September 11, 1981

The Honorable Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In his letter of September 9, 1981, Senator Humphrey sets forth the following questions:

1. Do you believe that all human beings should be regarded as persons for the purposes of the right to life protected by the Fifth and Fourteenth Amendments?

2. In your opinion, is the unborn child a human being?

3. What is your opinion of the decision of the Supreme Court in the 1973 abortion cases, Roe v. Wade and Doe v. Bolton?

4. Do you believe the Constitution should be interpreted to permit the states to prohibit abortion? If your answer is yes, are there any types of abortions where you think the Constitution should be interpreted so as not to allow such prohibition?

5. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child has an abortion performed on her?

6. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is sterilized?

7. Do you think the Constitution should be interpreted to permit the states to require the consent of parents before their unmarried, unemancipated minor child is given contraceptives by a third party?

The first and second questions concern the definition of human life and the legal consequences which attach to that definition. Congress is currently considering proposals directly addressed to these issues. Questions concerning the validity and effect of these proposals, if any are passed, might well be presented to the Supreme Court for decision.

A nominee to the Court must refrain from expressing any view on an issue which may be presented to the Court. A federal judge is required by law to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455; see Code of Judicial Conduct, Canon 3C. If a nominee to the Supreme Court were to state how he or she would rule in a particular case, it would suggest that, as a Justice, the nominee would not impartially consider the arguments presented by each litigant. If a nominee were to commit to a prospective ruling

in response to a question from a Senator, there is an even more serious appearance of impropriety, because it may seem that the nominee has pledged to take a particular view of the law in return for the Senator's vote. In either circumstance, the nominee may be disqualified when the case or issue comes before the Court. As Justice Frankfurter stated in Offutt v. United States, 348 U.S. 11 (1954), a core component of justice is the appearance of justice. It would clearly tarnish the appearance of justice for me to state in advance how I would decide a particular case or issue.

Other nominees to the Supreme Court have scrupulously refrained from commenting on the merits of recent Court decisions or specific matters which may come before the Court. Justice Stewart, for example, declined at his confirmation hearings to answer questions concerning Brown v. Board of Education, noting that pending and future cases raised issues affected by that decision and that "a serious problem of simple judicial ethics" would arise if he were to commit himself as a nominee. Hearings at 62-63. The late Justice Harlan declined to respond to questions about the then-recent Steel Seizure cases, Hearings at 167, 174, and stated that if he were to comment upon cases which might come before him it would raise "the gravest kind of question as to whether I was qualified to sit on that Court." Hearings at 138. More recently, the Chief Justice declined to comment on a Supreme Court redistricting decision which was criticized by a Senator, noting, "I should certainly observe the proprieties by not undertaking to comment on anything which might come either before the court on which I now sit or on any other court on which I may sit." Hearings at 18.

Questions three and four directly raise the issue of the correctness of particular Supreme Court decisions. In Roe v. Wade and Doe v. Bolton the Supreme Court held that states may not prohibit abortions during the first trimester of pregnancy. Questions related to the issues reached in these decisions may come before the Court, and the Court may also be asked to reconsider the decisions themselves. For the reasons I have stated in this letter as well as in my testimony before the Senate Committee on the Judiciary, it would therefore be inappropriate for me to answer questions three and four.

The fifth question concerns the constitutional validity of a law requiring parental consent prior to the performance of an abortion on an unmarried, unemancipated minor child. Several state statutes dealing with this subject have come before the Court and have resulted in sharply divided decisions. In Planned Parenthood v. Danforth, 428 U.S. 52 (1976), the Court ruled unconstitutional a statute requiring parental consent before an unmarried person under 18 could obtain an abortion. The Court specifically noted, however, that it was not ruling that every minor was capable of giving effective consent, simply that giving an absolute veto to the parents in all cases was invalid. In Bellotti v. Baird, 443 U.S. 622 (1979), the Court struck down a statute which required parental or judicial consent prior to the performance of an abortion on an unmarried minor. The Court failed to agree on a majority rationale. Just last Term, however, in H.L. v. Matheson, 101 S.Ct. 1154 (1981), the Court upheld a Utah statute requiring notification of parents prior to an abortion, at least as the statute was applied to an unmarried, unemancipated minor who had not made any claim as to her own maturity. These decisions indicate that the area is a particularly troublesome one for the Court, and also one in which future cases can be expected to arise.

The Supreme Court has recognized that "the parents' claim to authority in their own household is basic in the structure of

our society." Ginsberg v. New York, 390 U.S. 629, 639 (1958) (plurality). My sense of family values is such that I would hope that any minor considering an abortion would seek the guidance and counseling of her parents.

The sixth question concerns the constitutional validity of a law requiring parental consent before an unmarried, unemancipated minor child is sterilized. Once again I would hope that any minor considering such a drastic and usually irreversible step would seek the guidance of his or her parents and family. It would be inappropriate for me, however, to express any view in response to a specific question concerning the legality of a parental consent law, because the whole area of the constitutionality of statutes requiring parental consent is in a stage of development and because such statutes are likely to be presented to the Court for review. My hesitation is also based on the fact that I have not had the benefit of a specific factual case, briefs, or arguments.

The final question concerns the constitutional validity of a law requiring the consent of parents before an unmarried, unemancipated minor child is given contraceptives by a third party. In Carey v. Population Services International, 431 U.S. 678 (1977), the Court struck down a law making it a crime for anyone to sell or distribute nonprescription contraceptives to anyone under 16. The case, however, did not involve a parental consent requirement; indeed, Justice Powell found the law offensive precisely because it applied to parents and interfered with their rights to raise their children. Id. at 708 (concurring opinion). A three-judge district court found a state law prohibiting family planning assistance to minors in the absence of parental consent unconstitutional as interfering with the minor's rights, T.H. v. Jones, 425 F.Supp. 873, 881 (Utah 1975), but when the case reached the Supreme Court it was affirmed on other grounds, 425 U.S. 986 (1976). The constitutional question is therefore still open, and I must respectfully decline any further comments for the reasons set forth previously.

Mr. Chairman, I appreciate the opportunity to set forth my views on these matters in response to Senator Humphrey's letter.

Sincerely,

Sandra Day O'Connor

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