme Court] shall be of no further force or effect after such rules have taken effect." Id. A primary goal of this clause is, as one scholar has put it, "to provide a means by which the rule-making process can clear away from the timbers of important and enduring federal legislation the undergrowth of procedural marginalia that may have been attached to legislation for faded or forgotten reasons." Paul D. Carrington, "Substance" and "Procedure" in the Rules Enabling Act, 1989 DUKE L.J. 281, 324. It imposes no restrictions upon legislation passed subsequent to the promulgation of a rule. JAMES MOORE, MOORE'S FEDERAL PRACTICE § 1:02[5] (1994).
116. 582 F.2d 810 (3d Cir. 1978).
117. Id. at 814 (citing PA. CONST. art. V, § 10(c)).
119. Id. at 448.
120. Id. at 446.
121. Id. at 448.
122. Id.
such act may be inconsistent with such rule.”123 The court reasoned that, given the “broad scope of authority” that this statute delegated to the supreme court, “it would be anomalous to conclude that Section 10(c) is nothing more than a grant of concurrent power.”124

It would, of course, not be anomalous at all. The predecessor statute quite clearly stated that inconsistent legislation was invalid “from and after the effective date of any rule promulgated under this section.”125 In other words, the statute did more than merely supersede prior inconsistent legislation; it explicitly preempted subsequent inconsistent legislation as well. The fact that section 10(c) dropped the forward-looking language of its “predecessor statute” lends credence to the view that what remains is merely a supersession clause, like its counterpart in federal law.

As cursory and unsatisfactory as the supreme court’s analysis may have been, the result it reached is supported, albeit inconclusively, by the history underlying the adoption of section 10. In 1963, the Pennsylvania Bar Association published Project Constitution, a report that included proposed text for a new constitution.126 Section 12 of the judiciary article, as drafted by the Pennsylvania Bar Association, provided in relevant part that

(a) The Supreme Court shall exercise general supervisory and administrative authority over all the courts of this Commonwealth . . . .
(b) The Supreme Court shall have power to prescribe Rules in all civil and criminal actions and proceedings for all courts, governing administration, practice and procedure . . . . These rules shall have the force and effect of law and shall suspend all statutes inconsistent therewith.127

Comparing this text to that of section 10 gets us only so far. Section 10 appears to narrow the rule-making power contemplated in section 12 by prohibiting court rules affecting substantive rights and at the same time to broaden it by providing that supreme court rules shall invalidate all “laws,” not just “statutes” as was contemplated by its section 12 predecessor. Otherwise, section 12 is no less delphic than its section 10 progeny on the critical questions of whether the supreme court’s self-administration powers are exclusive and whether rules invalidate inconsistent prior laws only, or inconsistent future laws as well.

Looking beyond the text of section 12 to the report of the bar subcommittee responsible for drafting it is unhelpful. The subcommittee did not see

123. *Id.* at 447 (quoting 17 P.S. § 61 (1937) (repealed in part 1978)).
124. *Id.* at 448.
127. *Id.* at 195 (quoting Pennsylvania Bar Association Standing Committee on Constitutional Law, Resolution No. 105).
fit to elaborate upon its intentions, declaring somewhat smugly that "[t]he judges and lawyers, the provisions speak for themselves."\textsuperscript{128} Yeah, right.

As the Constitutional Convention drew closer, a preparatory committee of legislators developed a series of background manuals for the benefit of delegates to the Constitutional Convention, including Manual No. 5, concerning the judiciary.\textsuperscript{129} The committee found "increasing support of autonomy in court administration\textsuperscript{130} and identified organizations, such as the Conference of Chief Justices, that "have begun to double their efforts at thwarting non-judicial control of judicial administration.\textsuperscript{131} Referring to the statute discussed by the supreme court in \textit{In re 42 Pa. C.S. § 1703},\textsuperscript{132} the committee noted that "[t]he basic structure for complete self-administration of the courts is already established in the rule-making powers of the Pennsylvania Supreme Court,"\textsuperscript{133} but added that such powers "may be overruled by legislative enactment."\textsuperscript{134} To "obviate future squabbles between the judiciary and the legislative and executive branches,"\textsuperscript{135} the committee called upon the delegates to consider a proposal of the Maryland Constitutional Convention Commission, which provided that "the Supreme Court and the General Assembly are to have concurrent power to prescribe regulations governing administration of the courts;" but that "in the event of a conflict between a law and a Supreme Court rule, the latter is to prevail as to the conflict if the rule is readopted after the law."

That the Convention did not act on the preparatory committee’s proposal cuts both ways. On the one hand, the Convention did not adopt an explicit power-sharing arrangement between the judiciary and the General Assembly on matters of court administration, suggesting the possibility that none was contemplated. On the other hand, the preparatory committee invited the Convention to adopt a provision expressly empowering the supreme court to promulgate rules trumping past and future legislation, an invitation the Convention effectively declined, implying that the Convention may not have wished to confer such power on the judiciary.

\textsuperscript{128} \textit{Id.} at 284 (quoting \textbf{Pennsylvania Bar Association Standing Comm. on Constitutional Law, Interim Report of Comm. No. 6 on the Judiciary, Including the Minor Judiciary}).


\textsuperscript{130} \textit{Id.} at 222.

\textsuperscript{131} \textit{Id.} The Committee explained that the Conference on Chief Justices adopted a resolution which would ensure judicial independence over such areas as regulation of expenditures, supervision of employees, and the hiring and firing of employees.

\textsuperscript{132} 394 A.2d 444 (Pa. 1978).

\textsuperscript{133} \textbf{The Preparatory Committee, supra} note 129, at 222 n.37. See \textit{supra} notes 118-24 and accompanying text for a discussion of \textit{In re Pa. C.S. § 1703}.

\textsuperscript{134} \textbf{The Preparatory Committee, supra} note 129, at 222.

\textsuperscript{135} \textit{Id.}

\textsuperscript{136} \textit{Id.} at 223 (quoting \textit{Interim Report of the Maryland Constitutional Convention Commission 138} (1967)).
At the Convention itself, the language of section 10(c) was passed as it was introduced. Delegate Gustave Amsterdam offered the following gloss on this section in his summary of article V to the Convention: "This [section] is intended to clearly indicate that the Supreme Court is not a legislative body, is not to make substantive rights, but is to be charged with full responsibility for the proper administration and supervision of the entire judicial administration in the commonwealth." If section 10(c) was understood to give the supreme court "full responsibility" to administer the courts, it undercuts the suggestion that the judiciary was to share such responsibility with the General Assembly.

