LAW DAY

Separation of Powers: Framework for Freedom

PHOTO ESSAY

Innovation In New York State Courts

Photographs by David Handschuh

With the alarming number of opioid overdose fatalities in the Bronx and throughout New York state, Chief Administrative Judge Lawrence K. Marks, in partnership with Bronx County District Attorney Darcel D. Clark, announced the launch in Bronx County Criminal Court of two specialized court parts that specifically target low-level offenders at high risk of overdose.

The first such drug courts in New York City, the Overdose Avoidance and Recovery (OAR) tracks, under the direction of Bronx County Criminal Court Supervising Judge George A. Grasso, offer intensive treatment in lieu of incarceration to misdemeanor offenders charged with criminal possession of a controlled substance in the seventh degree who are at high risk of overdose. Eligible offenders who complete the OAR program will have their cases dismissed and sealed, averting the collateral consequences of a potential conviction—a strong incentive for participation in this voluntary court initiative.

The Bronx program is the second such program established in the state. The earlier Opioid Intervention Court, opened in Buffalo last May, was the first of its kind in the nation.

George Grasso, above, supervising judge for Bronx Criminal Court, presides over the first case in the Overdose Avoidance and Recovery program at the Bronx County Criminal Court on Jan. 29. Bronx County District Attorney **Darcel Clark**, below, announces two new specialized drug courts in Bronx County Criminal Court on the same day.

Our Commitment To Excellence Helps Keep Our Judiciary Strong and Independent

Janet DiFiore
Chief Judge
State of New York

This year's Law Day theme, the "Separation of Powers: Framework for Freedom," invites us to reflect on the vital role of the courts in our democratic system of government. The founders of our nation established three separate branches of government in a unique power-sharing arrangement that requires each branch to serve as a check on the power of the others. Their careful calibration of balanced powers, intended to avoid tyranny and ensure liberty and freedom, has served our nation well from its inception. However, this proven formula for democracy will surely fail if any one of the branches of government is weakened at the expense of the others. And so there is cause for concern when we read about executive officials and legislators who engage in vitriolic personal attacks on judges in order to publicly malign and punish them for unpopular decisions. Michael Wines, "Judges Say Throw Out the Map. Lawmakers Say Throw Out the Judges," New York Times, Feb. 14, 2018. Of equal concern are legislative proposals pending in 16 states to diminish judicial independence by giving governors and legislators more power over judicial selection, authorizing legislatures to override court decisions on the constitutionality of statutes, and enacting retaliatory budget cuts. Brennan Center for Justice, Legislative Assaults on State Courts—2018.

As judges, lawyers and citizens who care about the vitality of our democracy, we must be vigilant in defending against unjust and irresponsible attacks that erode public confidence in the judiciary and impair its ability to serve as an independent check on overreach by the other branches. Judges, of course, are ethically prohibited from responding to criticism of their decisions under the Rules of Judicial Conduct. New York Code of Judicial Conduct, Rule 100.3(B)(8). They depend on their partners in the Bar to stand up for them so that they can continue to uphold the rule of law free of outside pressures and fear of retaliation. Fortunately, New York's judges have enjoyed the vigorous support of many statewide, local, ethnic and specialty bar associations (as well as many public officials) who understand the importance of keeping our judiciary strong and independent. Mark H. Alcott, "Defending Judges, Standing Up for the Rule of Law," NYSBA Journal, January 2018, pp. 20-24.

While judges may not be able to engage in the rough and tumble of political and civic debate, there is much that we can do to keep our branch of government strong and resilient. Even with all the issues dividing Americans today, we should all be able to agree on the need for fair, accessible and well-functioning courts. Indeed, that is the vision and objective of our Excellence Initiative in the New York State courts, which I announced as our top institutional priority upon assuming the position of Chief Judge in February 2016. The Excellence Initiative is focused, as a threshold matter, on improving the efficiency, timeliness and quality of justice services delivered by our courts. It seeks, ultimately, to promote excellence in all aspects of judicial decision-making. By delivering high-quality justice services that meet the modern-day needs and expectations of our litigants, the courts earn respect and credibility in the eyes our citizenry and our partner branches of government. When the public values the work of the judicial branch, we are far better able to withstand the inevitable criticism that comes with our role as the arbiter of society's most contentious disputes. By contrast, when we fail to meet core obligations, such as the delivery of timely, affordable justice, we become easy prey for demagogues who seek to subvert judicial independence for their own political ends.

As Chief Judge, the issue of public confidence is never far from my mind. On February 6th, I delivered the State of Our Judiciary Address and summarized the encouraging progress we are making to improve the fairness, efficiency and effectiveness of our entire

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Legislative Assaults On State Courts

2018 legislative trends that pose the a threat to the role or independence of the courts:

- Injecting Politics Into Judge Selection
- Politicizing Judicial Rulings, Discipline, or Court Rules
- Reducing Resources or Establishing More Political Control in Exchange For Resources
- Altering Judicial Term Lengths and Limits
- Protecting the Legislature From Court Rulings
- Changing Size of Courts

Source: Brennan Center for Justice

Working Together to Achieve Excellence

Lawrence K. Marks
Chief Administrative Judge
New York State
Unified Court System

Separation of powers is a doctrinal element of both the federal and New York state constitutions. Derived from principles espoused by Montesquieu, the 18th century French philosopher, the United States from its very inception has strongly embraced this doctrine. Essentially, governmental authority is divided into legislative, executive, and judicial powers, with each assigned responsibilities and functions so that no one branch is omnipotent. Separation of powers was designed to bind governmental authority by creating tension among the branches, with each limiting the others. Nevertheless, to accomplish important goals and necessary reforms, the three branches of government frequently must collaborate and support one another to be successful.

Responsible for administration of the court system, the New York State Judiciary's mission is to promote fair and efficient justice. Chief Judge Janet DiFiore has made this the singular focus of her Excellence Initiative. In striving for excellence, it is apparent that, yes, we are an independent government entity, but to achieve our goals we must receive support and assistance from the two other branches of government. Indeed, the Judiciary must foster and encourage cooperation among the three branches if we are to administer justice effectively.

