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Double Standard Filibuster

By Alberto R. Gonzales

Monday, June 2, 2003; Page A17

Today John Roberts will take the oath of office to become a judge on the U.S. Court of Appeals for the D.C. Circuit. He is an excellent example of the kind of person President Bush has nominated to the federal appeals courts. Roberts has been a well-respected lawyer in Washington, principal deputy solicitor general of the United States, associate counsel to President Reagan and law clerk to then-Justice William Rehnquist. He has argued 39 cases before the Supreme Court and is widely recognized as one of the best appellate lawyers in America. He is a person of great integrity with wide bipartisan support, and the American Bar Association unanimously rated him well qualified. Roberts will be a distinguished judge on the D.C. Circuit.

The Senate voted unanimously on May 8 to confirm Roberts to the D.C. Circuit. That vote is noteworthy for two reasons, however, both of which demonstrate the serious breakdown in the Senate confirmation process for federal appeals court nominees.

First, the long road from Roberts's nomination to his confirmation vote is impossible to defend. Roberts was first nominated to the D.C. Circuit more than 11 years ago, in January 1992, but did not receive a hearing before the end of President George H.W. Bush's term. President George W. Bush then nominated Roberts on May 9, 2001, shortly after taking office. But the Senate Judiciary Committee did not hold a hearing on the nomination during the last Congress, even though no serious objections were lodged against Roberts. President Bush then re-nominated him on Jan. 7, 2003. Finally, after two hearings this year, Roberts received his Senate vote, on May 8. It was unanimous, which makes the many years of delay all the more difficult to explain and justify.

The Senate's delays and denials of votes on appeals court nominees -- which have been far too common in recent administrations -- flout the intention of the Constitution and the tradition of the Senate. No judicial nominee should ever have to wait years for a vote in the Senate. These delays leave judicial vacancies unfilled and thus prevent the federal courts from doing their jobs for the American people. The delays and uncertainty also threaten to deter the best and brightest from seeking judicial service. The Senate should fulfill its constitutional responsibility and ensure that every judicial nominee receives an up-or-down vote within a reasonable time after nomination.

Second, the confirmation of John Roberts also dramatically exposes the double standard being applied by Senate Democrats to the president's other

D.C. Circuit nominee, Miguel Estrada. The career records of Roberts and Estrada are strikingly similar. Both were unanimously rated well-qualified by the American Bar Association. Both have argued numerous cases before the Supreme Court, including as attorneys in the solicitor general's office. Both have devoted large portions of their legal careers to public service and also been partners at major Washington law firms. Both have clerked for Supreme Court justices. Both have the strong support of prominent Democratic attorneys who served in high-ranking positions in the Clinton administration. Neither has served previously as a judge or a professor, and therefore neither has written widely about his personal views on legal issues. Both have served instead as superb, well-respected and fair-minded lawyers for public and private clients throughout their careers.

Despite the great similarities between Roberts and Estrada, 45 Senate Democrats have treated them very differently. Senate Democrats never requested confidential case memoranda written by Roberts from his time in the solicitor general's office. Yet they are insisting on reviewing memoranda written by Estrada in the solicitor general's office, as a condition of ending a four-month filibuster of his nomination. Consistent with judicial independence and the traditional practice of judicial nominees, Senate Democrats also did not demand that Roberts answer questions about his personal views on legal and policy issues before they voted on him. Yet these senators are apparently demanding that Estrada answer such questions as a condition of ending the filibuster.

The 45 Senate Democrats who are filibustering Estrada's nomination are applying a double standard. There is no rational or legitimate justification for the disparate treatment of Roberts and Estrada -- particularly for the use of an extreme and unprecedented filibuster against Estrada, who would be the first Hispanic to serve on the D.C. Circuit and has the clear support of a majority of senators. The president has asked that the Senate Democrats halt the filibuster, stop the delays and allow an up-or-down vote on Estrada. As the president has said, let each senator vote as he or she thinks best, but end the double standard and give the man a vote.

The writer is counsel to the president.