On the other hand, amendments to other sections of article V, as introduced, counsel against racing to the conclusion that the convention delegates thought that they were giving the supreme court exclusive power over administration and rule-making. For example, section 1(b) of article V originally provided that "the jurisdiction and powers presently vested in the courts of this Commonwealth shall be vested in the unified judicial system created hereby and the General Assembly shall not remove any of said jurisdiction or powers from said system or any part thereof without prior approval of the Supreme Court." This language was deleted by amendment during the Constitutional Convention. As explained by one of the amendment's proponents, "what we are trying to abolish by this amendment, is the veto power of a judicial body over a legislature, which is contrary to Federal history and all of our history." Similarly, the Convention later deleted the phrase "with the advice and consent of the Supreme Court," from section 9, which originally read that "the General Assembly may, with the advice and consent of the Supreme Court, establish such courts, or divisions of existing courts, as may be needed, or, with the advice and consent of the Supreme Court, abolish any court, or division thereof, created by statute." The explanation offered for the amendment was to "parallel th[e] idea" reflected in the amendment to section 1(b).

To the extent the 1968 Convention was unwilling to confer upon the supreme court the power to frustrate the will of the General Assembly in sections 1 and 9, one might suppose that it would be equally unwilling to do so in section 10. Or maybe not. The debates on the amendments to sections 1 and 9 reveal that the Convention was primarily concerned with preserving the General Assembly's power to enlarge or restrict the judiciary's subject

138. 2 Debates, supra note 137, at 837.
139. 1 id. at 445.
140. 2 id. at 874.
141. 1 id. at 377.
142. Id. at 946-47.
143. Id. at 445.
144. 2 id. at 946.
matter jurisdiction. A sponsor of the section 1 amendment characterized that power as "an integral part of an act of the legislature" whenever remedial legislation is enacted; consequently, the sponsor thought it "absolutely essential that the Supreme Court not be given a veto power over such remedial legislation.”

Delegate David Barron offered an amendment to section 18 that would delete the same language he had succeeded in deleting in his amendment to section 9. The Convention rejected the section 18 amendment overwhelmingly. Section 18 provided that "[t]he number and boundaries of judicial districts shall be changed by the General Assembly only with the advice and consent of the Supreme Court." Unlike sections 1 and 9, which would have given the supreme court joint authority over matters the Convention considered of primary interest to the General Assembly, section 18 was seen as relating to matters of mutual interest to the judiciary and the General Assembly. As delegate and former governor William Scranton put it in opposing the section 18 amendment:

"This is both a financial and an administrative function, and that is precisely why we put both groups into it, the Legislature and the Supreme Court. The Legislature should have jurisdiction concerning judicial districts, because they partly pay for same... and... the Supreme Court under the new unified system for the first time in Pennsylvania has the responsibility for the administration of same...

Delegate John Hannum echoed the sentiments of Governor Scranton: "I voted for the Barron amendment, the first one we passed, because... this was an encroachment on the legislative function... I concur in the view of Governor Scranton with respect to the second proposal, that this is an administrative function and not an encroachment on the legislative function." Implicit in the comments of Governor Scranton and Delegate Hannum is the assumption that the courts' administrative functions fall within the purview of the supreme court and not the General Assembly—an assumption consistent with Delegate Amsterdam's characterization of section 10 as conferring "full responsibility" upon the supreme court for "proper administration and supervision" of the judiciary.

Even if the delegates did indeed believe that the General Assembly had no legitimate role to play in overseeing the court's rule-making and adminis-

145. See id. at 877 (delegates noting importance of not infringing upon legislature's prerogatives in amending section 1); 1 id. at 946 (Delegate Barron expressing belief that General Assembly should be empowered to remove same jurisdiction it created).
146. 2 id. at 477.
147. Id. at 947.
148. Id. at 949.
149. 1 id. at 448.
150. 2 id. at 947.
151. Id. at 948.
152. See supra notes 137-38 and accompanying text for a discussion of Delegate Amsterdam's comments regarding § 10(c) of article V of the Pennsylvania Constitution.
trative functions, they could not have foreseen the full extent of the powers they had ceded to the judiciary. It should be unsurprising to all except the hopelessly naive that the Pennsylvania Supreme Court would resolve a constitutional power struggle between itself and the General Assembly in favor of itself, particularly when the Convention debates lend support to the court's interpretation (never mind that the court did not rely on the Convention debates in deciding the issue). What is refreshing, if not surprising, is the reach and vigor of that power grab. Painting in the broadest of strokes, the *In re* 42 Pa. C.S. § 1703 court declared that "once it becomes clear—as it surely is now—that the rule-making power is vested by the Constitution in the judiciary, any legislative intrusion into that power must be viewed with the greatest of skepticism." The court dismissed the possibility that such an approach was inconsistent with separation-of-powers principles by observing that "the existence of appropriate overlap between branches with respect to some functions of government does not mean that such overlap is appropriate with respect to all functions." The Pennsylvania judiciary wasted no time in exploiting its recently discovered power over the General Assembly. In 1981, the commonwealth court did not even acknowledge the existence of "appropriate overlap between the branches," positing instead that "the functions of the several parts of government are thoroughly separated." Accordingly, the court held the Public Employee Relations Act unconstitutional to the extent that it imposed any limits on the power of the judiciary to discharge its employees, a power that "may not, consistent with the Constitutional doctrine of separation of powers, be policed, encroached upon or diminished by another branch of government." In 1983, the supreme court expanded the scope of its exclusive power over rule-making to reach all matters relating to judicial operations. As the court expansively put it, "[l]egislation that infringes on this Court's authority over courts is invalid." Accordingly, the court deemed the Ethics Act, which obligated public officials from all three branches of government to make certain disclosures with respect to their finances, unconstitutional as it applied to the judiciary. The following year, the Philadelphia Court of Common Pleas expanded the judiciary's power in another direction, ruling that its "exclusive power to regulate practice and procedure . . . in-

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154. Id. at 451.
156. Id.
157. *See* Kremer v. State Ethics Comm'n, 469 A.2d 593, 595-96 (Pa. 1983) (holding that financial disclosure provisions of the Ethics Act, insofar as they applied to judges, infringe upon supreme court's power to supervise courts and are thus unconstitutional).
158. Id. at 595.
160. Kremer, 469 A.2d at 595-96.
clud[ed] matters of evidentiary law." The court thus declared unconstitu-
tional a statute that redefined the insanity defense and reallocated burdens of
proof among the parties. And in 1992, the Pennsylvania Supreme Court
struck down a statute that forbade attorneys from entering into contingency
fee contracts within fifteen days of a client's release from a hospital, on the
grounds that the judiciary had the exclusive power to regulate the practice of
law.

