

NOTE: Dean Steve Woolpert Provides Commentary On Sotomayor Senate Hearings In Contra Costa Times In a guest commentary in the Contra Costa Times, Saint Mary's Dean Steve Woolpert shares his thoughts about the political gamesmanship involved in the U.S. Senate hearings on the nomination of Sonia Sotomayor to the U.S. Supreme Court. A politics professor and dean of the School of Liberal Arts, Woolpert has studied the history of the Supreme Court and offers a perspective on the judicial myths and political realities surrounding the confirmation process.

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Readers' Forum: Sotomayor confirmation exposes judicial myths and political realities

BYLINE: By **Steve Woolpert** Guest commentary

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WITH DEMOCRATS now holding a commanding 60-vote majority in the Senate, the confirmation of Judge Sonia Sotomayor to the U.S. Supreme Court is virtually assured. With the GOP in disarray, Republicans can ill-afford to alienate Latino voters by attacking her. Since she is replacing one of the court's more liberal justices, Republicans have little at stake, except the opportunity to challenge President Barack Obama's judgment in selecting her.

The most effective way to do this is not by questioning her qualifications but by invoking the popular myth that the Supreme Court is an apolitical institution. Its influence depends upon its decisions being perceived as impartial, objective applications of the law. The court's legitimacy is the key to its power. People feel more obliged to obey its rulings if they seem "nonpolitical."

Judge Sotomayor challenged this image of the courts when she told a Duke University audience in 2005 that appellate courts are "where policy is made." Realizing her transgression, she immediately added, "...and I know this is on tape, and I should never say that, because we don't make law, I know. OK, I know. I'm not promoting it, and I'm not advocating it."

Expect Republicans to fault her for this statement, even though she was right: appellate courts especially the Supreme Court make policy. The Supreme Court is political, not in the partisan sense, but because it helps decide who gets what, when and how. It determines the authority of the government; it protects and limits individual liberty; it provides those who lack influence an additional avenue to pursue their goals; and it places issues on the agenda of other political institutions.

The range and complexity of our laws ensure that most policy disputes are fought out partly in the courts. Consequently, presidents, senators and interest groups see a sympathetic Supreme Court as crucial to their goals. But Senate Republicans won't say that. Rather, they will invoke the myth of a nonpolitical court to portray Sotomayor as an "activist" judge. In political parlance, the term is applied to judges whose decisions run counter to one's policy preferences.

Sen. Jeff Sessions of Alabama previewed a second likely line of attack by Republicans. He said Sotomayor's confirmation hearings will "determine whether or not she will be faithful to the law, or whether she will allow her personal or political views to influence her decision-making." The notion that the high court simply applies legal rules to the facts at issue fuels the popular myth that there is only one right decision to any legal question.

In fact, justices have discretion. Routine legal questions never reach the Supreme Court. The high court faces issues on

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which the law is unsettled or incomplete, where the facts are novel, or where the lower courts are divided. On such matters there is more than one logically defensible ruling. (In the most recent term, 29 percent of the high court's decisions were determined by 5-4 votes. Seventy percent of these 5-4 decisions were identical splits between the four "liberal" and four "conservative" justices.) These persistent splits are not direct expressions of the justices' political ideologies. They reflect differences in jurisprudence: how they frame legal issues, which facts they deem pertinent and how strongly they support competing legal values raised in the cases before them.

The myth of a nonpolitical Supreme Court is the key to its influence, but these realities explain why the confirmation process is so politically charged. When Republicans invoke the myth of a nonpolitical Supreme Court, they will ironically do so for very partisan purposes: To challenge the Sotomayor nomination and damage President Obama.

Woolpert is dean of the School of Liberal Arts at Saint Mary's College.

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