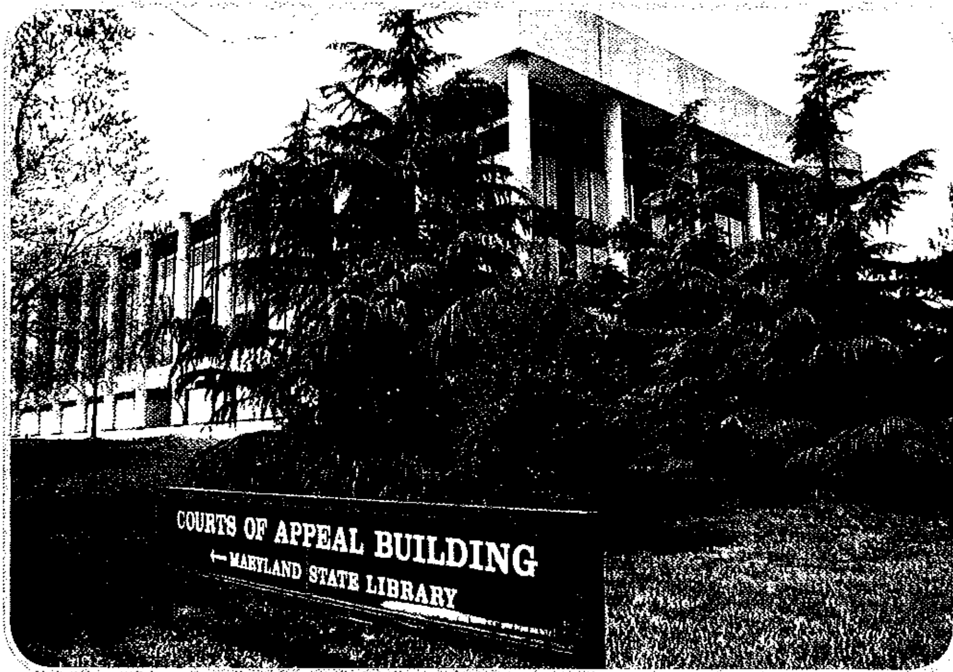
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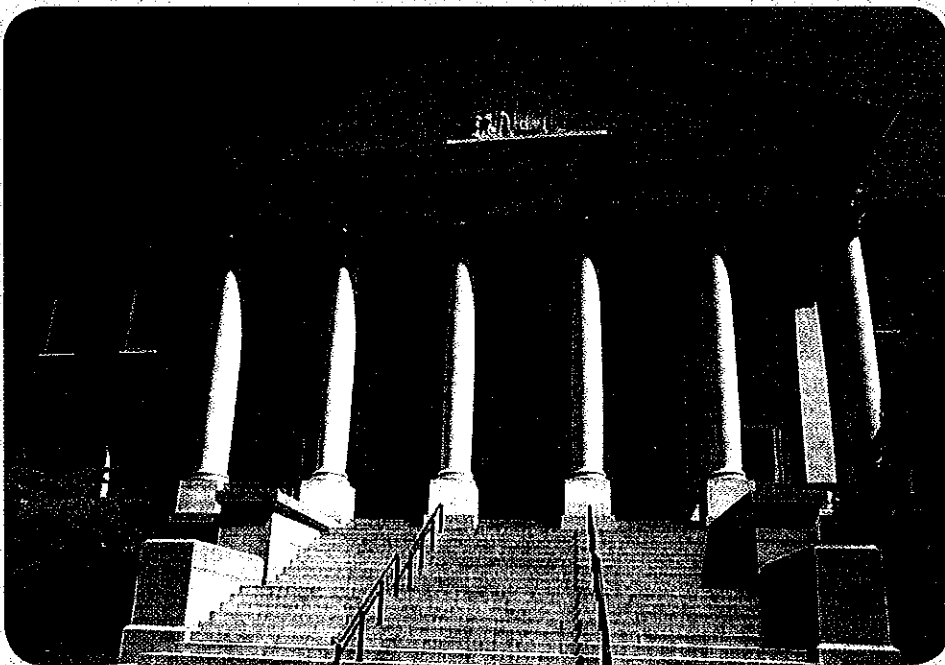
Separation of Powers Redux- Receded Scope of Judicial Review