Perhaps the leading example of the need for this collaborative exchange is the Judiciary's budget. Each year our branch of government drafts a comprehensive financial proposal, taking into consideration the fiscal climate of New York state at the time, and presents it to the Governor on December 1st for the upcoming fiscal year (beginning April 1st). In mid-January, the Governor transmits the Judiciary's budget proposal, with any comments he may have, to the Legislature, along with the Executive Branch's budget proposal. Representatives of the Judiciary then have extensive discussions in the ensuing weeks with members and staff of the Legislature and with Executive branch officials. This culminates in legislative enactment of a budget by the start of the fiscal year that meets the Judiciary's needs in fulfilling its mission and also fits properly within the overall fiscal plan for the state.

Juvenile justice reform is another example of the cooperative relationship among the three branches. For far too long, New York was one of only two states that treated all young people under the age of 18 as adults and processed them in criminal court for even the lowest-level crimes. For close to a decade, the Judiciary had been a strong advocate for raising the age of criminal responsibility in this state. Addressing this problem as best we could on our own, we created Adolescent Diversion Court Parts, designed to improve the criminal courts' treatment of 16- and 17-year-olds charged with non-violent offenses. Although this program yielded successes, it was not enough. We recognized that there was only so much we could do independently of the other two branches, and that the

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Inside

LAW DAY: Angela Turturro, Sections Editor
Monika Kozak, Design

Separation of Powers: A Tribute to My Father

Rolando T. Acosta

Presiding Justice
Appellate Division,
First Department

I honor my immigrant father by writing about the core principle that undergirds our democracy and preserves our liberty: the separation of powers. For him, the concept is not only theoretical, but personal. He has experienced how the balance of power anchors our freedoms, and how without it, we are lost.

You see, my father grew up under a dictatorship, which lasted more than 30 years. Unsurprisingly, after that dictatorship fell, the country did not suddenly become a model democracy. For years, the caprice of those in power continued to pass for justice, while each political party that won an election brought with it its own constitution. My father was one of the many unfortunate victims of the lack of strong democratic institutions—particularly an independent judiciary with the will to respond to the encroachment of the executive on the other branches of government. As the president of the country's powerful drivers' union, my father and his organization were responsible for disseminating information throughout the island in the pre-Internet era. As a result, he was jailed on several occasions around the time of the country's elections, his only "crime" being that he oversaw and facilitated the distribution of information that is essential for voters to make educated choices when electing their officials. He and countless others were jailed for exercising rights that many of us in the United States take for granted. So, for my father, the separation of powers was not a lofty concept taught in school; he knew it was a necessary ingredient to bring the dream of liberty and good government to fruition.

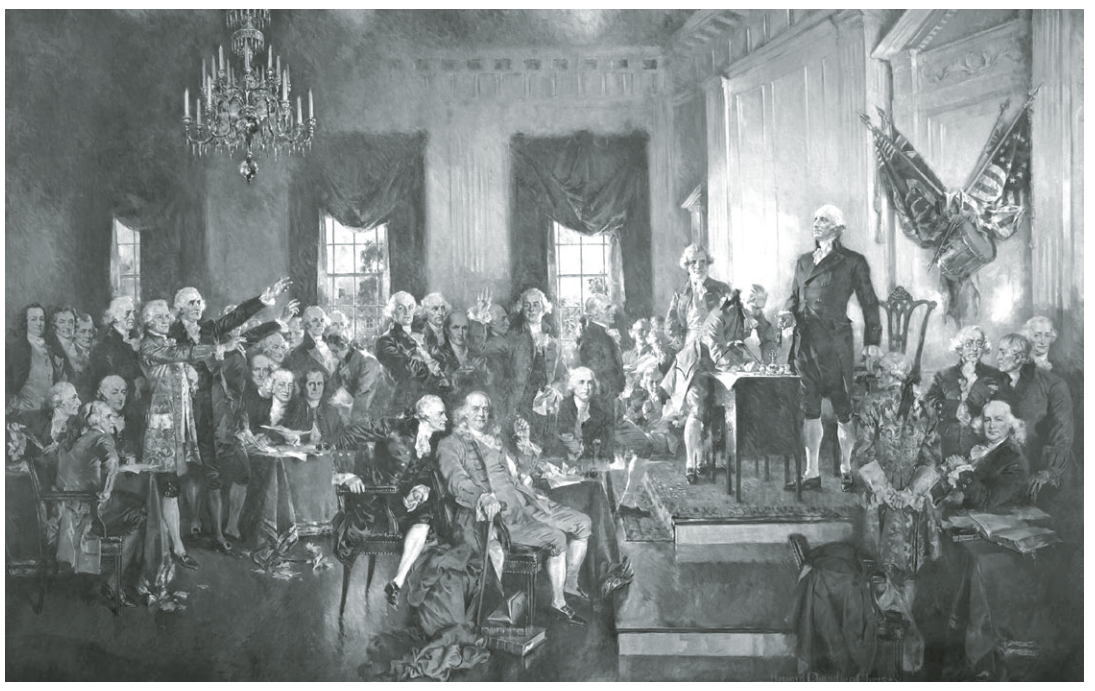
Our respect for the checks and balances enshrined in the U.S. Constitution is what has prevented tyranny from taking hold. As James Madison explained, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, … whether hereditary, self- appointed, or elective, may justly be pronounced the very definition of tyranny" (Madison, Federalist No. 47). Therefore, to have a functioning democracy, judges must be free from undue influence and pressure from the executive or legislative branches, as well as from private parties, economic interests, or politics (see Yash Vyas, "The Independence of the Judiciary: A Third World Perspective," 11 Third World Legal Studies 127, 133-34 (1992)).

