Time to Reform Senate Confirmations

By Eugene G. Bernardo II

No one can deny the U.S. Senate's authority in the judicial nominating process. However, something terribly wrong has happened as that majestic body has aggrandized and distorted its role in excess of our founders' intent. If the rule of law is to survive in its traditional form, the judicial confirmation process must return to our nation's governing orthodoxy which underpins an independent judiciary. President-elect Donald Trump and the Senate can start now.

The modern low point happened 15 years ago following the nomination of Miguel Estrada. Mr. Estrada arrived in the United States from Honduras at 17 speaking little English. He graduated with honors from Columbia College and Harvard Law School, and went to a prestigious clerkship at the Supreme Court before embarking on a career in Manhattan's U.S. attorney's office, and later as an assistant to the U.S. solicitor general. In private practice, he became one of the nation's premier appellate lawyers. Estrada would have been the first-ever Hispanic judge on the D.C. Circuit Court of Appeals.

Faced with his impressive record, Senate Democrats spent 29 months stalling and searching for reasons not to confirm him, never allowing Mr. Estrada an up-or-down vote. In asserting that political ideology should be a core criterion in the confirmation process, they enlarged the Senate's advice and consent role from a bare majority to 60 votes and filibustered Estrada's nomination seven times. In years following, Republicans have returned the favor and constructed other obstacles.

This confirmation mess arises from a misconception regarding the proper role of judges. Thomas Jefferson cautioned, if judges were allowed to interpret the law as they wished, the Constitution would be a "mere thing of wax in the hands of the Judiciary, which they may twist and shape into any form they please." There is a crucial difference between political ideology, which is a set of political beliefs or goals, and a nominee's judicial philosophy, which is a theory of, or approach to, judicial decision-making. Political ideology ought to play no role in a judge's judicial philosophy as it has no place in the function of judging.

This conventional understanding of the rule of law accomplishes two ends: First, it ensures that laws are enacted with legitimate constitutional authority. Second, it safeguards that the application of the law does not vary depending on who is in charge. The law can be applied consistently and fairly to all. Accordingly, the founders believed that the judiciary would be "the least dangerous" branch because they understood that the "judiciary power" was fundamentally different than that exercised by the political branches.

In Federalist 78, Alexander Hamilton argued that legal traditions would restrict a judge's role and decision-making. A judge, he maintained, would exercise "judgment" not "will." His argument presupposed that such a distinction was intelligible and readily understood. As Hamilton continued, "there is no liberty, if the power of judging be not separated from the legislative and executive powers."

This notion of the rule of law — that judges can objectively discern what the law is, rather than what it should be — has been the governing tenet since our nation's founding and the underpinning for our independent judiciary.

It is essential, therefore, that the judiciary is politically neutral — that it acts not from will or interest but from reason, according to law, consistent with the limits of our constitutional framework. If it does not, and engages in the political, then politics trumps law and the rule of law is undermined. The independence of the federal judiciary will be eviscerated as it becomes just another political institution.

President-elect Donald Trump will soon present his Supreme Court nominee to the Senate. He can accomplish several goals by nominating Estrada, including bold, cooperative reparations for his own anti-immigrant rhetoric and the personal cruelty inflicted on Estrada years ago. Most importantly, however, he can reset the

confirmation process and present the Senate with an opportunity to return to its traditional focus of evaluating judicial nominees on legal intellect, fairness, integrity, temperament and a commitment to fairly read and apply the law the irrespective personal political views. This can be the first step in repairing our constitutional framework.

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