By Joel A. Smith

Maryland Aviation Admin. v. Noland, 386 Md. 556 (2005) has prompted debate about the proper scope of judicial review in contested cases decided by government agencies. *Noland* is uncomfortably at odds with the separation of powers doctrine under Maryland law. The Court of Appeals has remarked in other opinions, "Our own cases have never interpreted the separation of powers doctrine embedded in Article 8 of the Maryland Declaration of Rights as imposing a complete separation between the branches of government." *Department of Transportation v. Armacost*, 311 Md. 64, 80 (1987).



The Court wrote in *Department of Natural Resources v. Linchester*, 274 Md. 211, 220 (1975), that within administrative agencies there is "some mingling, blending and overlapping of the legislative, executive and judicial functions." This overlap, the Court wrote, is permissible "as the separation of powers concept may constitutionally encompass a sensible degree of elasticity and should not be applied with doctrinaire rigor." *Id.*

Just as in civil actions, contested cases heard by administrative agencies require separate findings as to breach and penalty. *Noland* narrowed judicial review of the penalties imposed by administrative agencies and the Office of Administrative Hearings, saying that the separation of powers between the Executive Branch and the Judiciary permits only limited review of "Executive" decisions about penalties. The *Noland* decision relied on *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509 (2003), where the Court of Appeals had, in the words of the Court, "emphasized that 'judicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers as set forth in Article 8 of the Declaration of Rights of the Maryland Constitution.'" *Noland*, 378 Md. at 573 n.3.

The concept that *Noland* claimed to borrow from *Sadler* is that the Courts must tread lightly when sitting in review of Executive branch actions. The Court's holding in *Noland*, however, is an expansive statement balanced on a thin reed.

Noland turns inside out an essential tenet of constitutional law. Judicial review is not subordinate to the doctrine of separation of powers. Judicial review is in itself an expression of the doctrine of separation of powers. Judicial review arises out of, and it is essential to, the separation of powers between a robust judiciary and an equally robust executive, each to operate as a check and balance against the other branch of State government. To conceive of judicial review as limited in scope as the Court has in *Noland* requires the State judiciary to recede from that expected constitutional function.

Separation of Powers

That the separation of powers is fundamental in State government is beyond doubt. The Maryland Constitution provides that legislative power is vested in the General Assembly (Article II, §§ 1, 27 to 30). Executive power is vested in the governor (Article III, § 1). Judicial power is vested in the courts (Article IV, § 1).

The separation of powers is set out in Article 8 of the Maryland Declaration of Rights. ("That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other."). The separation of powers is acknowledged to be of "monumental" importance. But, it is not as much a boundary as a buffer that is intended to create conflict.

"Although this doctrine is both fundamental to our scheme of government and well known, we believe it important to recall that the "purpose (of separating the exercise of the sovereign powers) was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting), as quoted in *Attorney Gen. of Maryland v. Waldron*, 289 Md. 683, 688-89 (1981).

The principle of the separation of powers has existed in Maryland law since 1776 when it became a part of the Maryland Constitution. It is based on Maryland's colonial experience. "[T]he most glaring abuses of the colonial government was the concentration in the hands of the governors of judicial and legislative powers . . .; and it was against such abuses that this provision was directed." *Magruder v. Swann*, 25 Md. 173, 180 (1866).

The power of government should be divided to prevent any one branch from being able to use the power of government in an arbitrary way. If the business of government is to be conducted rationally and fairly, it is the responsibility of the judiciary to ensure as much. That point was too easily swept aside in *Noland*.

The separation of powers means that one branch may not overstep essential functions of another. The courts may review a law to determine whether it is constitutional and in accord with other law, but they may not determine whether a law is necessary or prudent. The courts may determine whether the Governor has administered a law correctly, but they may not question his political actions, such as his appointment of officers.