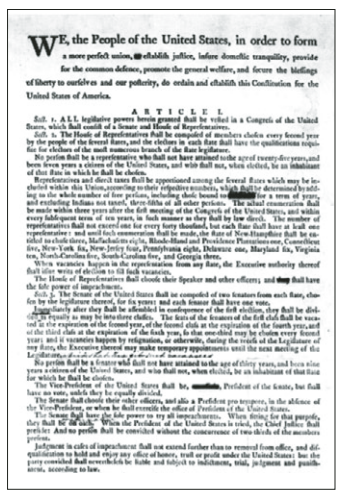
Of course, judicial independence does not mean a lack of accountability. Judges must be free even from their own prejudices (id. at 133), or at least be aware of those prejudices and recuse from cases where appropriate. Moreover, we are precluded from deciding legal questions based on our subjective feelings (id. at 135-36); we are bound by written law, precedent, and our oaths to uphold the Constitution and the rule of law. As Cardozo put it:

> [J]udges, even when [we are] free, [are] still not wholly free. [We are] not to innovate at pleasure … . [We are] to draw [our] inspiration from consecrated principles … . [We are] to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinate to the primordial necessity of order in the social life.

Benjamin N. Cardozo, The Nature of Judicial Process 141 (1921) (internal quotation marks omitted).

Thus, whereas judges must follow the law and, indeed, refrain from deciding questions necessarily left to "coordinate branches of government" (*Baker v. Carr*, 369 U.S. 186, 217 (1962)), so too must the legislative and executive branches respect » Page 12





LIBRARY OF CONGRESS

The Constitution, printed, with marginal notes by George Washington, Sept. 12, 1787, above. At left, Howard Chandler Christy's painting **"Scene at the Signing of the Constitution of the United States"** from 1940—one of the best known images in the U.S. Capitol. The painting depicts Independence Hall in Philadelphia on Sept. 17, 1787. George Washington is the most prominent figure.

"The United States Constitution sets out a system of national government with three branches—legislative (Congress), executive (President), and judicial (Supreme Court). The Constitution vests important functions in each of the branches, meaning it gives them separate, distinct powers. This separation of powers and the principle of checks and balances aim to prevent any branch from getting too powerful and becoming oppressive."

American Bar Association, Planning Guide, "Separation of Powers: Framework for Freedom," (Law Day 2018)

Separation of Powers: A Judicial Balancing Act

Elizabeth A. Garry

Presiding Justice
Appellate Division,
Third Department

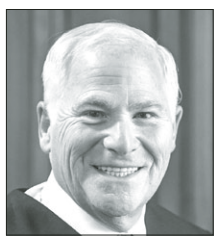
The Appellate Division, Third Department occupies a unique position among the three branches of our New York state government, both geographically and legally. Our courthouse is located in the Robert Abrams Building for Law and Justice in the Empire State Plaza, just across the street from the State Capitol, and next door to the Legislative Office Building, where members of the Assembly and Senate keep their Albany offices. Other Empire State Plaza neighbors include the Erastus Corning Tower and the Agency Buildings, housing various executive departments. We are thus quite literally surrounded by our counterparts in state government; this is further revealed in our considerable administrative law caseload, which consistently reveals the balance and interplay between the legislative, executive and judicial branches.

We are reminded of the wisdom and foresight of the individuals who crafted our system of government when we see the separation of powers at work in our courtroom. As the branches occasionally struggle with the scope of their respective powers, and as we in the courts work to uphold our judicial duties without encroaching on our legislative and executive colleagues, it is clear that checks and balances are as fully relevant and important today as they were at our nation's founding.

Administrative determinations are one of the primary ways that government affects the daily lives of our citizens. CPLR Article 78 proceedings challenging these determinations are commonly where we see the separation of powers in action. Our court hears cases challenging the disciplinary actions of public employers, the denial of government benefits, prison disciplinary proceedings, parole board determinations, tax assessments, professional discipline and license revocations, and zoning board determinations, among many others. The Third Department hears a particularly large volume of these cases because our region is home to so many government agencies; in addition to Article 78 proceedings, we have exclusive jurisdiction to review appeals from workers' compensation law (N.Y. Workers' Compensation Law §23) and unemployment insurance determinations (N.Y. Labor Law §624).

As the courts' role in CPLR Article 78 proceedings is intended to serve as a check—often on executive branch authority—our standard of review is highly deferential. In accord with the statute empowering us to review government actions, these cases may hinge upon whether "substantial evidence" supports a determination or whether it was "arbitrary and capricious," an "abuse of discretion," or lacking a rational basis. CPLR 7803. The Court of Appeals has generally explained that "rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard" (*Matter of Pell v. Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974)) and instructed that "where a determination is made and the person acting has not acted in excess of his jurisdiction, in violation of lawful procedure, arbitrarily, or in abuse of his discretionary power, including discretion as » Page 12

CPLR Article 78—Central to the Rule Of Law



Alan Scheinkman

Presiding Justice
Appellate Division,
Second Department

Aristotle is said to have observed: "It is more proper that law should govern than any one of the citizens." Aristotle's pronouncement may well have been the genesis of the Rule of Law, which may be distilled to the proposition that we are all governed by law, including the individuals who hold governmental positions. It is recognized in our current system of separation of powers by which our federal and state constitutions distribute power among three branches of government and provide mechanisms for each branch to check and balance exercises of power by the other branches. The judiciary is a check on both the executive and legislative branches but equally so those branches have their own check on the judiciary.

Among the means available to the judicial branch to curb excesses by the other branches of government, the one that comes most readily to mind is the power of the courts to authoritatively pronounce that a particular legislative enactment or executive action runs afoul of the Constitution or laws of New York. It is equally well known that the legislative and executive branches have the authority to overrule judicial constructions of legislation and to determine the budget of the judiciary and set the compensation of the judges. These are weighty and important issues that often garner media headlines and galvanize public attention. But in other ways, day in and day out, our courts play an important role in protecting the average person from the prospect of arbitrary governmental overreach. One such way is through the use of Article 78 of the Civil Practice Law and Rules.

The judiciary has the ability—and the responsibility—to review actions taken by officers or administrative agencies that are not amenable to resolution in a civil or criminal court proceeding. Absent judicial review, governmental agencies would have untrammeled authority to decide whether a person may engage in a particular occupation, keep his or her employment, or even drive a car. Traditionally, judicial review of agency action took the form of writs of mandamus to review and certiorari to review. Those writs, along with writs of prohibition and mandamus to compel, were codified in what is now CPLR Article 78, and those powers of review are now governed exclusively by Article 78. See CPLR 7801. Literally every day, counsel bring Article 78 proceedings to challenge governmental determinations and, by doing so, play an indispensable role in assuring adherence to the Rule of Law.

