

Hadley Arkes

NRO Contributor

July 01, 2009, 4:00 a.m.



A Different Strategy for the Hearings

Let Sotomayor talk — and get on the record what Dems don't want explained about the law.

By Hadley Arkes

As Cole Porter put it, “Another opening, another show.” The hearings on Sonia Sotomayor are scheduled to open on July 13, and Republicans can brace for another travesty, for this is something that Republicans just don't know how to do well. To make it worse, there are more traps this time than usual: We have already been amply warned that any serious questioning of Judge Sotomayor is bound to be portrayed by the Democrats as hostility toward Hispanics. (Of course, the filibustering of Miguel Estrada by the Democrats was somehow never given that construction.) But the presence of this hazard suggests a different and far better Republican strategy for the hearings. No roughing up of Sonia Sotomayor: She should be treated as we would wish our own sisters to be treated. But a gentle course may actually provide a greater political yield and be far more illuminating for the general public.

The appropriate line here comes from Kasper Gutman, Sydney Greenstreet's character in *The Maltese Falcon*: “By Jove, I do love to talk, sir, with a man who loves to talk.” This woman loves to talk. And by most accounts, she has high confidence in her ability to say things worth hearing. So the Republicans should simply invite her to explain the state of the law, as she sees it, on a range of subjects that have been particularly vexing of late in our politics: abortion (of course), but also matters like racial preferences, same-sex marriage, and the role of judges in overseeing military action on the battlefield.

There is no need to ask Judge Sotomayor how she would rule in any of these cases. She could simply display her learning by explaining the state of the law *as she understands it*, and reveal in that way the furnishings of her mind. For example, Iowa's supreme court recently invoked the concept of “equal protection of the laws” to strike down the traditional laws concerning marriage. Ted Olson, solicitor general in the first George W. Bush administration, has invoked the same concept in support of a right to same-sex marriage, without exactly filling out the reasoning.

How would that reasoning go? Olson has made a plea on behalf of the same-sex couple who earnestly love each other. Judge Sotomayor might well be asked why the same principle would not work on behalf of ensembles of three or four people who profess their love in the same way. Is there something in that principle of “equal protection” that works to confine the claim of marriage to two people? She might be asked, not how she would decide a case, but how judges would reason about a problem when it is presented in that way.

But it is on abortion that Judge Sotomayor could be most revealing. The Democrats always want to make abortion the central issue in the juridical and “culture” wars. Republicans can take a line from H. L. Mencken and give them what they want — “good and hard.” The Democrats are always pressing Republican nominees to commit themselves to maintaining *Roe v. Wade*, but they also prefer to surround the actual findings in *Roe v. Wade* with a benign haze. That haze nicely hides the companion case of *Doe v. Bolton*, the case holding that a woman may order an abortion at any time during the pregnancy if it was thought necessary to preserve her “mental health.” One professor at a major law school took a survey among 25 of her colleagues and found that only five of them could give an accurate account of the holding in these cases.

The Republicans can simply ask Judge Sotomayor to explain what *Roe v. Wade* and *Doe v. Bolton* established. If she just says those cases established a right to abortion for the first three months of the pregnancy, the Republicans can correct her, and correct her on national television. For the right to abortion actually extends through the entire length of the pregnancy. For most Democrats, that right to abortion would cover even partial-birth abortions, with the body of the child dangling out of the birth canal. In fact, the Democrats had no real enthusiasm in voting for the Born-Alive Infants

Protection Act (2002), the law that mandates preserving the life of a child who *survives* an abortion. However, only one Democrat with a national reputation summoned the nerve to oppose this measure: Barack Obama, back in the Illinois Senate, led the opposition to his state's version of that bill and managed to kill it.

But according to surveys, over many years, no more than 22 to 25 percent of the public have been willing to support the policy of abortion at any time for any reason. In one Zogby poll in 2004, the figure was as low as 13 percent, and a poll by ABC yielded a figure of 16 percent. When the matter is laid out with this kind of precision, would Pat Leahy and Dick Durbin really put on again their act of enjoining the nominee to affirm a policy that causes a large majority of the country to recoil when they hear about it?

From the exchanges that would emerge from this line of questioning, two critical points would be established, points that could transform the hearings:

(1) It would be clear that most people in the country — including many people who call themselves “pro-choice” — think that *some* abortions may be rightly regarded as unjustified, and rightly barred. And as it turns out, the law that has been shaped by the Supreme Court could be read as quite open to such restrictions on abortion in particular cases. It is arguable also that five of the justices now sitting would be willing to sustain those restrictions, depending on the case at hand. Does Judge Sotomayor understand the law in that way? Or does she think that the law springing from *Roe v. Wade* mandates nothing but abortion on demand, for any reason at all, at any time? If so — and if she could actually speak those lines — she would bring jolting news to many people in the country who know little about the state of the law. But if she reads the law as it actually stands now — a law open to restrictions on abortion in particular cases — that too would come as news to a large part of the public. It would also induce the most wholesome gnashing of teeth through all ranks of the Obama administration, along with a sinking feeling of buyer's remorse among the most zealous supporters of abortion rights.

(2) Once it is clear that the law is open to restrictions on abortion in particular cases, the scene is set for the second and decisive step. The nominee could then make the point that she cannot pronounce today on the kinds of restrictions that would pass constitutional muster without virtually inviting the legislation — and the litigation — she would be asked to judge. End of the conversation on abortion — now and forevermore in judicial confirmation hearings. Any future Republican nominee questioned on the subject could simply cite the precedent of these hearings, cite the reasons given by Sotomayor, and stand on the same ground as she politely declines to discuss anything more about the matter of abortion.

That in itself would be no small public service. And if Judge Sotomayor happens to stumble in these conversations, if her answers are less than luminous, or if she falls into gaffes of a Bidenesque nature, the Left will suffer an embarrassment amply earned. Instead of elevating someone who could stand on the same plane as Scalia, Roberts, and Alito, offering counterarguments, they may simply be putting on the Supreme Court a caricature of liberal jurisprudence who will dangle there for 30 years. On the other hand, Judge Sotomayor may be as brilliant and as scrappy as her backers tell us she is. And in that case, the hearings could reveal to us the furnishings of mind of a talented jurist. That too would be no small thing, and not a bad day's work for the Republicans on the committee.

— *Hadley Arkes is the Ney Professor of Jurisprudence at Amherst College and was the architect of the Born-Alive Infants Protection Act.*