The courts have repeatedly and consistently held that, beyond these limited exceptions, the judiciary has the power of judicial review. The role of the courts in regard to administrative agency functions "is to see that these responsibilities were properly empowered to the agency and have been performed within the confines of the traditional standards of procedural and substantive fair play." *Linchester*, 274 Md. at 223.

The General Assembly has the power to create agencies to administer

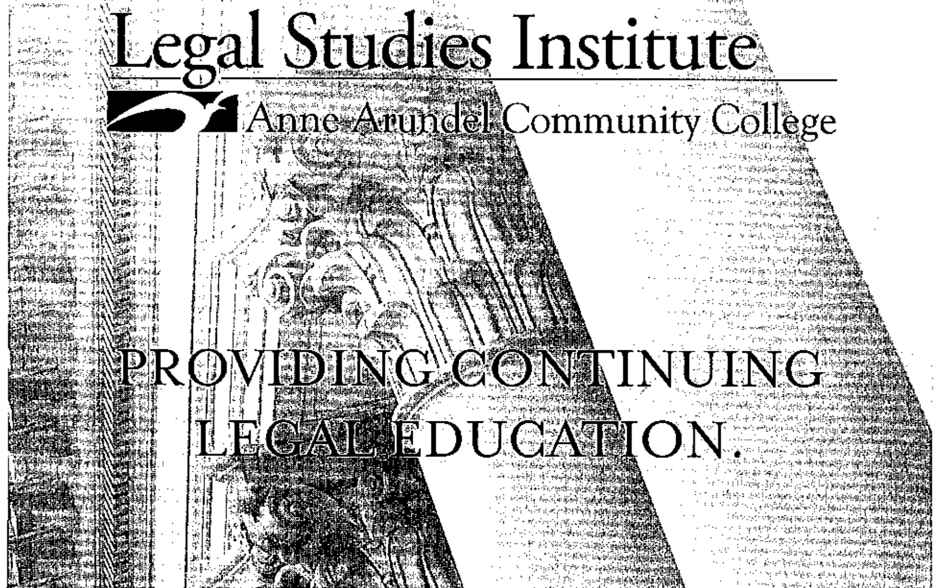
Maryland's laws and to define the scope of their authority. *See Dal Maso v. Bd. of County Com'rs of Prince George's County*, 182 Md. 200 (1943). The Governor has wide latitude to direct the work of the agencies. *See Maryland Classified Employees Ass'n, Inc. v. Schaefer*, 325 Md. 19 (1991). Administrative agencies are distinguished as they hold and exercise the attributes of all three branches of State government, legislative (in rule making), executive (in administration of the law) and judicial (in hearing and deciding contested cases). *See* R. Oppenheimer, *Administrative Law in Maryland*, 2 Md.L.Rev. 185 (1938).

The separation of powers apportions the separate roles of the three branches of government as they form, define and operate administrative agencies. The Courts, however, hold the exclusive power to review the acts of the two other branches of government.

Sadler v. Dimensions Healthcare Corp.

Although *Noland* relies on *Sadler v. Dimensions Healthcare Corp.*, 378 Md. 509 (2003), *Sadler* did not present a separation of powers issue, and it did not concern judicial review of a State government action. The dispute in *Sadler* was over a physician's privileges to practice medicine in a private hospital. The question presented in *Sadler* was "the standard by which a circuit court should review . . . a decision of the Board of Directors of a privately owned hospital as to who should have staff privileges at the hospital." *Id.* at 515.

Dr. Sadler brought suit after her privileges were revoked by the hospital. Dr. Sadler alleged breach of contract and tortious interference with contract. The hospital urged deference to its internal review of physician staff privileges. Quite in passing, in obiter dictum, the