Proceedings under CPLR Article 78 often involve reviewing determinations of executive branch agencies, and thus operate as a check on executive power by the judicial branch. This check, however, has itself been limited by the legislative branch, which enacted Article 78 and retains the power to amend it. Because a court's exercise of authority under Article 78 can result in direct alteration of a determination made or discretionary act taken by a representative of another branch of government, the Legislature strictly limited the scope of the courts' review power. The court is permitted to consider only a limited set of questions, and the standard of review is highly deferential—a restriction which is a check on judicial overreach.

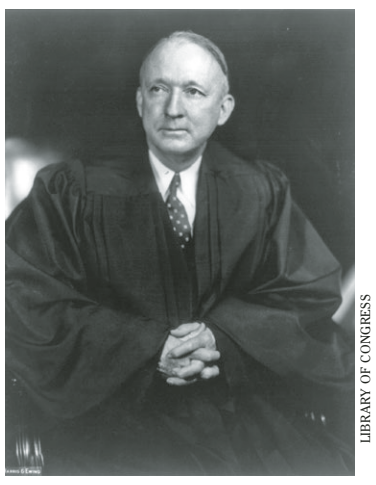
Specifically, in reviewing an administrative determination, the court may consider only whether the determination "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803(3). An arbitrary and capricious determination is one that "is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v. Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d 222, 231 (1974). Stated differently, such a determination lacks a "rational basis." Id. Where a determination was made after "a hearing held, and at which evidence was taken, pursuant to direction by law," the court may also consider whether the determination is supported by "substantial evidence." CPLR 7803(4). The Court of Appeals has defined "substantial evidence" as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 (1978).

These standards reflect the principle that the function of a court engaged in Article 78 review is not to determine whether the officer or agency determined the facts or exercised discretion in the same way the court would have, or applied the law in a way that would produce the result that the court would have reached. Rather, the court's task is essentially to determine whether the officer or agency was applying the law at all, and whether it based its determination on the facts, as opposed to acting for an impermissible reason, or for no reason (i.e., arbitrarily and capriciously).

The degree of judicial restraint required in Article 78 proceedings is occasionally challenging for judges, particularly Justices of the Appellate Division, who are accustomed to reviewing determinations made by other courts in the course of regular appellate review. On a direct appeal, Appellate Division Justices have the ability, and sometimes the obligation, to review factual findings, to exercise interest-of-justice jurisdiction, and to substitute their discretion for that of trial-level judges. None of that, however, is permissible when reviewing a determination by an officer or agency under Article 78. In such a case, the court's review of the facts is » Page 12

VETERANS HISTORY PROJECT COLLECTION

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION



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President **Harry S. Truman,** second photo from left, at his desk at the White House on Dec. 16, 1950, signing a proclamation declaring a national state of emergency in order to fight "Communist imperialism," a reference to Chinese forces fighting against U.S.-led UN forces in the Korean War.

At left, Supreme Court Justice **Hugo Black** in 1937.

Far left, staff Sergeant James Walsh with the 25th Infantry Division in **North Korea in 1951**.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) stemmed from the Korean War. President Harry Truman sent troops to aid South Korea without asking Congress for a declaration of war. With an increased demand for steel because of the war, steel prices rose, and the United Steel Workers of America threatened a strike unless wages also increased. Fearing disaster if steel production came to a halt, Truman ordered his Secretary of Commerce to take possession of and operate the steel mills to ensure the military effort in South Korea would not suffer.

The steel mill owners believed Truman's order was unconstitutional because it was not authorized by any law, and so the case landed before the U.S. Supreme Court. Truman argued that, as Commander in Chief, he had authority to seize and operate the mills. The majority opinion, authored by Justice Hugo Black, limited the President's power to seize private property without either specifically enumerated authority under Article Two of the U.S. Constitution or statutory authority conferred on him by Congress.