Until very recently, the walls of separation protecting the supreme
court's exclusive domain over procedural rule-making and judicial adminis-
tration extended, for all practical purposes, to judicial removal as well.
Granted, the Pennsylvania Constitution had always empowered the General
Assembly to impeach, try, and convict judicial officers, but it was a power
that, as a matter of custom, the General Assembly simply did not exercise. In
the 183 years preceding Justice Larsen's impeachment, the House impeached
no one, and none of the nine investigations into judicial misconduct con-
ducted during that time culminated in a committee recommendation to the
House as a whole that impeachment charges be filed.

Moreover, prior to the 1993 constitutional amendment, the remaining
two methods by which a supreme court justice could be removed from office
conferred ultimate removal authority upon the supreme court. The supreme
court appointed the JIRB, and JIRB recommendations were merely preca-
tory; the power to remove, discipline, or do nothing remained with the
supreme court. Similarly, the power to remove a judge upon criminal con-
viction was and remains within the ultimate control of the supreme court.

Although the text of the constitution does not make imposition of the sen-
tence discretionary with the court—a judge "shall forfeit automatically his

C.P. May 29, 1984). The court in Kidney based its ruling on article V, § 10(c) of the Penn-
sylvania Constitution, encompassing the doctrine of separation of powers, as interpreted by the
Supreme Court of Pennsylvania. Id.

162. Id. at *18.


164. ROBERT WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 364-67 (1985). In three of
the nine cases that Judge Woodside discusses, the Judiciary Committee recommended against
impeachment proceedings without appointing a subcommittee or requesting the appointment of
a special committee. In four other cases, the Judiciary Committee called for the appointment of
a special investigating committee; three of those four committees recommended against im-
peachment of the judge under investigation, while the fourth was unable to complete its work
before the close of the legislative session. In the remaining two cases, the Judiciary Committee
appointed a subcommittee to investigate: in one of those cases the Committee adopted its sub-
committee's recommendation against impeachment; in the other, the Committee rejected its
subcommittee's recommendation that impeachment charges be filed.

165. See supra notes 62-63 and accompanying text for a brief discussion of this amendment
to the constitution.

166. PA. CONST. art. V, § 18(g), (h).

167. See id. art. V, § 18(d) (providing for removal of justice, judge, or justice of the peace
upon conviction of certain crimes).
JUDICIAL SELF-REGULATION

judicial office" if convicted of "misbehavior in office"—the scope of "misbehavior in office" is the judiciary's, and in the end the supreme court's, to define and impose as it sees fit.

IV. THE DECLINE AND FALL REVISITED: THREATS TO ACCOUNTABILITY AND CREDIBILITY, AND THE NEED FOR A Blended SEPARATION OF POWERS

Having delineated the considerable extent to which the Pennsylvania Constitution isolates its judiciary from the other branches of government, it becomes possible to link such isolation to the two problems previously identified in connection with the Larsen case: first, that the misconduct for which the General Assembly impeached and removed Justice Larsen might well have gone undetected, had he not contested his reprimand by filing petitions to disqualify Justices Cappy and Zappala from deciding the matter; and second, that Justice Larsen had an obvious incentive to file such petitions as a means to exploit the inevitable conflict of interest created by his supreme court colleagues deciding whether and to what extent he should be disciplined for alleged misconduct. As argued in part A, the first problem is attributable, at least in part, to an under-regulated supreme court—an inevitable by-product of a constitutional structure in which the judiciary is isolated to the point of being unaccountable. As argued in part B, the second problem results from a system of judicial discipline in which the supreme court polices and removes its own, a responsibility that invites attacks on the court's credibility and which again is grounded in a constitutional vision of a judiciary isolated and accountable to no one but itself.

A. Accountability and Judicial Self-Administration

The Pennsylvania Supreme Court has acknowledged that it alone is accountable for the rules and procedures that it alone has the power to imple-
ment: "The sole responsibility for the administration of the judicial system and all the procedural problems inherent therein devolves upon this Court. Consequently, it is not the legislators who are held accountable by the public for the efficient and orderly administration of the courts, but the judiciary itself." As inspiring as it may be to witness a branch of government take responsibility for its actions by declaring that the buck stops with it, talk is cheap—particularly where, as here, the public has no real means by which to hold the judiciary accountable for its irresponsible administration of the courts, short of amending the constitution.

As an initial matter, judges and justices come up for reelection but once a decade. When they do, they must run unopposed. Moreover, the public has no role to play in filling a vacancy created by a vote of no confidence, meaning that the rational voter should cast her ballot against a judge's retention only if the judge is so incompetent that anyone the governor might appoint as a replacement would have to be an improvement.

None but the most grimly determined of voters can therefore be expected to exercise her decennial right to hold a judge accountable by assessing the judge's record as an administrator and casting her ballot against retention if that record proves wanting. Even among the few willing to do what it takes to hold a judge accountable for administrative mismanagement, none can do so intelligently. Unlike the federal system, where the Judicial Conference is required by statute to make its rule-making proceedings open to the public, the Pennsylvania Supreme Court makes rules behind closed doors and has invalidated legislative efforts to open them. Moreover, to the extent that the supreme court does not bother to publish the rules it promulgates in closed-door sessions, the public has no basis upon which to assess the court's administrative performance. As former Pennsylvania Supreme Court Justice Bruce Kaufman pointedly observed: "[T]he evidence overwhelmingly suggests that judges are elected in a climate of nearly total voter ignorance."

