

**Erie County Bar Association Law Day Luncheon  
Separation of Powers  
The Honorable Lawrence J. Vilardo  
May 1, 2018**

Before I begin, let me congratulate all our well-deserving award winners who remind us what Law Day is about. They live what is the very best about America, and they make me proud to be an American.

In that light, please permit me a couple personal indulgences. First, Denise Daniels is and has been for many years a shining star at the courthouse where I now work and where I once practiced. She can run a courtroom so smoothly that sometimes you forget she's there. But she is always there—working competently, efficiently, and fairly.

Second, I can't tell you how terrifying it is to give a talk on separation of powers in front of the professor who was the first to teach me about that subject in any depth. Dr. Peter Galie was the chair of the Canisius College Political Science department when I was a Political Science major and the professor from whom I took more than half the courses I needed to fulfill that major. Dr. Galie has promised not to grade my performance today, so at least that pressure is off. But if you'd like a critique afterwards, I'm sure he will give it to you.

In 1935, just four years before World War II would begin and with fascism on the rise in Europe, American author Sinclair Lewis wrote a book entitled *It Can't Happen Here*. The novel tells the story of Buzz Windrip, a charismatic populist politician who becomes president and then turns our country into a dictatorship—incarcerating political

enemies, eliminating powers of Congress, enlisting judges to preside over courts that simply do his bidding, and using paramilitary recruits to enforce it all.

Given what was happening and had happened in Germany, in Spain, in Italy, in the Soviet Union, and elsewhere in 1935, that must have been a truly frightening story for Americans to consider. But I'm here to tell you today that the book's title—despite Mr. Lewis's intentions—is really not satirical or ironic; rather, it's largely true. It didn't happen here and it can't happen here—at least as long as the branches of our government maintain their legitimacy. And the reason for that is today's Law Day theme: Separation of Powers.

Now we all learned about separation of powers—and its first cousin, checks and balances—in our eighth grade or high school civics classes. Congress has legislative power—the power to make laws. The president has executive power—the power to enforce laws. And the courts have judicial power—the power to interpret laws and the Constitution, and to punish violations of the law.

Each branch checks the power of the other two. The president can veto laws passed by congress and call special sessions of congress; the president also nominates judges and can pardon those convicted by our courts. Congress can impeach, convict, and remove from office the president or any judge. Congress can override presidential vetoes by a super majority. It advises on, and consents to, judicial and other executive appointments. Perhaps most powerfully, congress decides whether to appropriate funds necessary to run the courts and implement executive programs. The courts decide what the laws passed by congress mean and whether they meet the constraints in the Constitution. And they do the same for executive actions.

The reason behind separation of powers with its checks and balances is simple and all but obvious. Putting too much power in one person—or even one group of people—is dangerous. In the Federalist papers—Federalist 51—James Madison wrote this: "but the great security against the gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist the encroachment of the others . . . . It may be a reflection on human nature that such devices should be necessary to control the abuses of government. But what is government itself but the greatest of all reflections on human nature?"

We learned all that in grammar school and high school. In college, my understanding of all this went a level deeper as I learned about the protections we have against what Dr. Galie called "the tyranny of the majority." Our government is not a pure democracy; if it were, then the wishes and interests of the majority might well completely subjugate the minority. But the Constitution and its Bill of Rights protect against that. And the appointment of independent judges with lifetime tenure to enforce the Constitution—and to protect those rights—guards against both a dictatorship of one and a dictatorship of many.

In law school, that message went deeper still when I learned about the most famous footnote in jurisprudence—Carolene Products footnote four—in which Justice Harlan Stone recognized that statutes passed by our elected leaders deserved deference but suggested that there might be certain "discrete and insular minorities" unable to protect themselves who might need the protection of the courts against majority tyranny and for whom a higher level of scrutiny might apply.

The bottom line is that our Constitution protects us from it happening here. Our system of government prevents too much power being placed in the hands of any one person or any one group. And if any person or group tries to expand its power beyond the constitutionally appropriate limits, there are ways to correct and stop it.

Over the years, some have attempted to do an end run around separation of powers and checks and balances. Perhaps most famously, when the Supreme Court blocked Franklin Roosevelt's New Deal programs designed to lift our country from the Great Depression, Roosevelt proposed a simple solution: appointing more Supreme Court justices until he had a majority—appointed by him—who would find his new initiatives constitutional. More recently, the expansion of executive orders have pushed the envelope toward—some have said past—the edges of legislative power. And throughout America's history, congress has passed laws that test the limits of our Constitution. But those efforts have not been successful. Congress prevented Roosevelt from packing the court. The courts have set aside executive orders that are too aggressive. And for every boundary-pushing law written by congress, a president has exercised a veto or a federal judge has found it unconstitutional.