Protecting Our Country From Momentary Passions

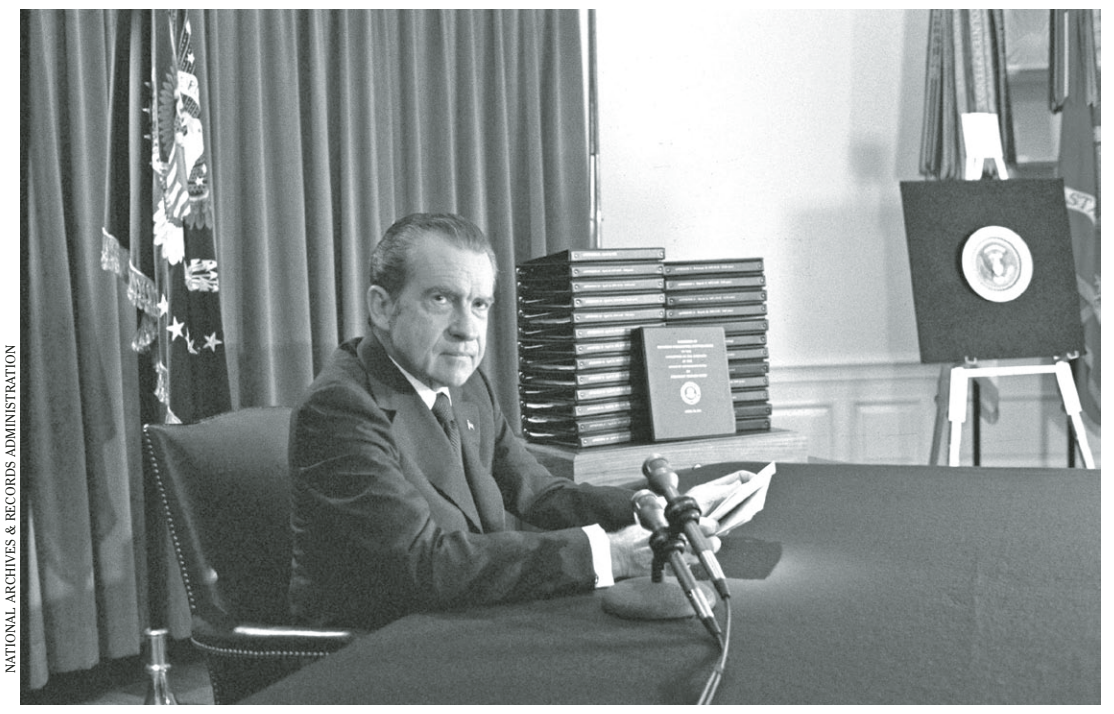
Gerald J. Whalen

Presiding Justice
Appellate Division,
Fourth Department

In a 1937 speech to the New York State Bar Association, then-Assistant Attorney General Robert H. Jackson offered a stark view of the Supreme Court's role in government. He posited that the judicial branch, with its "[u]nreasoning devotion to precedent" in ignorance of the realities of life, had created a "[g]overnment by litigation" in contravention of effective policy enforcement. Robert H. Jackson, Address Before the New York State Bar Association (New York, N.Y., Jan. 29, 1937). "Congress looks forward to results, the courts look backward to precedents, the President sees wrongs and remedies, the Courts look for limitations and express powers. The pattern requires the Court to go forward by looking backward." Id. Jackson's specific target that night was the monopolizing of the Court by the legal profession, with its penchant for technical legal patterns only attorneys can unravel. Jackson found that the conflict in philosophy between this staid legal thinking and expeditious political progress created a "struggle between every progressive administration in our history against the Federal bench." Id.

Jackson's rebuke that night of the "paralyzing complexity of government" (id.) unintentionally foreshadowed Franklin D. Roosevelt's attempt to change the personality, if not the functionality, of the court to an institution more supportive of his goals. Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt* 50-51 (Oxford University Press 2003). In his address introducing the so-called court-packing plan, Roosevelt pulled no punches in accusing the court of acting as a policy-making body, not a judicial one, by vetoing progressive social and economic legislation passed by Congress. Franklin D. Roosevelt, "Fireside Chat," March 9, 1937 (online by Gerhard Peters and John T. Woolley, The American Presidency Project). He framed the court's recent decisions as directly thwarting the will of the American people, specifically the voter-imposed mandate for Congress and the president to protect the nation against another economic depression. The court had become, in his opinion, an unbridled "super-legislature," one against which the nation was required to "take action to save the Constitution from the Court and the Court from itself." Id.

Roosevelt was not the first president to suggest a fundamental conflict between the court's power of review and the political principles of a representative government. Lincoln opined in his first inaugural address that "if the policy of the government, upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, … the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal." » Page 12



NATIONAL ARCHIVES & RECORDS ADMINISTRATION

In 1974, President Richard Nixon, in a letter to Senate Watergate committee chairman Sam J. Ervin Jr., outright refused to produce any of the documents subpoenaed by the committee, calling the request "'an overt attempt to intrude into the executive office to a degree that constitutes an unconstitutional usurpation of power.'"

To comply with the three subpoenas, Nixon told Ervin, "would unquestionably destroy any vestige of confidentiality of Presidential communications, thereby irreparably impairing the constitutional function of the office of the Presidency. Neither the judiciary nor the Congress could survive a similar power asserted by the executive branch to rummage through their files and confidential processes."

Paul Healy, "Nixon Refuses to Give Tapes to Ervin Panel," Daily News (Jan. 5, 1974)

NY DAILY NEWS

New York Daily News article on the **Watergate scandal** in 1974, above.

President Nixon, at left, announces he would release more Watergate tapes during broadcast of his address to the Nation on April 29, 1974.

Democratic National Committee headquarters at Watergate Complex in Washington, D.C., below.

WIKIMEDIA

Ensure That All Understand the Importance of an Independent Judiciary

Sharon Stern Gerstman

President
New York State
Bar Association

Most lawyers have a limited need to consult the five articles of the U.S. Constitution, and probably have not done so since attending law school. Most of the cases involving constitutional law invoke rights and responsibilities under the amendments, primarily the Bill of Rights and the 14th Amendment.

The actual body of the Constitution sets out the framework of our government. Each article addresses a different branch of government—how it is constituted and what powers are allotted to it. Article I addresses the legislative branch, Article II addresses the executive branch, Article III addresses the judicial branch, and Article IV addresses the rights reserved to each state and addresses how the states interrelate with each other. Article V sets out the process to amend the Constitution.

Our brilliant founding fathers constructed a federalist government, with a strong central government, and individual state governments. The central government is carefully constructed to separate the powers of each branch, but to allow each to exercise checks on the others' powers. If you are still reading, you might be asking why I am reteaching what we all learned in fifth-grade civics? The American Bar Association's theme for Law Day this year is Separation of Powers: Framework for Freedom. It is a subject we have probably not thought about much since that fifth-grade class, and unless any of us is a constitutional scholar, probably not much with a lawyer's brain. So why did the ABA pick this subject, this year?

I can only surmise that the ABA chose this theme because there has been a slow erosion of the separation of powers, probably because so many of our citizens and even our leaders do not appreciate its importance as the foundation of our democracy. As lawyers, we are keenly aware of the erosion of the power of the judicial branch by many factors.

First, the judiciary is under economic attack. The judiciary depends upon the executive and legislative branches for funding. We have often seen the executive and legislative branches attack the judiciary's budget requests. This includes the criticism of judicial salaries—it shouldn't have to be the case that the best lawyers must be willing to take large pay cuts to be judges of the Court of Appeals.

It includes the cutbacks to support personnel, so essential in New York where the number of judges may be limited by the New York State Constitution. It includes restriction of overtime, so that an expert witness on the stand has to come back the next day, at great cost to the litigants, rather than allowing extended hours to accommodate his or her testimony.

Second, the legislative and executive branches consistently criticize the judiciary for the checks and balances they are called upon to exercise—ensuring that the legislative and executive branches stay » Page 12

SHARON STERN GERSTMAN *is counsel to Magavern Magavern Grimm in Buffalo.*

DiFiore

« Continued from page 9

court system. Among the many reforms I highlighted was a new rule, recommended by the New York State Justice Task Force, that is strengthening due process and preventing wrongful convictions by requiring judges presiding over criminal trials to issue standing orders advising prosecutors and defense counsel of their professional responsibilities to disclose exculpatory evidence and provide constitutionally effective assistance of counsel. In upstate counties where the presence of counsel at first appearance has not always been easy to achieve, we are implementing new off-hour and weekend arraignment parts to ensure the provision of constitutionally guaranteed legal representation. And in our high-volume New York City criminal courts, a pilot program involving the increased use of Superior Court Informations is expediting the resolution of felony cases and reducing backlogs.