174. For a concise and convincing argument that Pennsylvania's system of judicial elections does not adequately foster accountability, see Montgomery & Conner, supra note 2, at 18-21.
176. Id. art. V, § 15(b).
177. Under the Pennsylvania Constitution, it is the governor who fills judicial vacancies, with the advice and consent of two-thirds of the members of the Senate. Id. art. V, § 13.
178. 28 U.S.C. § 2073(c)(1) (1988) (providing that each meeting of Judicial Conference rules committee "shall be open to the public," except under specified circumstances, and further providing that "[m]inutes of each meeting . . . shall be maintained by the committee and made available to the public").
180. See infra notes 194-200 and accompanying text for a discussion of the court's failure to publish the rules regarding allocatur petitions.
In the federal system, where judges are appointed for life, accountability for judicial rule-making and administration derives from the concurrent jurisdiction of Congress over such matters. The price the judiciary must pay for its autonomy is competent, responsive, and politically sensitive decision-making. This is not to say that Congress is forever breathing down the neck of the third branch. To the contrary, matters of judicial rule-making and administration are, for the most part, sufficiently esoteric, arid, and lacking in political profile that legislators have little incentive to get involved, unless and until there is a groundswell of complaints by constituents or others signifying the existence of a potential problem. The point remains, however, that the federal judiciary—unlike its Pennsylvania counterpart—is ultimately accountable for its procedural and administrative decision-making.

The federal judiciary thus has a significant incentive to consider carefully responsible calls for court reform. In 1988, for example, Congress created the Federal Courts Study Committee, comprised of representatives from all three branches of government and charged with the task of recommending reforms that would better equip the judiciary to cope with docket congestion and other long-term problems. The Committee made many recommendations, including thirty-seven that the judiciary could implement without enabling legislation. Within a year after the Committee published its report, the Judicial Conference had taken a position on at least twenty of those recommendations, approving sixteen and rejecting only four. The Con-

182. See supra notes 92-95 and accompanying text for a discussion of Congress's concurrent jurisdiction.
183. See supra notes 96-98 and accompanying text for a discussion of the effect of Congress's concurrent jurisdiction on the judiciary.
184. See Charles G. Geyh, Mass Tort Litigation and the Politics of Reform, 10 REV. LITIG. 401, 403-04 (1991) (identifying litigation reform issues as "incomprehensible and dreary for the average member of Congress," arguing that "[a]s long as complex-litigation reform maintains a low political profile, and pressure to pass legislation of some sort is therefore limited, the most likely outcome—in the absence of a consensus as to how best to proceed—will be in a decision not to move forward, for want of time, interest, and expertise"). I say "for the most part" because Congress has taken a renewed interest in judicial rule-making in recent years that may reflect a sea-change of sorts toward greater interaction between the branches. See also Linda S. Mullenix, Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking, 69 N.C. L. REV. 795, 843-51 (1991) (criticizing political interference with judicial rule-making process).
186. The Report of the Federal Courts Study Committee included a multi-page summary of its recommendations, organized alphabetically, by subject. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 172-83 (1990). Fifty-seven recommendations were directed at the judiciary. Of those 57, five were duplicates, one was directed at the Federal Judicial Center (which is not within the Judicial Conference's jurisdiction), eight recommended that the judiciary "continue" existing policies (making Judicial Conference action unnecessary), and six amounted to platitudes (e.g., "Be sensitive to jurors' needs," or "select well-qualified lawyers as magistrates"), leaving a total of 37 substantive recommendations. See id. (summarizing content of committee's recommendations).
187. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 60-122 (1990). These figures were derived by tallying the Committee recommendations
ference has since considered and adopted additional Committee recommendations. 188

Pennsylvania had two counterparts to the Federal Courts Study Committee. The first was the Committee to Study Pennsylvania’s Unified Judicial System, chaired by former Pennsylvania Supreme Court Justice Pomeroy, which issued a report in 1980. 189 The second was the Governor’s Judicial Reform Commission, chaired by Judge Phyllis Beck, which issued its report in 1988. 190 These two groups issued at least twelve recommendations between them that the supreme court could have implemented without any enabling legislation or constitutional amendment. 191 Unlike the United States Judicial Conference, which promptly reviewed and accepted a significant number of the Federal Courts Study Committee’s recommendations, the Pennsylvania Supreme Court adopted none of the recommendations pro-

admitted or rejected throughout the span of the cited pages, a task simplified by a table of contents corresponding to the Federal Courts Study Committee’s alphabetical summary of recommendations, referring the reader to those pages of the annual report where committee recommendations are discussed. Id. at 121-22.

188. Examples include: (1) conducting a study of inter-circuit conflicts; (2) initiating additional case-management efforts; (3) having the judicial councils undertake long-range planning; and (4) reviewing allowable magistrate duties. Interview with David Sellars, Public Affairs Officer, Administrative Office of the United States Courts (Feb. 15, 1995).

189. REPORT OF THE COMMITTEE TO STUDY PENNSYLVANIA’S UNIFIED JUDICIAL SYSTEM (1980) [hereinafter POMEROY REPORT].

190. REPORT OF THE GOVERNOR’S JUDICIAL REFORM COMMISSION (1988) [hereinafter BECK REPORT]. A variety of other groups have assembled and studied the Pennsylvania judiciary with a primary focus on judicial selection. See, e.g., Judicial Reform Oct. 6, supra note 3, at 5-102 (testimony of Fred Voight, Executive Director of the Committee of Seventy; Robert Surrick, Executive Director of the Coalition for Real Judicial Reform; and Jerome Bogutz and Richard Klein, for Commission for Justice in the 21st Century).

191. These commissions recommended that the Pennsylvania Supreme Court: (1) formalize all administrative policy decisions in the Rules of Judicial Administration, BECK REPORT, supra note 190, at 50-51, 64-65; (2) delegate to the chief justice responsibility for routine management of the judicial system, id. at 24-25; POMEROY REPORT, supra note 189, at 30; (3) elect a chief justice for renewable five-year terms, BECK REPORT, supra note 190, at 52-53; (4) authorize regionalized administration of the lower courts, id. at 63, 71; (5) develop a program for temporary assignment of common pleas judges to intermediate appellate courts, id. at 69; (6) establish minimum personnel, supplies, services, and facilities standards for all local court systems, POMEROY REPORT, supra note 189, at 63; (7) create a personnel system to ensure that supreme court staff are well-trained professionals, BECK REPORT, supra note 190, at 125; POMEROY Report, supra note 189, at 31; (8) make lower court administrators secondarily responsible to the Administrative Office of Pennsylvania Courts, BECK REPORT, supra note 190, at 70; (9) authorize a stronger, more independent judicial council, POMEROY REPORT, supra note 189, at 36-37; (10) appoint an ad hoc committee to review rules of administration and make recommendations, BECK REPORT, supra note 190, at 62; (11) promulgate rules and regulations to establish accounting methods for appropriated and unappropriated funds, POMEROY REPORT, supra note 189, at 63; BECK REPORT, supra note 190, at 125-26; and (12) make financial disclosure requirements for judges at least as full as comparable requirements imposed on other state employees, BECK REPORT, supra note 190, at 67, 188.
posed by either the Beck or Pomeroy commissions until all but forced to do so by the Larsen fiasco.\textsuperscript{192}

