

COLUMNS

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New Hearings, New Possibilities

By Hadley Arkes

We await now the coming of Sonia Sotomayor. The hearings over her confirmation to the Court will open in another week, and the Republicans and pro-lifers are gnashing their teeth, for they see little they can do to avert what they sense is a calamity in the making. When the nominees have been sent up by Republican presidents, the Democrats have assumed—not always correctly—that the candidate before them is a probable vote to overrule *Roe v. Wade*. Even if they cannot block the confirmation, they can at least wound the candidate in some way and score some points for their side. They try to elicit, from the candidate, his willingness to respect *Roe v. Wade* as a precedent. As Richard Doerflinger once observed after a study of the polls, about 60 percent of the public would oppose about 90 percent of the abortions permitted under *Roe v. Wade* and its companion case of *Doe v. Bolton*. But the Democrats regard this matter as a bit too jarring to convey to the public, and so they are content to leave the hearings in a benign haze on what that “right to abortion” really covers.

When a Democratic president sends up a nominee, the Republicans have been more anxious to show how fair-minded they are. They will focus their concerns on “judicial activism” and “legislating from the bench.” They will expend their genius in railing against a problem that most of the public do not understand, and care little about.

And yet the Republicans could waken themselves from their

melancholy.

Since the last hearings for a nominee, there have been some shifts that mark a new moment, and some new possibilities are in sight for those with eyes to see. A Court containing John Roberts and Samuel Alito upheld the federal bill on partial-birth abortion. It upheld, that is, a restriction on abortions performed at the very point of birth, with most of the body of the child dangling outside the body of the pregnant woman. But about two-thirds of the Democrats in the Senate and the House voted against that bill. They were willing to put themselves on the record in opposing a limit on abortion even at the point of birth. And Judge Sotomayor's nomination has come from the most radical pro-abortion President we have yet seen, a man who would not accept a limitation even on killing a child who had survived an abortion. These plain facts, now on the record, are momentous. They mark a truly new situation for the occasion of these hearings. Unless the Republicans are brain-dead, they have the chance now to bring out points about the law that would truly capture the attention of the public--and make these hearings into a torment for one Barack Obama.

There would be no need to assail or disparage Judge Sotomayor. The Republicans can merely ask the Judge to draw upon her seasons of experience in the law to lay out for them her understanding of the law that has been shaped now on abortion by the Court. One of the plainest questions must be, Is there any limit to that right to abortion, either in the age of the child in the womb, or the reasons for electing that surgery? If so, where are those limits? Most Democrats in Congress refused to see even the point of birth as the limit. Does she regard that as an

arguable point, or does she think that matter has been “settled” now by the Court?

The President who appointed her thought that it would impair that constitutional right to abortion if the law sought to preserve the child who survived. Does she regard that as a tenable view, which may yet be argued as an open question in a Court she will join? If not, she rebukes severely the President who appointed her. But if she defends him, she reveals to the country an understanding of abortion that is truly radical, sweeping, unqualified at any time, for any reason. And that itself would be a headline in the making. ("SOTOMAYOR REFUSES TO RULE OUT RIGHT TO KILL THE CHILD BORN ALIVE.")

Just to raise this question will set Democrats to defending their President; it would gin up Team Obama in denying again that he had opposed the Born-Alive Infants' Protection Act in Illinois; and it would compel the media to cover a part of the Obama story that they had been quite content to leave uncovered, undisclosed.

But let us suppose that Judge Sotomayor moves in the grooves of conventional opinion, and gives the answers that most of the public would prefer to hear. Let us suppose that she reflects the polls and notes that even people who are “pro-choice” think that *some* abortions may rightly be restricted. She would not likely vote, as a judge, to uphold any restrictions. But by affirming that point, she puts in place the premises that would support any pro-life nominee to the Court in the future. And she would set the stage for the steady erosion of *Roe v. Wade*. With those simple moves, to allay misgivings, she could induce, among the most zealous supporters of the Administration, a deep heartburn and

buyer's remorse. Some things to be extracted and savored even in a bad situation.

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