In response to the tragic opioid crisis ravaging our communities, we have opened the Opioid Intervention Court—the first of its kind in the nation—in the City of Buffalo. In collaboration with the District Attorney, the defense bar and the treatment community, prosecution is suspended in order to provide charged offenders at high risk of overdose with immediate, intensive treatment. The early results—only two overdose deaths among 250 participants in less than a year—have attracted the close attention of policymakers and state court systems all around the country. Timothy Williams, "This Judge Has a Mission: Keep Defendants Alive," New York Times, Jan. 3, 2018. This new approach, which we are quickly expanding to New York City, recognizes that the devastatingly addictive qualities of opioids demands early court intervention, aggressive treatment and close interagency collaboration. Andrew Denney, "New Bronx Opioid Treatment Court Looks to Help Addicts Kick their Addictions," New York Law Journal, Jan. 29, 2018.

With regard to families and children, we are in the midst of implementing historic "Raise the Age" legislation that will enable the vast majority of 16- and 17-year old offenders to have their cases adjudicated in Family Court, where they will have access to rehabilitative options shown to reduce recidivism and help young people get on track for productive, law-abiding lives. And our New York City Family Court (with over 200,000 new case filings each year) recently became the largest paperless court in the state. The smart use of technology is improving public access to the court's services, helping us manage our massive docket more efficiently and supporting the complex, substantive work performed by our Family Court Judges. Janet DiFiore, "Going Paperless: The New York City Family Court," New York State Bar Journal, March/April 2018.

We are also following through on the recommendations of the Special Commission on the Future of the New York City Housing Court to transform the litigation experience in one of the busiest, most overburdened courts in the nation. At a time when homelessness has reached historic highs in New York City, we are overhauling Housing Court operations to improve efficiency and litigant services, and adopting new procedures to promote the legislative intent of the Universal Access to Legal Services Law, which is designed to provide legal assistance to low-income tenants facing eviction.

In our civil courts, we are piloting new programs to streamline litigation and promote early case settlements, and exploring whether to adopt innovative reforms that have improved the litigation experience in the Commercial Division. In our Surrogate's Courts, which provide important services to the public, we have adopted a new case management system to improve efficiency and will soon introduce standards and goals to better measure court performance.

Finally, because the structure of the courts as set forth in the New York State Constitution is so outdated and fragmented that it prevents us from properly and efficiently managing our people and resources, we have re-convened our Judicial Task Force on the New York State Constitution and asked it to consider possible amendments to the Judiciary Article of the State Constitution that will enable us to serve the public in more efficient and cost-effective ways.

These few brief highlights of our extensive commitment to reform and innovation in the New York state courts show how hard we are working to deliver fair, smart and cost-effective justice outcomes that make a positive difference in the lives of the litigants who appear before us. I believe that our constant pursuit of excellence in the delivery of justice will earn for us the credibility we need to carry out our constitutional duties as a strong, equal, independent and non-political branch of government. As Americans, we are fortunate to live in a nation where the enormous power of our government has been dispersed and balanced in such a way as to foster the freedom, equity and opportunity we need to pursue our dreams, do good works and distinguish ourselves as individuals. However, this ingenious "framework for freedom" is not self-executing or self-sustaining. It requires every one of us who has committed our professional lives to the law to be vigilant in defending judicial independence and to work earnestly to promote fair and effective justice institutions that are valued by the public.

Acosta

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the Constitution, the rule of law, and the province of the courts. The alternative would inevitably lead to the rights of the people being trampled.

Growing up, my father's stories always seemed unreal and impossible, even though I experienced some of them until I was 14 and immigrated to the United States. His experience is in stark contrast to America's wonderful (albeit imperfect) experiment in democracy, where strong democratic institutions check one another's power, and where an independent judiciary answers to fundamental principles of justice, not to despots. How could anything seriously threaten to dismantle the magnificent architecture of checks and balances established in our federal and state constitutions?

I once believed that the bedrock principle of separation of powers was so integral to our culture that we no longer had to worry about structural frailties like those of developing democracies. But as we are increasingly faced with a loss of respect for fundamental values, facts, truth, reason, and the rule of law, I am no longer so sanguine. As judges, we take no position on public policy issues that are the source of vigorous debate in today's society. For example, we have no official position on immigration or health care policies. But the rule of law is not a partisan issue, nor are the core constitutional principles that ensure debate on those policies and support the administration of justice. We must insist on fundamental respect for our laws and the people they protect. Indeed, our wonderful experiment is only viable or workable in an environment of mutual respect and the protection of individual rights, which is no less important when those rights belong to those of a different national origin or persons we fear to be "foreign."

My father is 96 now, and I cannot help but think that the America he longed for, and the dream that he made into a reality for his family, is in jeopardy. We are being tested, to be sure. But while my confidence in the "unshakable" pillars of our democracy is shaken, I believe there is reason to hope that this too shall pass. For example, according to a 2017 survey by the Pew Research Center, 83 percent of respondents said that it is "very important" to have "a system of checks and balances dividing power between the President, Congress, and the courts" to maintain a strong democracy (Pew Research Center, Report, *Large Majorities See Checks and Balances, Right to Protest as Essential for Democracy* at 9 (March 2, 2017).

So, as we celebrate Law Day and contemplate the doctrine that forms the very foundation of our government, let us commit to doing our best, as lawyers and judges, to restore our fellow citizens' trust in our core institutions. For if we truly value the separation of powers as vital to the preservation of liberty, our democracy will endure, and my grandchildren will be fortunate enough to grow up, like my children and I have, in a nation where power is not consolidated in the hands of the few, or in one branch of government.

Whalen

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John Nicolay and John Hay, eds, *Abraham Lincoln: Collected Works*, vol. 2, 5 (New York 1894). The presidents perceived a more effective government would result from a court that acted in harmony with the presidential administration, in other words, as an institution subject to the political system, not superior to it. Mario M. Cuomo, *Why Lincoln Matters* 149 (Harcourt, 2004).

