

Maryland Lawyer

News and analysis of legal matters in Maryland

Why the fuss?

Judge Sotomayor and the past and future of judicial nominations

In a country facing two wars and the worst economic slide since the Great Depression, what is the most pressing issue facing the U.S. Senate? On May 25, few would have suspected that it would be the Supreme Court nomination of a law-and-order Yale Law School graduate who has served with distinction on the U.S. Court of Appeals for more than a decade (and on the District Court before that). But such was the response to the May 26 nomination of Sonia Sotomayor to the U.S. Supreme Court.

This immediate reaction — fanned by the national press and the blogosphere — seems out of proportion to the actual stakes in Judge Sotomayor's nomination and selection. What are those stakes? And what explains the reaction?

The actual chances that Judge Sotomayor would bring about, or even be instrumental in, some fundamental change in the balance of power on the present Supreme Court are vanishingly small. Although it is always risky to compare one justice's judicial philosophy or rulings to another's, it is safe to say that Judge Sotomayor's rulings place her firmly in the center of early 21st-century American jurisprudence.

Analysis of her decisions as a whole — and there are many, from her years as both

a trial and an appellate judge — provides no evidence of a judicial philosophy that is grounded in anything but precedent.

The best view is that she would be slightly toward the left side of center on the current Supreme Court, about where her predecessor Justice Souter was. The former prosecutor from the Manhattan D.A.'s office might even find herself to the right of Democratic appointees on criminal justice issues.

And the "controversy" about Judge Sotomayor's frank statements that appellate courts are "where policy is made" and that a "wise Latina" judge might reach better judgments in some cases than her white male counterparts will ultimately be a non-issue. There is no hint that these sentiments have influenced Judge Sotomayor's rulings to date and no evidence that she is a Manchurian candidate who will adopt a radical bent once seated.

Nor is there a serious question about Judge Sotomayor's Senate confirmation. Simply stated, the Democrats have 59 votes (possibly 60 by late summer, if the Minnesota Supreme Court acts promptly) and it is likely that more than a few Republicans will vote to confirm.

Why, then, the superheated rhetoric? Why the insistence — surprisingly, on

both the right *and* the left — that Judge Sotomayor's views place her outside the mainstream? And why the suggestion that this appointment is one of the top items on the Senate's agenda, in the face of other pressing items, to put it mildly?

Last gasp?

Maybe the politics of Supreme Court nominations changed, finally and irrevocably, with Robert Bork's nomination in 1987. Perhaps every future nomination is fated to play out the same way, with a furious battle no matter the nominee's political philosophy. But another possibility is that the last two weeks are in reality the

last gasp: the final appearance for a political culture of judicial nominations that thrives on division and magnifies small

differences accordingly. Because it was not so long ago that even nominees whose views placed them well outside the mainstream of modern judicial thought were confirmed easily, even unanimously. (Justice Scalia, for example, whose arch-conservative views were well known before his nomination, was confirmed 98-0 in 1986.)

Given the certainty of Judge Sotomayor's confirmation, and the high likelihood that she will not cause a major change in the court, it is fair to predict that her confirmation hearings will turn out to be a non-event.

This can already be seen in retractions of some of the more over-the-top remarks, such as Newt Gingrich's statement that Judge Sotomayor was a "racist."

Based on what is known today, there is simply nothing to suggest that there will be moments of high (or low) drama when the Senate Judiciary Committee, which starts hearings on July 13, actually sits down to decide her nomination.

If this prediction proves correct, could it tell us anything about the future for Supreme Court nominations? After all, President Obama is very likely to name at least two more justices. There is a possibility, at least, that the next nomination may make even less stir — assuming, of course, that the president continues to choose from the broad range of left-to-center candidates available to him.

After all, the Democratic Party will still have the numbers, and the social/cultural issues that proved such flashpoints in the past have decreasing salience today. If the political temperature decreases for the next choice, Supreme Court nomination politics could even return to the historical norm.

For a Congress (and a chief executive) that has much bigger problems of war and peace, and the economy, on its plate, that wouldn't be such a bad result.

Cyril V. Smith is a partner at Zuckerman Spaeder LLP in Baltimore and past president of the Federal Bar Association, Maryland Chapter.



CYRIL V. SMITH
Commentary