A principal thrust of these reports was to recommend formalizing, regularizing, and increasing the flow of information to, from, and within the supreme court.\textsuperscript{193} Nowhere was the need for such reform more obvious than with respect to the court's rules for handling allocatur petitions, rules which were largely unpublished and informal.\textsuperscript{194}

Pursuant to informal supreme court practice, allocatur petitions filed with the court were routinely sent to neighboring law schools, where part-time "allocatur clerks"—law school professors—would review the petitions and make recommendations.\textsuperscript{195} In Justice Larsen's case, his allocatur clerks were on the same faculty as a long-time friend and former full-time clerk.\textsuperscript{196} This former clerk, in addition to teaching law, affiliated himself with a law firm that had an active supreme court practice.\textsuperscript{197} There is no evidence to suggest that Justice Larsen's allocatur clerks communicated with the professor-practitioner about pending petitions of interest to the practitioner or the firm whose office space he shared. There is, nevertheless, an inescapable appearance problem created by a professor making recommendations on court petitions filed by a firm with which the professor's colleague is affiliated.

Under the supreme court's informal rules, a justice could participate in the allocatur process and influence the court to grant a petition on behalf of a friend or political contributor,\textsuperscript{198} only to recuse herself once the petition was granted.\textsuperscript{199} There are situations in which a justice's decision to participate in the allocatur process and recuse herself from the later appeal is perfectly innocent, as, for example, where the justice first becomes aware of a conflict of interest after the petition is granted. The critical flaw in the Pennsylvania Supreme Court's rules was that neither the public, the litigants, nor their lawyers were made aware of which justices participated in the allocatur process and which recused themselves.\textsuperscript{200} It was thus possible for a justice—such as

\textsuperscript{192} Interview with William Kent, Assistant Director, Democratic Legislative Development, Pennsylvania House Of Representatives (Mar. 3, 1995). The House Judiciary Committee's Subcommittee on Courts assembled a list of recommendations never implemented from, among others, the Beck and Pomeroy Reports; Mr. Kent, who assisted the subcommittee in compiling that list, confirmed that none of the recommendations directed at the supreme court had been fully implemented as of the subcommittee's first court reform hearing on July 14, 1994. \textit{Id.}

\textsuperscript{193} See \textit{supra} note 191 and accompanying text for a summary of the main recommendations.

\textsuperscript{194} \textit{Grand Jury Report, supra} note 29, at 246-47.

\textsuperscript{195} \textit{Id.} at 199.

\textsuperscript{196} \textit{House Report, supra} note 32, at 23-28.

\textsuperscript{197} \textit{Id.} at 24-25, 28.

\textsuperscript{198} Succeeding in obtaining such a grant is not an inconsiderable role to play, given that fewer than one in ten allocatur petitions are granted. \textit{Grand Jury Report, supra} note 29, at 198.

\textsuperscript{199} \textit{Impeachment Trial, supra} note 18, at 70 (Aug. 8, 1994) (testimony of Charles Johns).

\textsuperscript{200} \textit{Grand Jury Report, supra} note 29, at 247; \textit{Impeachment Trial, supra} note 18, at 100 (testimony of Charles Johns). The United States Supreme Court, in contrast, has listed the justices not participating in the resolution of petitions for certiorari. See \textit{John C. Jeffries, Jus-
Larsen—to manipulate the allocatur process without fear of outside detection.

In addition, individual justices could place "holds" on allocatur petitions, suspending their resolution for an indefinite period of time without the need for an explanation. This not only afforded a dishonorable justice an opportunity to manipulate the ebb and flow of supreme court litigation for improper purposes, but also made an honorable justice a potential target, in that others could impute improper motives to an innocent decision to place a given matter on hold.

The Pennsylvania Supreme Court finally addressed some of these gaps in its administration of the allocatur process. In October 1994, the court announced that it would revise the manner in which the court processed allocatur petitions. Among the changes adopted were (1) publishing internal operating procedures; (2) eliminating unlimited and unexplained "holds" on cases and allocatur petitions; (3) establishing a central case-tracking system for every matter filed with the court; (4) publishing the names of justices not participating in an allocatur decision; and (5) moving toward exclusive reliance upon internal staff (and away from outside allocatur clerks).

The point to underscore, however, is that it took nothing short of a constitutional crisis to prompt such meaningful change. Blue-ribbon commissions had come and gone with no apparent effect. Not until a supreme court justice—reprimanded for improper ex parte contacts, indicted on drug charges, and accused of case-fixing—had charged his brethren with misconduct ranging from bribery to attempted murder did the court begin in earnest to consider reforms. Even then, it is unclear if the court would have acted without the publication of the grand jury report, which laid much of the blame for the fiasco squarely upon the shoulders of an under-regulated supreme court and urged the court to take appropriate action.

In the end, the grand jury report recognized that the ultimate issue was one of accountability, noting that "[a]lthough we have not attempted to con-

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201. GRAND JURY REPORT, supra note 29, at 247.
202. FINAL REPORT AND RECOMMENDATIONS OF THE ALLOCATUR STUDY COMMITTEE (June 22, 1994).
203. ADMIN. OFFICE OF PA. COURTS, PRESS RELEASE 3-4 (Oct. 12, 1994) [hereinafter PRESS RELEASE].
204. Id.
206. PRESS RELEASE, supra note 203, at 3.
207. INTERNAL OPERATING PROCEDURES, supra note 205, § 6.
208. PRESS RELEASE, supra note 203, at 2-3.
210. GRAND JURY REPORT, supra note 29, at 246-49.
duct a comprehensive investigation of the Court, our investigation and the
findings reflected in this report lead us to conclude that part of the problems
or perceived problems are the result of a perceived lack of accountability."²¹¹
The grand jury report recommended term limits or shorter terms as a means
to restore accountability.²¹² Such measures would not serve the desired end.
As to term limits, it is difficult to understand how a judge not eligible for
reelection would be more accountable to her constituency than one who is.
Shorter terms, on the other hand, assume that the electorate can and will
ferret out incompetent or corrupt jurists. This is an unrealistic assumption
given the public's limited access to information—access limited by the
supreme court itself, pursuant to its exclusive authority over the judicial ad-
ministration and rule-making.²¹³

