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Why the Democrats will not go in to battle over Alito

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Samuel Alito, President George W. Bush's new nominee for the US Supreme Court, possesses a far more nuanced record on the hot-button topic of abortion than either Democratic opponents or Judge Alito's conservative backers want to admit. The main cudgel being wielded by his foes is a 1991 opinion in which the judge voted to uphold a Pennsylvania law that would have required married women seeking abortions to notify their husbands in advance. Exceptions were provided if a woman feared or had suffered spousal violence, or if the husband was not the actual father or could not be found.

Judge Alito had to follow a constitutional test that Justice Sandra Day O'Connor, whom he now would replace, had articulated as the controlling vote in earlier Supreme Court decisions. Mr Alito made a thorough effort to apply Justice O'Connor's "undue burden standard", but his effort was proven apparently faulty when Justice O'Connor herself, a year later, struck down the spousal notice law when the case reached the Supreme Court. Now, Judge Alito's partisans assert that Justice O'Connor altered her standard in that later ruling, while the judge's liberal opponents say his opinion proves he is a patriarchal sexist uninterested in victims of domestic violence. Judge Alito wrote that "the plight of any women, no matter how few, who may suffer physical abuse or other harm as a result of this provision is a matter of grave concern", but that statement will not be publicised by his opponents.

Five years ago, in a second abortion case, Judge Alito authored a brief concurring opinion agreeing that a New Jersey measure outlawing so-called "partial birth" abortions was obviously unconstitutional pursuant to a new Supreme Court decision on an almost identical statute. Some conservative US jurists have striven to uphold such bans, but Judge Alito's 2000 statement is a straightforward application of the controlling precedent. A decade ago, Judge Alito cast the decisive appeals court vote in a lesser-known abortion case: *Elizabeth Blackwell Health Center v. Knoll*. He did not write an opinion, but that decision, properly understood, may be the most instructive about what appears to be Judge Alito's fundamentally dispassionate approach to abortion conflicts. The Blackwell case turned on the question of whether federal government limits on the use of public funds for poor women's abortions precluded Pennsylvania from imposing even stricter limits. One judge said no and another said yes, but Judge Alito voted with the latter, against the more restrictive anti-abortion policy.

A results-oriented, politically driven judge easily could have voted the other way. Judge Alito did not and already some of his rightwing supporters, fearful this vote will scare anti-abortion hardliners, are asserting both that the case only concerned administrative authority and that

Justice Antonin Scalia, the hardliners' favourite, would have voted identically had he been in Judge Alito's shoes.

Neither side in the US abortion debate, and neither side in today's intensely partisan warfare over Supreme Court seats, is willing to acknowledge complexity and nuance in a nominee's record. In the end, Judge Alito will win US Senate confirmation by a margin of about 65 to 35. That is because at hearings before the Senate's judiciary committee, Judge Alito will profess respect for earlier precedents, just as John Roberts, the new US chief justice, did in winning Senate approval recently. Moderate Democrats will accept Judge Alito's statements as a sign that he has no ideological fervour to overrule *Roe v. Wade*, the original case that protects US abortion rights.

What is more, Democratic opponents who want to use Judge Alito's nomination to assail Mr Bush also know that abortion is not the battleground on which to fight. US public opinion overwhelmingly supports spousal notification requirements such as the one Judge Alito voted to uphold, and attacking him for that vote will win plaudits only from true believers.

Beginning a year ago, from John Kerry, the defeated presidential candidate, to Hillary Rodham Clinton, a prospective 2008 presidential candidate, top Democrats have publicly signalled their desire to distance their party from all-out defence of abortion rights. Many liberal interest groups feel otherwise and their proclamations will be shrill. But Democratic senators will shy away from a partisan showdown over abortion and Samuel Alito will be confirmed as a Supreme Court justice.

The writer, a senior fellow at Homerton College, Cambridge, is the author of *Liberty and Sexuality* (1998), a history of the US abortion rights struggle.