Senator Tom Coburn, M.D.
Written Questions for the Record
Dr. Charmaine Yoest, Americans United for Life
July 17, 2009

1) Judge Sotomayor repeatedly testified that she believed the "central holding" of *Roe v. Wade* was "settled law." Can you please explaiu what the holding of *Roe v. Wade* was?

In *Roe v. Wade*,[1] the Supreme Court held that the decision to have an abortion was part of the right to privacy protected as a personal liberty under the Due Process Clause of the 14th Amendment of the United States Constitution. While the Court in *Roe* purported to allow regulation of abortion in some circumstances, Justice Blackmun wrote that the Court's opinions in *Roe* and *Doe v. Bolton*,[2] decided on the same day, were "to be read together." In *Doe*, the Court defined "health of the mother" so broadly that it eliminated the state's ability to preserve or enact any meaningful regulations of abortion. The "health of the mother" exception provided that a physician's

> medical judgment may be exercised in light of all factors--physical, emotional, psychological, familial, and the woman's age--relevant to the wellbeing of the patient. All these factors may relate to health. This allows the attending physician [the abortionist] the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman.[3]

Therefore, under the *Roe / Doe* framework, an abortionist could offer any reason imaginable to justify performing an abortion at any time during a woman's pregnancy.

Do you believe it is settled law?

No. First, no judicial decision is ever completely "settled." It can be changed by constitutional amendment or subsequent court decision. Furthermore, statutes and case law that conflict with the Constitution can never be considered "settled."

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[1] 410 U.S. 113 (1973).

[2] 410 U.S. 179 (1973).

[3] Id. at 192.

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Second, the holding in *Roe* was substantially modified by the Court in *Planned Parenthood v. Casey*.[4] In *Casey*, the Court upheld what it called the central holding in *Roe*, but abandoned *Roe's* trimester framework in favor of a new standard of review – the "undue burden" standard. Under this standard of review, if a law's purpose or effect is to place substantial obstacles in the path of a woman seeking an abortion before the fetus attains viability, the law is unconstitutional. The Court stated: "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."[5] The Court reaffirmed that legislative bodies may enact laws to protect the unborn post-viability.

In its most recent abortion case, *Gonzales v. Carhart*,[6] the Court upheld the constitutionality of the Federal Partial-Birth Abortion Ban, which lacked the typical "health exception," both before as well as after viability.

Therefore, abortion law is far from settled. The holding in *Casey* was a definitive step away from the Court's former holding that abortion was a fundamental right, with any regulation thereof subject to strict scrutiny. In *Gonzales*, the Court upheld the ban of one abortion procedure and arguably narrowed the unlimited health exception in *Doe*.

2) Did any of the laws of the 50 states regulating abortion survive the decision in *Roe*?

No. The combined effect of *Roe v. Wade* and *Doe v. Bolton* was to render state abortion regulations unenforceable, as discussed above.

3) **Was there any limit to the right to abortion, either in the age of the child in the womb or the reasons for electing that surgery, following *Roe*?**

No. As discussed above, in *Doe v. Bolton*, the companion case to *Roe*, the Court created a broad health exception to the regulations purportedly allowed under the *Roe* framework. The health exception granted abortionists the right to perform abortions for any reason during any time in the pregnancy.

If so, where are those limits?

See above.

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[4] 505 U.S. 833 (1992).

[5] Id. at 879.

[6] 550 U.S. 124 (2007).

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4) **Should the courts take into consideration developments in science and technology when considering cases involving life issues?**

Yes.

Why or why not?

In *Roe*, the Court held that the State's interest in protecting the "potentiality of human life" increases through the pregnancy, and purported to allow regulation or proscription of abortion after viability. While the Court in *Casey* threw out *Roe's* trimester framework, it stated that states can regulate more heavily after viability. Therefore, as technology progresses and unborn children are able to survive outside of the womb at earlier stages of development, by the Court's own reasoning, the State's interest in protecting the unborn should begin earlier.

Developments in science and technology should also inform the Court on when life begins. Increased knowledge of when vital bodily functions begin, like the heartbeat and brainwaves, should enable the Court to take judicial notice of when life begins. The Court has historically brushed over these questions as beyond the Court's capacity to answer. However, in the very least, the Court should accept these facts as legislative findings in support of regulations written by legislatures.

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