The Senate Judiciary Committee's Opportunity

peterberkowitz.wordpress.com/2002/04/22/the-senate-judiciary-committees-opportunity

April 22, 2002

April 22, 2002 at 8:00 am

This essay originally appeared at NRO.

I recently asked three former solicitors general — Democrats Walter Dellinger and Seth Waxman and Republican Kenneth Starr — to name the nation's greatest appellate lawyers. One name that appears on all three lists is that of Washington, D.C. attorney John Roberts, whom President Bush named almost a year ago to be a judge on the D.C. Circuit Court of Appeals. "In my view," said Dellinger, "there is no better appellate advocate than John Roberts." With cross-party kudos like this, you might think that Roberts would have an easy time winning confirmation. In fact, he can't even get a hearing from the Senate Judiciary Committee.

Roberts has been targeted by Left-liberal interest groups as a Right-wing ideologue, a crucial cog in President Bush's plan to complete the conservative conquest of the federal judiciary launched more than 20 years ago under President Reagan. In reality, Roberts is superbly well qualified by virtue of his training and his mastery of craft to serve as a federal appeals court judge. Alas, the Democratic-controlled Senate Judiciary Committee's decision to let his nomination languish without a hearing reflects the crude politicization — for which both parties must bear responsibility — that has afflicted our judicial-nomination process for some time now.

To be sure, Roberts is a conservative. As a young lawyer, he worked in the White House Counsel's Office during the Reagan administration, and he served as former Solicitor General Kenneth Starr's principal deputy during the Bush administration.

Since returning to private practice in 1993 at the Washington law firm of Hogan & Hartson, Roberts has built a varied law practice in the high stakes, rarefied realm of appellate advocacy. At this level of the federal judiciary, without juries and where all factual determinations have already been made by lower courts, a premium is placed on a lawyer's ability to persuade an ideologically diverse panel of judges, who are asked to rule only on questions of law. Earning across-the-board admiration from the experts, Roberts has argued an enormous range of cases before the United States Supreme Court over the last nine years as well as before the DC Circuit Court of Appeals, often thought to be the second highest court in the land.

Although Robert's practice does not revolve around political issues or causes and he has not been particularly involved in movement politics since leaving government service, critics such as the Alliance for Justice, a Left-liberal watchdog organization, see him as the enemy. Their Independent Judiciary website notes that in 1991, as principal deputy solicitor general, Roberts cowrote one brief arguing that *Roe* v. *Wade* should be overturned, another supporting the right of public schools to include religious ceremonies at graduation, and served as lead counsel on a case arguing that citizens do not enjoy a right to sue the government over alleged violation of federal environment regulations. The organization also blames him for arguing as a lawyer in private practice before the Supreme Court on behalf of Toyota that the Americans with Disabilities Act does not apply to all workers with job-related injuries (though the website does not mention that the Supreme Court unanimously agreed with Roberts). To cap off the case against Roberts, Independent Judiciary calls attention to two law-review articles written by Roberts while a student, in which he called for a broad reading of the Constitution's Contracts Clause and Takings Clause (which would perhaps be relevant had President Carter nominated Roberts more than 20 years ago when Roberts was a student at Harvard Law School).

In fact, the Alliance for Justice's concerns tell us next to nothing about how Roberts is likely to rule on the range of issues that will come before him as a judge on the DC Circuit Court of Appeals. A lawyer's own views — on abortion, on religion and the schools, on workplace injuries, and all the rest — cannot be inferred from the arguments that he advances as an advocate on behalf of a party to litigation. In any case, Roberts has had a diverse array of clients; it is not uncommon for him to advance on their behalf arguments that support government regulation.

Furthermore, the main task of an appeals-court judge is not to reconsider but to apply Supreme Court precedents. Here, not politics but knowledge of the law and the requisite restraint are usually decisive.

Roberts's knowledge of the law is beyond dispute. But does he have the requisite restraint crucial to good judging, which means the discipline to apply the law impartially to the case or controversy before the court rather than rule in accordance with ideological inclinations or political predilections? His critics have given no reason whatsoever to doubt that he does.

But, Democrats may retort, didn't Republicans, when they controlled the Senate Judiciary Committee, obstruct the appointments of and deny hearings to worthy Clinton nominees? Certainly.

Nobody wants to be played for a fool. But both Democrats and Republicans have an interest in escaping the vicious cycle that has turned eminently well-qualified judicial nominees — both Democrats and Republicans — into figures of bitter partisan struggle. President Bush's

nomination of John Roberts to the DC Circuit Court of Appeals presents Senate Democrats with an opportunity to strengthen of the federal judiciary by affirming the important principle that there is an excellence in law that transcends party differences.

Democrats should seize the opportunity and promptly confirm Roberts. Or they should have the decency, and respect for their constitutionally mandated role of “advice and consent,” to explain at a public hearing of the Senate Judiciary Committee why his nomination should be rejected.