While accountability is clearly the problem, the solution lies in restoring
the balance of power between the judiciary and the General Assembly. That,
in turn, necessitates an amendment to article V, section 10 of the Penn-
sylvania Constitution that would give the General Assembly some form of
concurrent jurisdiction over court administration and procedure.²¹⁴ Then,
and only then, will there be a constitutional check in place sufficient to en-
sure competent judicial self-administration.²¹⁵

B. Credibility and Judicial Removal

As argued above, an insufficiently blended separation of powers in a tri-
branch system of government, such as that of Pennsylvania, is unhealthy. It
encourages isolation of the branches and facilitates over-concentration of
power in a single branch. There are at least two manifestations of this prob-
lem in the Larsen case. The first, as discussed in the preceding section, is that
such isolation invites a lack of accountability, which in turn invites under-
regulation and mismanagement.²¹⁶ The second, addressed here, is that with
isolation comes a lack of credibility, painfully illustrated by the supreme
court-dependent mechanisms employed to discipline and remove Justice Lar-
sen from office.

The Larsen saga showcased four distinct methods of judicial discipline
and removal in action, each of which resembles mechanisms in place in other

²¹¹ Id. at 248.
²¹² Id.
²¹³ See supra notes 173-81 and accompanying text for a discussion of the limited informa-
tion available to voters on judicial candidates.
²¹⁴ See supra notes 105-69 and accompanying text for a discussion of the extreme separa-
tion of powers in place under the Pennsylvania Constitution.
²¹⁵ In recommending constitutional reform to create concurrent jurisdiction of the judici-
ary and General Assembly over procedure and practice in the Pennsylvania courts, I do not go
as far as Professor Ledewitz, who proposes a constitutional amendment that would give the
supreme court no powers other than those "imposed by law," presumably meaning by the Gen-
eral Assembly. See Ledewitz, supra note 114, at 459 (proposing constitutional amendment limit-
ing supreme court's powers over judicial practice and procedure).
²¹⁶ See supra notes 173-215 and accompanying text for a discussion of the lack of account-
ability resulting from the separation of powers under the Pennsylvania Constitution.
states. Of those four, however, only two had been brought to bear in the 180 years preceding Justice Larsen's removal: discipline by the supreme court upon JIRB recommendation and removal by the trial court upon criminal conviction. These two mechanisms both make the supreme court the decision-maker of last resort and may therefore be characterized as supreme court-dependent mechanisms. A third mechanism, removal by the Court of Judicial Discipline, is a recent arrival to the Pennsylvania Constitution that emerged in response to the perceived failings of supreme court-dependent removal devices. It is not supreme court-dependent in cases in which the miscreant is a supreme court justice, but is intra-judicial in that the final appeal is heard by seven lower court judges chosen by lot. Fourth, and finally, is removal by impeachment and conviction, a mechanism within the exclusive province of the General Assembly.

1. Supreme Court-Dependent Removal Mechanisms

Given the extent to which the Pennsylvania Constitution isolates its judiciary by delegating to it alone the responsibility for regulating court operations, it is unsurprising that the mechanisms of choice for disciplining and removing judicial officers would likewise be supreme court-dependent. As argued below, however, such mechanisms are fatally flawed, at least in cases when the respondent judge is a supreme court justice.

There is an apparent, if not a real, conflict of interest created whenever supreme court justices, as decision-makers of last resort, discipline or remove a fellow jurist with whom they share a dais. The American Bar Association...
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tion Standards for Judicial Discipline allude to this problem with the admonition that disciplinary mechanisms must guard against "any appearance of favoritism that might arise due to personal ties between the responding judge and his colleagues on the court."223

Consider the general standards for judicial recusal from traditional litigation, and how the principles derived from those standards apply to a justice of the supreme court who must adjudicate a dispute between a fellow justice and the JIRB. Under the federal disqualification statute, a judge must recuse herself from any case in which a party is represented by the judge's former firm, if the judge was still affiliated with the firm at the time it took the case.224 The need for automatic disqualification in such cases is clear: by virtue of her past professional affiliation with the representatives of a party in a case before her, the judge had access to information that might color her judgment improperly.

The argument for disqualification seems even stronger when a judge is currently affiliated with a party in a case before her. It is therefore unsurprising that only three justices participated in the decision to adopt the JIRB's recommendation and publicly reprimand Justice Larsen.225 The justices who did participate, however, cannot be faulted for doing so. The Pennsylvania Constitution explicitly directed the supreme court to act upon JIRB recommendations arising out of investigations into the conduct of supreme court justices.226 Conventional litigation has no corollary. No statute or rule orders a judge to sit under circumstances in which another statute or rule requires her recusal.227 The constitution thus presented the


224. 28 U.S.C. § 455(b)(2) (1988). Many judges voluntarily recuse themselves from any case in which their former law firm represents a party. Interview with Senior Circuit Judge Thomas A. Clark (Jan. 12, 1995). See also JEFFRIES, supra note 200, at 277-78 (discussing Justice Powell's recusal practices, including his recusal from cases in which Hunton & Williams, his former firm, was party). Although the statute does not require recusal in all such instances, many judges nevertheless disqualify themselves pursuant to the general recusal standard, which states that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

225. See supra note 36 and accompanying text identifying the judges who did not participate in the decision to reprimand Justice Larsen.

226. PA. CONST. art. V, § 18(g), (h).

227. Courts do speak in terms of a judge's duty to sit, but it is a duty that ends where bias or conflict of interest begins. See, e.g., United States v. Bray, 546 F.2d 851, 857 (10th Cir. 1976) (noting obligation of judge "not to recuse himself when there is no reason to do so" and holding
justices of the Pennsylvania Supreme Court with a Hobson's choice: to decide Justice Larsen's case in the teeth of an obvious conflict of interest, or to disqualify themselves from deciding the case and thereby shirk their constitutional duty.