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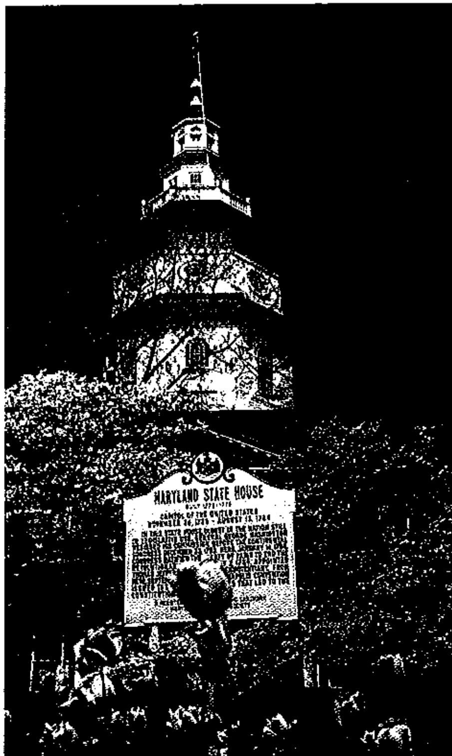

Court remarked that "judicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers as set forth in Article 8 of the Declaration of Rights of the Maryland Constitution." *Id.* at 530.

Because in Dr. Sadler's case, the hospital was a private entity and its decision was not that of an administrative agency, the Court found no reason to defer to the hospital's internal decision. The "traditional summary judgment doctrine" was applicable, and the action was "to be treated like any other breach of contract action." *Id.* at 542.

Sadler did not consider or decide a separation of powers issue. *Sadler* did not concern constitutional functions of the three branches of government. *Sadler* did not decide the scope of judicial review. Had the hospital been a public institution, or had the contested staff privileges been suspect to action of an administrative agency, the effect of the Court's opinion might well have been otherwise. The process of judicial review would have applied. *Sadler* only hints at why review of a government action is treated differently than a private dispute.

If based on the action of a unit of government, an administrative decision as to staff privileges would be due some degree of deference because one must assume that government units use their authority rationally and fairly. The proper functioning of administrative agencies requires their actions to be reasoned and rationally based. Still, those government actions are subject to judicial review. As Judge Robert Bell wrote in his dissenting opinion in *Lussier v. Maryland Racing Commission,* 343 Md. 681, 702 (1996), in a contested case, "the imposition of a penalty, such as a fine, is an adjudicatory matter," and, "[p]rinciples of due process, including proportionality, are applicable ...."

MTA v. King and MAA v. Noland

MTA v. King, 369 Md. 274 (2002) set the foundation for *Noland. King* was the first case in which the Court of Appeals clearly began to treat the "sanction" or "penalty" in an administrative decision on a contested case as a matter of independent Executive "discretion." King, a State employee, argued that his termination was an abuse of discretion. The agency had a system of progressive discipline with discretion to impose harsher sanctions under appropriate circumstances. The Court concluded that neither "disproportionality [n]or abuse of discretion" were grounds for review. The State Administrative Procedure Act, the Court noted, simply does not list "abuse of discretion" as a ground for disturbing an administrative decision.

The Court rejected the idea that disproportionality between an offense and penalty, or between the penalty imposed in one case as opposed to the penalty imposed in prior cases involving like facts, could be a basis for review. The Court found that an agency's determination as to sanction was, at minimum, completely immune from judicial review as disproportionate to the offense. "As long as an administrative sanction or decision does not exceed an agency's authority ... there can be no judicial reversal or modification of the decision based on disproportionality or abuse of discretion, unless, under the facts of a particular case, the disproportionality or abuse of discretion was so extreme and egregious that the reviewing court can properly deem the decision to be 'arbitrary or capricious.'" 369 Md. at 291.

Judges Wilner and Harrell filed concurring opinions in *King*. Judge Wilner opined that there is no practical room for distinction between "abuse of discretion" and "arbitrariness." Labeled either way, a disproportionate sanction could rise to the level of unlawfulness when it "reaches the point of the decision exceeding the agency's lawful authority or discretion and *for that reason,* being arbitrary, capricious, or otherwise unlawful." *Id.* at 293. According to Judge Harrell: "The Court's opinion introduce[d] the specter of potentially divergent standards of judicial review based on its perception that the Court of Special Appeals ... may have reviewed [the agency's] action based on an abuse of discretion standard." *Id.* at 297.

