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The court: Better a branch than a twig

By Peter G. Verniero

The office of chief justice of the United States was not always the powerhouse it is today. To illustrate the point, I offer this simple question: Who was the first chief justice of the United States?

Readers who did not correctly answer John Jay are forgiven. Jay served in 1789 when the fledging judiciary was overshadowed by a dominant Congress and a heroic chief executive, George Washington. Back in Jay's time, the legislative and executive departments towered over the judiciary to such an extent that the three branches of government looked more like two branches and a twig.

John Marshall, the nation's fourth chief justice, changed all that. Marshall wrote the Supreme Court's 1803 decision, Marbury vs. Madison, which established the principle of judicial review. That principle permits the court to invalidate the unconstitutional acts of the other two branches.

Without Marbury vs. Madison, the court might never have decided Brown vs. the Board of Education, the landmark desegregation case, or issued a number of other decisions that have become vital to our national life.

Every citizen who has suffered under the sometimes excessive reach of our elected leaders has Marshall to thank for leveling the governmental playing field.

It is against that backdrop that we must measure Chief Justice William Rehnquist's tenure. Whether one agrees or disagrees with his legal philosophy, the late chief justice deserves respect for his diligence and intellectual integrity, hallmarks of his lengthy stewardship of the court.

He also was a stout defender of an independent judiciary, which is critical to the course of government and consistent with Marshall's vision of a judiciary equal in standing to Congress and the White House.

New Jersey's history and that of the Rehnquist Court are intertwined. In 1998, when I was the state's attorney general, the court decided New Jersey vs. New York, in which the justices ruled that most of Ellis Island resided within the borders of the Garden State.

Two years later, after I had joined the state Supreme Court, the Rehnquist Court overruled my former court in Apprendi vs. New Jersey, concluding that portions of our state's hate-crime statute violated the right to trial by jury.

Having witnessed those two cases up close (although I did not participate in the Apprendi case as a judge), I can say unhesitatingly that the Rehnquist Court treated New Jersey fairly in each instance. And each case was important. The Ellis Island decision settled a dispute that had been brewing with our friends across the Hudson for more than a century. The hate-crimes decision set the stage for the court's ruling earlier this year that certain applications of the federal sentencing guidelines were unconstitutional.

To the litigants involved, every decision of every court in the country is important. When the Supreme Court decides a question, however, its decision reverberates beyond the parties who brought suit.

Although his vote is the same as each of the associate justices, the chief justice is first among equals. With the ability to shape the court's private deliberations and the power to select the justices who author the court's opinions, the chief justice wields considerable influence.

The ideal chief is one who leads the court to a correct reading of the law and fair application of the facts. Partisans on both sides of the political aisle are wrong to suggest that the chief justice must be an ideological fellow traveler who should rely on such ideology to decide cases.

To the contrary, we need a chief who will set aside personal beliefs in favor of reasoned judgments based solely on the records at issue in individual cases. The Senate should probe President Bush's nominee to become the 17th chief justice, Judge John Roberts Jr., on this score, in addition to evaluating his temperament and other characteristics necessary for the job.

Some chief justices (and associate justices) have surprised the presidents who appointed them. When President Dwight Eisenhower nominated Earl Warren to serve as chief, Ike thought he was appointing a "safe" Republican to the bench. Instead, his appointee did more to establish the court's liberal legacy than any chief justice in recent history. There is something about donning a judicial robe and enjoying lifetime tenure on the court that allows one happily to defy expectations.

It would be helpful if the next chief justice were a consensus builder. That is not to say that we should fear divisions on the Supreme Court. Indeed, dissent can be a healthy thing on an appellate court, where today's dissenting opinion might be tomorrow's majority decision. Still, a highly fractionalized decision by the court lacks the persuasiveness that comes from a ruling supported by a clear majority of justices.

How the Senate will address the confirmation of Roberts remains to be seen. For now, we take solace in the fact that the Supreme Court has grown from an anemic to a co-equal branch of government, one that deserves a chief justice capable of furthering its critical mission on behalf of the rest of us.

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