A second Hobson's choice followed naturally from the first for the justices who opted in favor of hearing the case: to find in favor of Justice Larsen, and be accused of doing so because he was their friend; or to find against him, and be accused of doing so because he was their enemy. To make matters worse, the supreme court controlled the appointment of a majority of the JIRB, which invited accusations that the court, or at least certain of its members, manipulated JIRB investigations.

Removal by the trial judge upon criminal conviction, like removal by the supreme court upon JIRB recommendation, requires the supreme court to serve as ultimate arbiter of a fellow justice's conduct, and to that extent suffers from the same infirmities. Moreover, it empowers a single inferior court judge to remove the highest-ranking judicial officer of the commonwealth and thereby, in effect, fire her boss. The implications of vesting a lower court judge with such power is pursued further in the next section.

2. Removal by the Court of Judicial Discipline

The depressing spectacle created by these two supreme court-dependent disciplinary mechanisms in action finally gave way to constitutional reform, borne of the recognition that the supreme court could not be the final judge of its own conduct and retain credibility. Pennsylvania voters thus abol-

that requisite allegations of prejudice had not been made); Rosen v. Sugarman, 357 F.2d 794, 797 (2d Cir. 1966) (noting that "there is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is"). The Pennsylvania Constitution, in contrast, directed justices to adjudicate disciplinary actions involving fellow justices in which there is an inevitable conflict of interest.

228. Justice Larsen, for example, accused Justices Zappala and Cappy of pursuing disciplinary action against Larsen as a means to "railroad[ ]" him, "for purposes relating to their own interests in seizing, exercising and retaining disproportionate power and control in the business and affairs of this court." GRAND JURY REPORT, supra note 29, at 167.

229. PA. CONST. art. V, § 18(a).

230. Justice Larsen accused Justices Cappy and Zappala of urging JIRB members "to make an adverse recommendation" against Justice Larsen; but for their interference, Justice Larsen concluded, "it is likely [he] would have been exonerated." GRAND JURY REPORT, supra note 29, at 100.

231. The Pennsylvania Supreme Court has not ruled on Justice Larsen's appeal from his criminal conviction, but only two justices participated in his earlier appeal from a lower court order denying his petition to stay Senate impeachment trial proceedings, and it can be assumed that the appeal of his criminal conviction will likewise be sparsely attended by members of the court. See Larsen v. Senate of Pa., 646 A.2d 694, 704 (Pa. Commw. Ct. 1994) (denying Larsen's request for preliminary injunction and holding that impeachment involves adjudication process in which courts have no power to intervene); see generally Frank Reeves, Justices Reject Larsen's Appeal/Former Justice Faces Impeachment Trial in Senate Tomorrow, PITTSBURGH POST-GAZETTE, June 12, 1994, at E1.

232. See supra note 62 and accompanying text for a brief discussion of the public perceptions resulting from Justice Larsen's removal from the court.
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ished the JIRB and created the Judicial Conduct Board and Court of Judicial Discipline.233

The new system addresses a number of the credibility problems inherent in supreme court-dependent approaches. First, the supreme court does not appoint a majority of the Judicial Conduct Board or the Court of Judicial Discipline; rather, the supreme court and the governor each appoint half of the membership of each body.234 Second, the Court of Judicial Discipline has more independence and power than its predecessor, the JIRB. It makes decisions, not recommendations.235 Moreover, its findings of fact may not be reversed on appeal unless "clearly erroneous," and the sanctions it imposes may not be set aside as long as they are "lawful."236 Third, and finally, an ad hoc panel of lower court judges—not the supreme court—hears appeals from decisions of the Court of Judicial Discipline in cases concerning supreme court justices.237

Commentators have praised this form of judicial removal precisely because it is independent of the supreme court, and thereby solves certain credibility problems associated with a system in which the supreme court disciplines and removes its own.238 On the other hand, what that system gains in credibility it loses in accountability by empowering lower court judges to remove high court judges.239

The constitution places ultimate responsibility for the health and well-being of the Pennsylvania judiciary upon the shoulders of the supreme court. It is therefore the supreme court's responsibility to supervise the lower courts. The new disciplinary scheme has given lower court judges, the supervisees, disciplinary power over supreme court justices, the supervisors. It is a power unencumbered by a corresponding responsibility for the consequences of its exercise. The constitution does not hold the lower courts accountable for the care and feeding of the judiciary. Nor do the voters.240 Put

233. See supra note 63 and accompanying text for a brief discussion of the creation of the Judicial Conduct Board and the Court of Judicial Discipline.

235. Id. § 18(b)(5).
236. Id. § 18(c)(2).
237. Id. § 18(c)(1).
238. See generally Rubin G. Cohn, Comparing the One- and Two-Tier Systems, 63 JUDICATURE 244, 248 (1979) (rejecting criticisms of two-tier system of judicial discipline and arguing that private informal reprimands, employed by unitary system, may be used in cases of flagrant judicial misconduct); Frank Greenberg, The Illinois "Two-Tier" Judicial Disciplinary System: Five Years and Counting, 54 CHI.-KENT L. REV. 69, 77 (1977) (indicating preference for Illinois' two-tier system of judicial discipline as it insulates judicial inquiry board and court commission from any significant degree of control by judicial, executive, and legislative branches of government).

239. Note that this criticism loses some force in cases involving the removal of lower court judges. In such cases the supreme court is the decision-maker of last resort, which is considerably less troubling, given that the constitution explicitly charges the supreme court with the responsibility to supervise the lower courts. PA. CONST. art. V, § 18(c)(i).

240. The sections of the Pennsylvania Constitution discussed previously in connection with the election and retention of supreme court justices apply with equal force to lower court judges.
another way, the lower court judges who review a Court of Judicial Discipline decision to remove a supreme court justice are accountable only to their consciences.

