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COMMENTARY

 **Disrespect for Constitutional Process Damages Democracy**

 To remain hopeful for the future of our fragile system means to remain vigilant and do everything we can as citizens to protect democracy and engender reverence for it in others.

 January 03, 2023 at 03:20 PM

 By Rolando T. Acosta | January 03, 2023 at 03:20 PM

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I have taken several opportunities in recent years to warn that our fragile democracy has been imperiled by assaults on our governmental institutions and the rule of law. Calls to vigilance may sound alarmist to some, but the erosion of our constitutional norms is not exaggerated, nor is it solely the fault of one side in our deeply divided body politic. Nevertheless, there are reasons to be optimistic for our national future.

Last November’s midterm election results were perhaps a harbinger of better things to come, a promising indication that American democracy is still resilient. By and large, candidates who without proof denied the integrity of the 2020 election—and who likewise raised doubts about the very elections in which they were running in 2022—were defeated, suggesting that a majority of voters have little patience for such specious arguments.

The U.S. House of Representatives took an honest look and published unvarnished findings into the causes and consequences of the January 6 insurrection. The Justice Department has been investigating and bringing cases against the alleged perpetrators. And significantly, the least understood and usually least appreciated “Third Branch” of government—the Judiciary—has been upholding the rule of law and reaffirming its own defining feature: independence.

Lower federal courts, for example, have been adjudicating the January 6 cases, state courts, including ours, have imposed disciplinary sanctions on lawyers who violated their constitutional oaths in the effort to overturn the 2020 results,^[1] and the U.S. Supreme Court has issued rulings against the 45th President, demonstrating that even those Justices who were appointed by the former president are not beholden to him.^[2] Other courts, including those on which

appointees of the former president serve, have also ruled against him.^[3] I do not express any view on the merits of these cases, but merely highlight these rulings to illustrate the fortitude of the courts in the face of pressure campaigns designed to sway their decision-making. Time continues to prove the value of an independent judiciary.

To be sure, the independence of our judiciary means that other branches of government will disagree with our rulings on occasion. But that disagreement must not lead the other branches to overstep by attempting to pressure the courts into compliance or by demonizing judges simply because of disagreement with one or more of their judicial opinions. As George Washington wrote in 1796 upon announcing that he would not seek a third term as President:

It is important ... that the habits of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism.^[4]

In other words, the separation of powers is crucial to a functioning democracy. To shortchange that fundamental principle of our governance is to break faith with democracy itself. Every modern governor, legislator and judge, in fulfilling their sworn duties, carries the figurative baton of constitutional government that has been handed down unflinchingly since 1787. It is not enough to decry those who sabotage the process. The only way to preserve the process is for each of the three branches to ensure that it is honored, even if the outcome may not be what particular individuals may wish.

If it undermined the rule of law in February 2016 to deny Merrick Garland a U.S. Senate hearing, let alone a fair one, on his nomination by President Obama to the Supreme Court, would it not undermine the rule of law to deny a fair hearing to Governor Hochul's nominee for Chief Judge of the New York Court of Appeals? There is a state constitutional process to faithfully observe in 2023, just as there was a federal constitutional process that was shamefully abandoned in 2016. In New York, a nomination commission sends the Governor a list of candidates, the Governor selects one, the State Senate holds a confirmation hearing and votes up or down on the nominee. Op-eds and letters to the editor are no substitute.

Indeed, a fair hearing would provide an essential opportunity to correct much of the exaggerated and even distorted information that is being circulated by partisans who are attacking a nominee ethically bound to circumspection, whose *only* forum would be a Senate hearing.

Given the controversy swirling about this nomination, what would undoubtedly be a much-watched confirmation hearing would also provide the Senate with an opportunity to educate the public on the role of a judge in a democracy, which partisans in this current fight seem to have misconstrued.

Judges do not issue rulings based on constituent letters, surveys of eligible voters, Twitter polls, or a sense of how their decisions will play in the press. They decide on the facts, the applicable law, and independent analyses of the record. As Benjamin Cardozo wrote, a judge "is not a knight-errant roaming at will in pursuit of his [or her] own ideal of beauty or of goodness."^[5]

To be sure, electing and selecting judges is an inherently political process. But judges are not political actors in the same vein as legislators or executives. They do not appropriate funds or supervise agencies to enforce their writs. They do not hold town meetings or issue constituent newsletters to explain their rulings. Their decisions speak for them, and for themselves. While a free press may sometimes misinterpret those decisions, government leaders, and for that matter attorneys and law professors, have a responsibility to be scrupulously fair when interpreting a court's opinions.

For example, a judicial finding that a defendant trespassed onto the grounds of a pro-life counseling center is no more proof that the judge is anti-abortion than a finding of trespass onto the grounds of a distillery means the judge is a prohibitionist. Deciding a judicial nomination on such nonsense would be worse than unfair. It would substitute facile

partisanship for intelligent inquiry. As such it would degrade the constitutional process all three branches of government are obliged to imbue.

In New York, I believe those democratic values are alive, but they should never be taken for granted. After all, throughout the country, there are still many of our fellow citizens who question the legitimacy of U.S. elections. A recent New York Times/Siena College poll found that “[t]wenty-eight percent of all voters, including 41 percent of Republicans, said they had little to no faith in the accuracy of this year’s midterm elections.”^[6] And there are those who continue to downplay the January 6th attack or argue that it was the work of so-called patriots.

To remain hopeful for the future of our fragile system means to remain vigilant and do everything we can as citizens to protect democracy and engender reverence for it in others. Those of us in government must live up to our oaths and meet our responsibilities. People outside government must do their part through civic education, voter participation, support of civil institutions, and national service. We must not allow our democracy to be undermined by cynical factions that would substitute partisan politics for constitutional process, simply to advance their own agendas.

May Washington’s Farewell caution be our wake-up call: “[L]et there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.”^[7]

Endnotes:

^[1] See, e.g., *Matter of Giuliani*, 197 AD3d 1 (1st Dept 2021).

^[2] See, e.g., *Trump v. Comm. on Ways & Means*, No. 22A362, 2022 WL 17098419, at *1 (U.S. Nov. 22, 2022); *In Blow to Trump, Supreme Court Permits House to Obtain His Tax Returns*, Charlie Savage, NY Times, Nov. 22, 2022.

^[3] See, e.g., *Trump v. United States*, 54 F.4th 689 (11th Cir. 2022); *Appeals Court Scraps Special Master Review in Trump Documents Case*, Alan Feuer and Charlie Savage, Dec. 1, 2022.

^[4] Washington’s Farewell Address (1796).

^[5] Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921).

^[6] *Voters See Democracy in Peril, but Saving It Isn’t a Priority*, Nick Corasaniti et al., NY Times, Oct. 18, 2022.

^[7] Washington’s Farewell Address (1796).

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