Those of you listening carefully earlier might recall that when I said "it can't happen here," I added a caveat. There is no such thing as a sure thing, and that applies to our government as well. But the threat to our liberal democracy is not court packing or executive orders or boundary-pushing laws. The threat—and I think it is a real and growing threat today—is, in a word, disrespect. Disrespect for the president, congress, and our judges. Disrespect that erodes the legitimacy of their offices and their decisions. And disrespect that threatens to create a constitutional crisis.

I don't know when civil discourse about politics turned into name-calling and insults. But from comments on the internet to presidential debates, rational discourse about issues has given way to ad hominem attacks about height, hair, girth, and other issues that I would rather not see at the forefront. Although the polarization of our politics may well have something to do with it, there is nothing political about the new way of arguing. No one listens. Both sides call each other names. And the ball of progress never moves.

Certainly the anonymity that the internet provides is partly to blame. Communicating messages—sometimes very important messages—in short sound bites or 150 characters doesn't help. And when those who occupy prominent offices in our government resort to name-calling and insults, that sets the stage for the rest of us.

Like him or not, the President of the United States is our president and holds an office that deserves respect. Like them or not, our senators and representatives in the United States Congress hold those offices and deserve the respect that goes with representing their constituencies. And like it or not, federal judges appointed by the president and confirmed by the senate are judges with lifetime appointment, and the positions they hold deserve respect.

Now, you might disagree—perhaps strongly—with an executive order or with congressional action or inaction. Many might think that some judicial decisions do more harm than good. I'm sure that as the New Deal started to lift us from economic depression, there were lots of folks—maybe most people—who thought the Supreme Court was doing nothing more than blocking progress.

But that is the price we pay for having a system that keeps it from happening here. It is the *system* that provides that protection—the branches of government, the separation of powers, and the checks and balances that each branch has on the others—*not the people* who hold office in the system. And if that system erodes because of disrespect to those who hold office, or end runs around what the majority believes to be bad decisions that threaten progress, we risk losing the very protection that keeps it from happening here. Like Will Roper in *A Man for All Seasons*, we will have cut down the trees that protect us, and when the devil turns on us, we will have nowhere to hide.

Our Constitution does not guarantee a particular outcome. For many years, it upheld slavery, and more recently, it allowed American citizens to be placed in internment camps. But when the powers of government remain separate, and each branch remains legitimate, the rights of the people cannot be dictated by one person or group. That allows for correction. In other words, our Constitution ensures that if it starts to happen here, we can fix it.

Respect for the office—even, and perhaps especially, when we disagree with or dislike the office holder—is the key to maintaining legitimacy. And those who hold office—all of us—should understand and remember that the respect we receive is because of our position, not our person. Shortly after I took office, I addressed a group of grammar school and high school students who had watched a short court proceeding before I talked with them. One young student noted that everyone stood up when I walked into the courtroom, and I asked her why she thought that was. "Because you are important," she responded. I told her that I was just an old, bald guy in a black robe.

I explained that my office was important, not me. And I said that everyone stood up because I represent the United States of America, not because of who I am.

I may be particularly sensitive to the legitimacy of our government offices because legitimacy is the only source of the courts' power. As Alexander Hamilton wrote in Federalist 78, "The Executive . . . holds the sword . . . . The legislature . . . commands the purse . . . . The judiciary, on the contrary, has no influence over either . . . . It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." Because the judicial branch must rely on the other branches to effectuate its judgments, respect for the courts is all that sustains the judicial branch.

Today, the erosion of that respect threatens the legitimacy of our branches of government and thus threatens the separation of powers that prevents it from happening here. If a judge who issues an order is demeaned or degraded by other officials, why pay any attention to her decision? If officials elected to high office are so inept, why pay attention to what they say? And if politics and political discourse come down to appealing to bases on the left and on the right, why bother listening or compromising or even thinking?

Remarkably, the legitimacy of our branches of government have shown a great deal of resiliency despite being under an attack of disrespect. When a district court judge ruled the president's immigration plan unconstitutional, the president's plan stopped until higher courts intervened. By the same token, when the president issues an executive order, that order is followed unless and until a judge rules that it is unconstitutional or otherwise illegal in some way. And despite attacks in the media and

marches on Washington, those who were elected to public office remain there—at least through their next election, when the people have the power to decide whether they remain. That is our system working as it's supposed to, regardless of how any one may feel about the results.

So we have systemic constitutional protections that have prevented and should prevent it from ever happening here. In light of their ability to withstand the disrespectful winds of political discourse that are blowing today, those protections are strong. Erosion is incremental, however. We don't notice Niagara Fall's wearing away the stone beneath it, but I'm told in a few million years it will pass Grand Island. So to keep our constitutional protections strong, we must remain vigilant to ensure that our branches of government—with their powers separate and with checks and balances on each other—remain respected and legitimate regardless of who occupy those branches and whether or not we like them. If we do that, then it can't—and won't—happen here.

Thank you very much.