It may not seem like a bad thing for a judge to be accountable only to her conscience; it is, after all, at the heart of judicial independence. But the business of putting the highest-ranking judicial officer of a state on trial for misconduct in office, and removing her if guilty, is not merely a judicial act. It is a political act. The National Commission on Judicial Discipline and Removal, a group of federal legislators, state and federal judges, representatives of the executive branch, and assorted academics commissioned by federal statute to evaluate the federal impeachment process and its alternatives, underscored this point in its report:

[T]he process of judicial removal should remain political. To place removal of federal judges in the hands of a body less electorally responsible than Congress would shift the constitutional balance significantly in the direction of unaccountability. Moreover, as the framers recognized, impeachable offenses by government officials are by their nature political crimes, both because they involve breaches of the public trust and because they represent misuse of office . . . . Judging whether the public trust has been violated or the power granted by the people misused is fundamentally a political decision, one that should be made by officers who answer to the voters.241

One can quarrel with extending the Commission's analysis to intra-judicial removal of lower court judges at the state level, where the removal decision is arguably less "political" than "administrative."242 But the point is incontrovertible as it applies to the removal of a supreme court justice. When a supreme court justice is accused of misconduct, it is news because it concerns a high-ranking official in a position of state-wide public trust who may have violated that trust. Whether such a violation occurred, and if so whether the justice should be removed from office, are thus issues properly for the public to decide through their elected representatives.

See supra notes 173-81 and accompanying text for a discussion of the process of electing judges in Pennsylvania.


242. Indeed, the American Judicature Society quarreled with the Commission's conclusion as it applied to federal judges. The president stated:

With all due respect to the Commission, the American Judicature Society does not concur in the conclusion that there is a constitutional impediment to removal of federal judges by an alternative to impeachment. In addition based on the experience of the states we believe there is much to be gained from an appropriate alternative. Such alternatives have not proven to be a threat to judicial independence in the states and removal occurs only for egregious misconduct.

Hearings of the National Commission on Judicial Discipline & Removal 727 (June 24, 1993) (statement of Frances Zemans, President, American Judicature Society).
3. Removal upon Impeachment and Conviction

When all is said and done, impeachment in the House followed by conviction in the Senate remains the most satisfactory mechanism for removing high court judges, because of the intermingled separation of powers balance it preserves. Unlike judges, members of the General Assembly are directly accountable to the electorate in frequent elections. In his opening statement before the Senate Special Committee on Impeachment, Representative Frank Dermody, Chairman of the House Managers, emphasized this point:

Justice Larsen is not the only one on trial here today. You are on trial as well, each of you, your committee, your Senate. And just as you will try Justice Rolf Larsen, you will be tried [in] the court of public opinion, because what is at stake here is not only Justice Rolf Larsen but the integrity of our constitutional system of government.  

Counsel for Justice Larsen echoed Representative Dermody’s comments with his admonition to the Senate Committee that “[y]ou will reach the verdict [on] Justice Larsen; the court of public opinion and our children will render yours.”

Moreover, by virtue of its independence, the General Assembly is an inherently more credible decision-maker of last resort than an intra-judicial body, be it the supreme court or a panel of lower court judges. Individual legislators may be accused of harboring hidden or not so hidden agendas that call their credibility into question, but unlike the judiciary, the General Assembly has no institutional bias vis-a-vis removal or retention of a supreme court justice.

Removal by impeachment and conviction is a mechanism with flaws. After all, the impeachment and removal process is not just a political one, but a judicial one as well, and good legislators do not necessarily make good judges. Students of the state and federal impeachment processes have thus criticized those processes as unduly cumbersome; they have imputed ulterior motives upon participating legislators; they have questioned the capacity of the Senate to make reasoned rulings on the admissibility of

243. I Impeachment Trial, supra note 18, at 33 (Opening Statement of Representative Frank Dermody).

244. Id. (Opening Statement of William Costopoulos).


246. See generally Peg Brickley, Shooting Blanks, PITTSBURGH POST-GAZETTE June 12, 1994, at F1 (questioning motives of state legislature and method of examination used in impeachment case of Rolf Larsen).
evidence; and they have second-guessed the Senate's findings of fact in particular cases.

It is beyond the scope of this article to defend the impeachment process against its critics, an effort that has been ably undertaken by others. Suffice it to say that when the task is to determine whether a supreme court justice is fit to remain in office, the impeachment process alone entrusts that task to a credible and accountable decision-maker.

V. Conclusion

An independent judiciary is a good thing. Without it, fair and principled administration of justice is difficult, if not impossible. An unaccountable judiciary, on the other hand, is not a good thing. And when a state constitution, such as Pennsylvania's, isolates its judiciary by rendering its operations completely immune to legislative oversight, the line between independence and unaccountability is crossed. With the specter of legislative intervention altogether absent, a powerful incentive for vigilant judicial self-regulation is removed. An under-regulated judiciary is a natural, if not the inevitable, consequence. That, in turn, gives rise to inefficiency, mismanagement, and, in some cases, corruption. I do not quarrel with those who argue that the quality of the Pennsylvania judiciary would be much improved if judges were chosen on the basis of merit, rather than in partisan elections. But the state constitution must be amended to restore the balance of power between the judicial and legislative branches, by giving the General Assembly shared responsibility over judicial administration and rule-making, be it akin to that afforded the United States Congress over the operation of the federal judiciary or some other variation. Unless or until that is done, the Larsen saga could too easily repeat itself, with or without merit-based judicial selection.

Just as shared separation of powers is important to good judicial administration, so too is it important to judicial discipline and removal. Intra-judicial mechanisms may work well when it comes to disciplining and removing

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249. See Judicial Discipline Report, supra note 241, at 27-68 (1993) (discussing careful balance of powers in American impeachment process and need to retain impeachment procedure as means of removing officials who commit serious crime or breach public trust); Gerhardt, supra note 247, at 161-69 (defending absence of evidentiary rules in impeachment proceedings on basis that it is "extraordinary hearing"); Warren Grimes, Hundred-Ton Gun Control: Preserving Impeachment as the Exclusive Removal Mechanism for Federal Judges, 38 UCLA L. Rev. 1209, 1254 (1991) (arguing that workable impeachment remedy must be available as ultimate sanction for judicial discipline).
lower court judges. As far as removing a supreme court justice is concerned, however, such mechanisms are inherently flawed. If the supreme court is the decision-maker of last resort, any decision it renders as to the fate of a colleague will certainly raise questions about the court's credibility. If a panel of lower court judges hears the final appeal, unaccountable supervisees are empowered to remove their supervisor, which turns the judiciary's chain of command on its head and overlooks the intrinsically political nature of the removal.

In such cases, impeachment and conviction remain the only viable means of judicial removal, which simultaneously delegates the political act of removing a supreme court justice to politically accountable decision-makers and obviates credibility problems by delegating the removal decision to a separate branch of government that lacks an obvious personal stake in the outcome.