The frustration of the executive branch is understandable. The president, under a term limit, sets out to achieve the change promised during the campaign, and the effectiveness of any administration is often measured by the speed with which such goals are effected. Jackson's 1937 speech expressly criticized the machinations of the court as preventing the political compromise necessary to make real progress. The assertion that the court's exercise of its judicial power of review is antithetical to our democratic process, however, is unsupportable. Alexander Hamilton explained that the court's power of review does not "suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former." Alexander Hamilton, Federalist No. 78 (The Heritage Press ed. 1945).

The judicial branch therefore does not act in contravention of the separation of powers or the ability of Congress and the president to effect the will of the people. The Constitution is the will of the people, and unless and until the people act to change its provisions, "it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge, of their sentiments, can warrant their representatives in a departure from it." Id. Thus, contrary to the assertions of Roosevelt and Lincoln, it cannot be posited "that the Constitution could intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority." Id.

Further, the tension between political expediency and judicial review complained of by Roosevelt is by no means an unintentional by-product of our tripartite Constitutional system; rather, the founders expressly intended this balance. What is criticized as inefficiency reflects a purposeful fractionalized design intended to ensure additional security to the rights of all. James Madison, Federalist No. 51 (The Heritage Press ed. 1945). If the executive branch steams forward to implement the common interest of the majority, the judiciary reflects whether the rights of the minority will remain secure. Id.

An effective judiciary therefore requires a steadfast resistance to executive overreach in order to protect, not negate, the will of the people. Almost 20 years after his speech to the New York State Bar Association, Justice Jackson advocated for such resistance through an independent judiciary and supporting legal community. He emphasized a truth that has not changed since the Constitution's creation, that "[i]t is the nature of power always to resist and evade restraints by law, just as it is the essential nature of law, as we know it, always to curb power." Robert H. Jackson, The American Bar Center: A Testimony to Our Faith in the Rule of Law, 40 A.B.A.J. 19, 22 (1954). Although he did not divert from his belief that the law is a living doctrine, not one closed to the realities of life, this time Justice Jackson recognized the beneficial contribution of legal philosophy to ensuring that all three government branches conduct themselves with the knowledge that they operate under, not above, the law.

The importance of judicial independence to our society cannot be overstated. Circumstances will inevitably present themselves, such as those that prompted Lincoln to ask whether the integrity of one law should be permitted to threaten the whole Union (John Nicolay and John Hay, eds., *Abraham Lincoln: Collected Works*, vol. 2, 60 (New York 1894)), that tempt the momentary yielding of our founding principles to a claimed greater good. The bulwark of a strong and independent judiciary is necessary to protect our country against such momentary passions—compelling though they may be—for if we fail in that, we lose our very foundation.

Garry

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to the penalty imposed, the courts have no alternative but to confirm his [or her] determination." Id.

We are not to substitute our judgment for that of the agency decision maker "unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." Id. at 232 (internal quotations and citations omitted). We may not look beyond the grounds stated in the determination (*Parkmed Assoc. v. New York State Tax Com'n*, 60 N.Y.2d 935, 936 (1983)), and administrative hearings are not held to the same rules of evidence that would apply in court (*Sowa v. Looney*, 23 N.Y.2d 329, 333 (1968)). The Court of Appeals has expressly rejected the "legal residuum rule and the doctrine … that annulment was in order where the agency's findings were such that a jury's verdict to the same effect would be set aside by the court as against the weight of evidence." *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 N.Y.2d 176, 180 n.* (1978).

As a result, it may appear that we review the decisions of our judicial colleagues working in trial courts more closely than those of administrative law judges and other non-judicial government actors who apply and interpret laws and regulations. This is so because, unlike our review of judicial action, our review of administrative action is a statutory exception to the general rule that the branches of government will not interfere with one another. The Court of Appeals has noted, for instance, that "'this grant of power must be reasonably construed in the light of the settled principles governing the relationship between the courts and the administrative agencies'," (*Matter of Pell*, 34 N.Y.2d at 232–33 quoting *Stolz v. Bd. of Regents of Univ.*, 4 A.D.2d 361, 364 (3d Dept. 1957)) and our highly deferential standards of review have evolved accordingly.

This can be a difficult balancing act. In these cases, individuals may be facing serious discipline, losing their livelihoods due to a professional license revocation or being denied access to medical care or other government benefits. In some of the cases we review, we might have reached a different determination than that of the administrative decision maker if the initial decision had been ours to make. On one hand, the Legislature intended that we "ameliorate harsh impositions of sanctions by administrative agencies" and "accomplish what a sense of justice would dictate," but on the other hand, we must respect the principle that "it is the agency and not the courts which, before the public, must justify the integrity and efficiency of their operations." *Matter of Pell*, 34 N.Y.2d at 235.

In seeking this balance, we are continually exploring and occasionally redefining the boundaries of our deference, and it is a challenging area of law. The agencies act, and we in the judicial branch review, their actions within the framework set forth by the Legislature; the evolution of our decisions in this area of law vividly reveals the separation of powers at work.

This same principle applies when we are asked to review an issue more appropriately suited for action by the Legislature. Even where the legislative branch has declined to act, principles of justiciability may prevent us from acting in their stead. As an example, earlier this year I wrote a decision in a case where our court was asked to direct the State Board of Elections to rescind an opinion treating LLCs as persons for the purpose of determining campaign contribution limits. *Matter of Brennan Ctr. for Justice at NYU School of Law v. New York State Bd. of Elections*, – A.D.3d –, 2018 NY Slip Op 02227 (3d Dept. 2018).

This is undeniably an issue of great importance, as presented by petitioners. Nonetheless, the majority held that we could not reach and address petitioners' request—because to do so would violate the separation of powers. We held that the issue posed was not appropriate for judicial resolution because it was an action that must be left to the Legislature, which had conferred authority upon the Board to render this determination.

This is just one very recent example of the practical implications of the separation of powers set forth in the constitutions of the United States and the state of New York. Of course, our system of government was designed this way because it is ultimately within the power of the people to elect a legislature that will address any matter the current body is unable or unwilling to grapple with. Even when there is a void, or potential inaction, the constitutional separation of powers may operate to prevent other partners in government from stepping in to take charge.

