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Why is Sen. Josh Hawley trying to abort a conservative judicial nomination?

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Rarely does a conservative freshman senator receive serious blowback from conservative leaders for taking a stance that itself sounds conservative, and rarely is the blowback as deserved as that now being experienced by Republican Missouri Sen. Josh Hawley.

Several outlets last weekend reported that Hawley is threatening to vote against Neomi Rao, President Trump's nominee for judgeship on the D.C. Circuit Court of Appeals seat vacated by now-Justice Brett Kavanaugh. Hawley, just elected in November as the latest great new hope for conservatives, confirmed to Axios' Jonathan Swan that he is concerned Rao will not show the requisite "strong record on life," and that specifically, "I have heard directly from at least one individual who said Rao personally told them she was pro-choice. I don't know whether that's accurate, but this is why we are doing our due diligence."

This is an extremely dicey approach for a senator to take on judicial confirmations, both in theory and, ironically, for the anti-abortion cause itself in practice.

Conservatives have argued long and correctly that professional qualifications and personal integrity, along with a basic commitment to the Constitution itself, should be the only determinants of nominees' fitness for appointment to federal judgeships. In particular, conservatives have inveighed against any result-oriented, single-issue litmus tests for judges, especially for those below the level of the Supreme Court.

Federal appellate judges are supposed to faithfully follow existing Supreme Court precedent without implementing their own policy choices. For years, conservatives have complained vociferously when Democrats opposed Republican nominees specifically because of the nominees' presumed "position" on abortion, no matter how strong the nominees' resumes, how keen their intellects, and how firm their stated commitments to follow precedent rather than their own policy preferences. It would be a terrible double standard to insist on a pro-life litmus test while denouncing a pro-choice one. But that, in effect, is what Hawley is doing, and on the basis of mere hearsay, at that.

Slightly different standards might apply for one of nine spots on the Supreme Court, where new, binding precedents are set. But for a lower court, if a nominee is both distinguished and brilliant, as Rao certainly is, and has shown commitment to constitutional and statutory text, as she has, then that should be enough to confirm her. No lower-court judge can overturn the pro-abortion *Roe v. Wade* regime anyway, so Hawley is wasting his energy.

He also would arguably be hurting, not helping, the pro-life cause in the long run. When conservative nominees have run the gauntlet of a closely divided Senate, they often have relied for key votes on pro-choice senators such as Sen. Susan Collins, R-Maine, who take the nominees' word that presumably pro-life personal views would not affect their faithfulness to precedent. This especially has been the case with nominees who are devout Catholics, whom the Left opposes on the assumption that they will overturn *Roe*.

Without the votes of Collins or Sen. Lisa Murkowski, R-Ala., or the occasional moderate Democrat, star jurists such as Supreme Court Justices Sam Alito or Brett Kavanaugh or appeals court judge Amy Barrett might never be confirmed. If conservatives, too, start insisting on "personal pro-life" litmus tests, Collins and company may no longer be on board when nominees need them.

Most abortion-related court cases these days arise at the margins. The Supreme Court, for example, is repeatedly asked to consider cases involving how early in a pregnancy states can ban abortions or impose restrictions on how and where medical personnel can perform them. At those margins, a conservative constitutionalist on the Supreme Court can do far more to advance the cause of life than a personally pro-choice appeals court judge can to retard it.

For all those reasons, the reaction on the Right against Hawley's threats, including from numerous pro-lifers, has been swift and strong. Former Reagan Attorney General Ed Meese, a virtual demigod among legal conservatives, released a new statement in support of Rao, as did longtime Christian right leader Ralph Reed. Carrie Severino, chief counsel of the powerful, conservative Judicial Crisis Network, said that "Josh Hawley is already acting like [Missouri's former Democratic senator] Claire McCaskill when it comes to judges," and conservative constitutional scholars Jonathan Adler and Ilya Shapiro were among those who joined a series of tweetstorms criticizing Hawley.

Rao already is under a furious, unjustified assault from the Left over contextually reasonable collegiate writings. She is a leading intellectual light among conservatives. To kill her nomination from the right would be asinine.