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ROLE OF THE COURTS/PART III: Court should be shaped by changing times in which we live

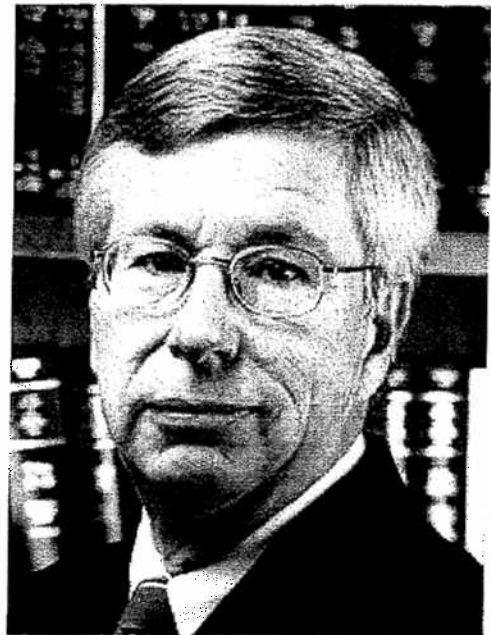
*PAT KNIE
For the Herald-Journal*

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The role of the U.S. Supreme Court is outlined by the Constitution. Its duties include interpreting the Constitution, interpreting the laws of the United States and settling differences between various states and the citizens of different states.

The court was created as a co-equal third branch of government independent of the political process inherent in the executive and legislative branches.

The selection of justices was rarely a political issue until the 1968 presidential election when Richard Nixon coined the expression "strict constructionist" in promising to nominate justices who would restrict the school integration decision in *Brown v. Board of Education*. Judicial selection also became a campaign platform in the 1980 presidential election. Since that time, the selection of federal judges, particularly to the Supreme Court, has been a politically contentious process that, at times, has halted the appointment process.



With the current nominating process under way to fill the seat recently

vacated by Justice Sandra Day O'Connor, partisan sniping has already begun. Republicans argue that Senate questioning of nominee Judge John G. Roberts should be limited to his understanding of the Constitution and interpretation. Democrats want to ask the candidate about his political views on abortion and the environment. Both are wrong. Both know it, but both would rather politically

posture more than find a good justice for the Supreme Court.

To ensure that the proper role of the court is carried out, Americans deserve better behavior from Congress. We deserve the best possible justices regardless of ideology. To that end, it is important to examine judicial temperament, legal ability and fundamental impartiality.

The professional career of a candidate deserves scrutiny. Did the candidate hold political office? Was the candidate otherwise active politically? Was the candidate's employment history such that being impartial and independent is potentially compromised? If the candidate is predictably liberal or conservative, is that judicially healthy?

Supreme Court justices are appointed for life, and tenures generally survive several presidencies. Several justices have served well in excess of 30 years.

The authors of the Constitution recognized the advantage of having long-serving jurists, thereby creating stability in the federal court system. It is therefore essential that the president appoint good judges, with little consideration of party affiliation or political and social views, thereby attempting to maintain a court without an agenda and one that is the court of all Americans, just not those who share the ideology of the sitting president or party in power.

In the absence of such a court, we are left with a branch of government that is not independent but a political mirror image of the other two branches instead of containing the checks and balances envisioned by the authors of the Constitution.

Mindful that the three-branch system was to be a system of checks and balances, the court should be composed of fair-minded but diverse jurists whose goal is to fashion a body of law that interprets the Constitution and legislation in a reasonable, common-sense approach. Even the Federalists recognized that the Constitution had to be a flexible document interpreted to adjust to changing times. Likewise, Chief Justice Marshall, arguably America's preeminent jurist, said, "We must never forget that it is a constitution we are expounding ... intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs."

Much debate today centers around jurists' constitutional philosophy, whether they are "strict constructionists," those purportedly showing "judicial restraint," or instead are "judicial activists," a phrase suggesting that such jurists make law rather than interpreting them.

Those who claim to be "strict constructionists" use the Federalist Papers, largely written by John Madison and Alexander Hamilton, to support what they contend the framers of the Constitution intended. Of course, these Federalist Papers did not find their way into the Constitution and were not the work of all of the authors of the Constitution.

At least one current justice of the Supreme Court scoffs at the notion that the Constitution is a living, breathing document that must accommodate the times. The Founding Fathers prepared this document based on their own ideas of democracy from the Magna Carta to the Declaration of Independence but created it in such a way to be applicable to all times. How would the Founders have imagined listening devices, night vision scopes or, for that matter, electricity? Do we want to be like Italy, where the constitution has to be redrafted at the blink of an eye? Justices then must use their training and common sense to interpret, restrict and expand the law at times. Unfortunately, there are times when legislation is unclear and requires judicial interpretation and intervention.

Furthermore, those among us today who argue that the Supreme Court has interpreted the Constitution in ways never intended by our Founding Fathers ignore that a large part of the court's work has arisen from interpreting amendments passed by Congress, not our Founding Fathers. The 14th Amendment, for example, states, in part: "No state shall make or enforce any law which shall deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Clearly those words mean many things to many people. Would they mean one thing while we were engaged in World War II or immediately after 9-11 and mean another thing when we are in times of peace? Some would argue "yes."

The challenges that face the Supreme Court are always large. It has only been five years since the court decided the 2000 election in the famous Bush v. Gore decision. The role of the court must be shaped by the times in which we live, carefully guarding the rights and privileges we secured in the Constitution.

Pat Knie, a Spartanburg

attorney, serves on the board of governors for the S.C. Trial Lawyers Association.

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