Gerstman

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within their constitutional powers. Every time a judge sets aside an executive order or a piece of legislation, he or she is criticized not only for the wisdom of the decision made, but for daring to challenge the executive or legislative authority. Pasted with the label "activist judge" or "so-called judge," the pressure upon the judge must take its toll.

Third, the influence of the political process upon the selection of the members of the judiciary limits the independence of the judiciary. It is difficult for judges not to worry about pleasing the political leaders who hold their advancement or re-election or reappointment in their control. Even judges appointed for life feel the tug of pleasing the political leaders who were responsible for the appointment or election (see *Bush v. Gore*).

All of these factors have a distinct effect on the independence of the judiciary. As lawyers, this concerns us, but does the average citizen care? Wouldn't it be enlightening, if we could imagine a government without an independent judiciary, sort of like our own take on "It's a Wonderful Life," to show Americans what it would be like if the Constitution didn't set up the judicial branch to be separate and independent with strong powers?

We might first show our judges, like those in some other countries, removed or jailed for positions antithetical to the political leaders. We might show the logical next steps, where those with political power or allies with power can commit crimes without fear of consequence; where average citizens have no power to enforce rights; where courts are for pomp and show, leaving the real power to police who can jail and strongmen who can steal.

We might show that when the judiciary is no longer independent, and has no power, the legislature will soon follow, leaving all power in the hands of a despot who can control all without any checks or balances from the legislature or the judiciary or from the citizens who are oblivious to what has happened. Like Bedford Falls without George Bailey, it would be a pretty grim America to live in.

As lawyers, we know how important an independent judiciary is. On this Law Day, let's make sure our fellow citizens understand it, too.

Marks

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ultimate solution was legislative reform. Last year, the Governor and the Legislature agreed. Through two phases, to be fully implemented by October 2019, 16- and 17-year-olds charged with misdemeanors and most felonies will be adjudicated in Family Court, where no criminal record will result, and where they will be connected with much needed programs and services.

Another area in which we have made significant strides by working with the Executive and Legislative branches is the establishment of centralized arraignment court parts. A long-standing criticism of our town and village courts is that many off-hours arraignments are held without a defense attorney present in these important proceedings—in clear violation of constitutional requirements. The necessity to conduct off-hours arraignments in these courts results from the lack of overnight holding facilities in less populous jurisdictions, and the absence of defense counsel results from insufficient staffing to cover proceedings throughout the night in a given county's multiple Justice Courts. We came up with a proposed solution, but it required changes in several areas of the law—the Judiciary Law, Criminal Procedure Law, and the Uniform Justice Court Act. By authorizing a centralized arraignment part in counties throughout the state, individuals arrested anywhere in the county may be arraigned, with defense counsel present, in a single convenient location. This greatly reduces unnecessary delays and realizes significant savings to localities, all while meeting constitutional mandates.

The Judiciary has spent nearly a decade working closely with the Executive and Legislative branches to safeguard against wrongful convictions. These miscarriages of justice represent the worst possible result in our criminal justice system. To address these grave injustices, the Judiciary created the New York State Justice Task Force to examine the causes of wrongful convictions and to recommend changes and safeguards for the criminal justice system to adopt. The Task Force includes representatives from all parts of the criminal justice system—judges, prosecutors, defense attorneys, members of law enforcement, legislators, Executive branch officials, forensic experts, victim advocates, and legal scholars. The Task Force's efforts have spurred the Governor and the Legislature to adopt a wide range of statutory reforms, including the expansion of the state DNA database, increased defense access to DNA testing, mandated videotaping of interrogations in the most serious cases, and safeguards for identification procedures.

These are just a few examples of how the Judiciary has effectively collaborated with the other branches of government to improve the administration of justice in New York. Although we can draw satisfaction from these accomplishments, further collaboration will be necessary to fully achieve the goals of the Chief Judge's Excellence Initiative. In the future, we will focus our attention on other areas in need of reform, including bail and criminal discovery. Where the Judiciary determines that executive and legislative support are needed, we will continue to strive to work together with our partner branches of state government so that we can ensure the highest quality of justice that the public deserves. In the framework of our government, we recognize that excellence is best achieved with the cooperation and combined efforts of each branch.

Scheinkman

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limited to ascertaining whether the determination was supported by substantial evidence, and in assessing discretionary decisions, the Appellate Division is subject to the same limitations as the Court of Appeals, in that such a decision may be disturbed only if it constituted an abuse of discretion as a matter of law.

These limitations have received special emphasis from the Court of Appeals in cases involving the imposition of discipline or penalties. In 1974, the Court of Appeals held that a sanction imposed by an agency or employer may be set aside by a court under Article 78 only if the punishment is "so disproportionate to the offense, in the light of all the ci rcumstances, as to be shocking to one's sense of fairness." *Matter of Pell*, 34 N.Y.2d at 233 (internal quotation marks omitted). Since then, the Court of Appeals has consistently held that an administrative sanction "must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law," and "the Appellate Division lacks any discretionary authority or interest of justice jurisdiction in reviewing the penalty." *Matter of Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). Earlier this year, the court once again reminded the judiciary that a court may not annul a disciplinary measure taken against an employee if that measure is not "irrational" and does not "shock the conscience," and that the Appellate Division "exceed[s] its authority" when it "reweigh[s] the evidence and substitut[es] its judgment for that of the hearing officer." *Matter of Bolt v. New York City Dept. of Educ.*, 30 N.Y.3d 1065 (2018). These holdings reflect the court's recognition that "'it is the agency and not the courts which, before the public, must justify the integrity and efficiency of [its] operations.'" Id. at 1072 (Rivera, J., concurring), quoting *Matter of Pell*, 34 N.Y.2d at 235.

CPLR Article 78 represents a careful balancing of the powers of different branches of our government. By strictly adhering to the proper standards of review, the courts avoid interfering with the legitimate prerogatives of other governmental entities, while still fulfilling their role in enforcing the Rule of Law by ensuring that those entities do not abuse their power by wielding it in an arbitrary or unjust manner. Through the litigation and determination of Article 78 proceedings, we all play our part in preserving the Rule of Law.