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# Why Senators Should Ask Supreme Court Nominees About Their Views on Abortion Rights

Reproductive rights and a woman's ability to make decisions about her health, including the right to choose an abortion, are increasingly under threat. Over the past three decades, the combined effect of a severe shortage of doctors providing abortions, onerous state abortion restrictions, and lack of funding have made abortion virtually unavailable for many women. The last Supreme Court ruling on abortion, the 5 to 4 decision in *Gonzales v. Carhart* upholding the first federal ban on certain methods of abortion, further diluted the constitutional protections for a woman's right to abortion.

The Center for Reproductive Rights believes that members of the Senate Judiciary Committee should ask Supreme Court nominees substantive questions about their views on constitutional protection for abortion rights and should insist that nominees provide fully responsive answers. Failure to pursue such questions creates dangerous uncertainty regarding a constitutional right that has already been significantly weakened.

## It Is Appropriate for Senate Judiciary Committee Members to Ask Probing Questions about a Supreme Court Nominee's Judicial Philosophy.

The Senate and the American people have the right to understand the judicial philosophy of potential Justices of the Supreme Court before they are confirmed, and knowing a nominee's views on the right to privacy and *Roe* is an integral part of that understanding. Full-scale questioning of judicial nominees, including questions relating to the nominee's views on the constitutional right to privacy and abortion, illustrate important aspects of the understanding of the Constitution and the role of the courts, which a nominee will carry with him or her into a lifetime appointment.

Indeed, numerous legal scholars have argued that it is a Senator's constitutional duty to act as an appropriate legislative "check" on the power of the Judiciary by ascertaining the judicial philosophy of a Supreme Court nominee before voting to confirm a nomination. As explained by Robert Post and Reva Siegel—two leading constitutional law scholars at Yale Law School, "[I]t is precisely because the Senate must decide whether to vest nominees with the discretion and authority to interpret the Constitution that the Senate may need nominees to explain their constitutional philosophies."[1]

## There Is No Principled Justification for a Nominee to Refuse to Answer Questions Related to Abortion.

While recent Supreme Court nominees have raised various objections to disclosing their views on controversial issues and cases, it is clear that nominees have been highly selective in choosing which questions about important constitutional principles and cases they will or will not answer.[2] For example, most of the nine Justices who made up the Rehnquist Court [3] were willing to discuss and even embrace the historic school desegregation decision *Brown v. Board* of Education when asked about it during their confirmation hearings, but most refused to answer any questions about *Roe*. In addition, current Chief Justice Roberts, who was confirmed in 2005, and the Court's most recent appointee, Justice Alito, who was confirmed in 2006, were willing to answer questions about *Brown*, but refused to substantively answer most questions relating to abortion cases.

This stark contrast in the justices' willingness to answer questions about *Brown* while almost universally refusing to discuss *Roe* cannot be explained by the claim that *Roe* presents issues which may come before the Court again, while *Brown* does not. As recently as 2007, the Supreme Court ruled on the very issue presented in *Brown*—racial integration of schools.

In addition, several nominees who have been unwilling to discuss *Roe* have been willing to answer questions about cases involving constitutional protection for access to contraception and the right to privacy more generally. While this difference can possibly be explained by the fact that the right to access contraception is perceived as less controversial than the right to abortion, a nominee's refusal to respond cannot be justified by unwillingness to address controversial topics. Indeed, as Michael Stokes Paulsen, a legal scholar opposed to abortion, has suggested, asking a nominee about his or her opinion of *Roe* is perhaps the most important question that a senator can ask because the answer "would yield the maximum possible salient information about a nominee's overall judicial philosophy and outlook[.]" [4]

## Members of the Judiciary Committee Should Ask All Nominees About Their Judicial Philosophy in Regards to Abortion.

A nominee's present understanding of the law will undoubtedly affect how they will interpret the Constitution once they are confirmed as a Supreme Court Justice. As a result, by engaging nominees in substantive discussions of important legal issues, such as the right to privacy and *Roe v. Wade*, senators not only educate themselves on the nominee's views on the meaning of the Constitution and the role of the Court, but also educate the American people and allow them to determine whether they believe the nominee will move the Court in the right direction. The Constitution bestows on the Senate the duty to provide its "advice and consent" to the appointment of Supreme Court Justices. In order to fulfill that duty, senators must be able to fully engage in a substantive democratic review of a nominee's views, including his or her opinion on Roe and its progeny.

## ENDNOTES

1 Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 YALE L.J. POCKET PART 38, 45 (2006) [hereinafter Post & Siegel, *Questioning Justice*].

2 Post & Siegal, *Questioning Justice* at 46.

3 The Justices who sat with late Chief Justice Rehnquist from 1994 to 2005 are Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, and Breyer.

4 Michael Stokes Paulsen, *Straightening Out the Confirmation Mess*, 105 YALE L.J. 549, 568 (1995).