In *Noland,* the Court digressed still further from the traditional standards of judicial review. *Noland* held that under the separation of powers doctrine, the discretion of an agency in choosing a sanction is on par with the Executive discretion invested in the Governor, or an unreviewable, political act. The Court of Appeals, in an

extended footnote, wrote that when an agency official uses "judgment," the official is exercising Executive Branch powers and utilizing discretion that a court should not interfere with. According to the Court:

> when an agency or official in the Executive Branch of Government exercises "judgment," the agency or official is ordinarily performing a task which the Maryland Constitution or statutes have assigned to the Executive Branch and not to the Judicial Branch. The phrase that a court "substitutes its judgment" for the judgment of the Executive Branch suggests that the court is engaging in precisely the same type of determination, and is performing a function, which has been assigned to the Executive. Nevertheless, for the court to perform the same function as the Executive Branch would not be consonant with the express separation of powers mandate set forth in Article 8 of the Maryland Declaration of Rights. *See Sadler v. Dimensions*, 378 Md. 509, 530, 836 A.2d 655, 667-668 (2003), where Judge Raker for the Court recently emphasized that "judicial review of the actions of an administrative agency is restricted primarily because of the fundamental doctrine of separation of powers as set forth in Article 8 of the Declaration of Rights of the Maryland Constitution."

386 Md. at 573 n.3.

Noland concluded that there exists a "limitation upon the judicial review authority of courts, with regard to a lawful and authorized sanction, imposed by an Executive Branch administrative agency, [which] applies broadly." *Id.* at 577. The Court wrote: "the limitation upon the judicial review authority of courts" precludes "argument that the discipline or sanction imposed was 'disproportionate to the offense,' or 'disproportionate to the misconduct,' or 'disproportionate to the violation.'" The Court went on: "judicial review of a lawful and authorized administrative disciplinary decision or sanction, ordinarily within the discretion of the administrative agency, is more limited than judicial review of either factual findings or legal conclusions." *Id.* at 575.

Noland remarked that "'the courts owe a higher level of deference to functions specifically committed to the agency's discretion than they do to an agency's legal conclusion or factual finding.'" *Id.* at 575 (quoting *Spencer v. State Board of Pharmacy*, 380 Md. 515, 529-31 (2004)).

This "more limited" scope of judicial review permits a Maryland court to intervene only when a sanction is "so extreme and egregious" as to be arbitrary and capricious. *Id.* at 575-76. Under *Noland*, the discretion to prescribe a given penalty or sanction is an Executive function that is largely immune from review by the judiciary.

The Troubled Path After *Noland*

Noland runs against the grain of the separation of powers doctrine. The Courts have the Constitutional power to ensure that administrative decisions are rational in basis and within the bounds of "fair play." *See Linchester*, 274 Md. at 223. That is good and credible government. Citizens have every right to expect that administrative entities should explain the reasons for their actions, and that the actions are rational, temperate, and fair.

Judicial review should ensure that an agency has acted fairly and rationally, and plainly relied on its professional and expert role in administering the law. As Judge Wilner's noted in *MTA v. King*, a decision that embodies "discretion" is not "immune from judicial review." 369 Md. at 293.

An agency cannot act with such broad authority as to act without reasons, or act in a manner that is plainly unfair, arbitrary or without meaningful judicial review. The discretion to sanction or penalize a party appearing before an administrative agency must be cabined within reasonable limits. The Courts cannot afford agency officials such wide ranging discretion that they may not be held to account, to state their reasons, and to act fairly and rationally. Agency officials must utilize their power to discipline and sanction "within the confines of the traditional standards of procedural and substantive fair play." *Linchester*, 274 Md. at 223.

Noland holds that its limitation of judicial review "applies broadly" when it is the penalty selected by an administrative agency that is at issue. *Noland* also holds that "the agency need not justify its exercise of discretion by findings of fact or reasons articulating why the agency decided upon particular discipline." 386 Md. at 581. *Noland* is drawn on the premise that Executive Branch officials enjoy a zone of "discretion" that is immune from judicial review.

Under *Noland*, administrative agencies may impose penalties without the need for justification. The penalties imposed by administrative agencies affect untold numbers of Maryland residents, daily. No function of government that significant should be so immune from substantive review. The doctrine of separation of powers does not demand or support that result.

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