

Senator SIMPSON. Then if I might return to this issue, because you get into—and I talked about abortion, but let's get to privacy. That keeps coming up because it is an attempt—and you handle it very deftly—to simply lead you from the issues of privacy to abortion. And that hasn't worked so far. It didn't work with anybody that I have had the opportunity and the pleasure to serve on this committee while they were presenting themselves to the Senate. Sandra Day O'Connor, Justice Kennedy, Justice Scalia, Justice Souter—none of them answered these questions.

But just a quick word on privacy. You told me in a private meeting earlier this year that you honestly had not made up your mind on the terribly searing issue of abortion. I accept that statement. And it is tough for me because I am pro-choice. I have always believed that a woman should have this choice. And it didn't come from confirmation hearings. It came from practicing law with real live human beings. So I have not come to that position through a rigorous analysis of the U.S. Constitution, but through life as a lawyer, dealing with the real live problems of real live people in extremity, who came to me for, I hope, honest and real assistance and that is what I tried to give; like, you know, I am going to commit suicide if I have to carry this child to term. That is when as a lawyer, a male lawyer, you really don't want to go much further. At least I didn't. So at least here is what I hope is my common sense, real life interpretation of privacy and how that might extend to a right to abortion.

Privacy in the west is a very extraordinary thing, perhaps not more than any other State in the Union or place in the Union, but in Wyoming, by God, it is the right to be left alone. And it means a lot to people.

This often-mentioned doctrine of family privacy protects against legislation that interferes with certain universally respected rights. But family privacy is not an absolute. It does have some limits. Few things are absolute. It seems its most appropriate power is when it protects the right of one individual without imposing in any way on the rights of another individual.

The Supreme Court has clearly established that a family has the right to send their children to a private school—that is the *Pierce* case; that a family may decide which family members may live in their home—we have talked about that one, *East Cleveland*; that the family has the right to decide whether or not to practice contraception, *Griswold*. All in which I concur. However, that family privacy doctrine is not absolute. A husband or wife does not have a family privacy right or a constitutional right to batter and maul the other one. And according to *Roe v. Wade*, a woman does not have an unfettered right to abort her unborn child once the fetus has become viable.

Family privacy then does stop at certain barriers and boundaries when the right of one person impinges on the right of another.

My question to you is this: Is not the family privacy doctrine a question of degree and not an absolute, clearly defined thing in stone?

Judge THOMAS. Senator, the courts have wrestled with defining the contours of the right of—that important right of privacy. I think I come from a part of the country where privacy is treated

pretty much as the way it is treated out west; that you really value your privacy, you learn to respect your neighbor's privacy. You don't just ride onto someone's land without being invited, and you certainly don't walk into someone's house, and definitely not their bedroom, without being invited. So it is important.

The Court, though, has wrestled with how far does this right extend. What portions of this right are to be considered fundamental? And those contours I think over time will be defined in Supreme Court cases.

Senator SIMPSON. Is it not inevitable that reasonable people would disagree about whether a woman has a constitutional right to abort a nonviable unborn child?

Judge THOMAS. It is certainly an issue in the general public that people have very strong opinions about, and as I have indicated earlier, I can understand the depth of feelings and passions on both sides of the argument.

Senator SIMPSON. Well, many special interest groups and many politicians paint abortion as some black-and-white issue. And my personal experience is that abortion is a numbingly difficult and anguishing and ghastly issue just because it is not a black-and-white issue. The toughest one perhaps that could ever be made by a woman. But in my mind that is the only person that can make that decision. I feel it very strongly, so I ought to be really zeroing in on you more. But I am not because these other things that we are going to see and we do see about you—integrity, honesty, character, judicial temperament—and you have got that, my friend. I don't know who is keeping the score book, but judicial temperament, you have won the Oscar because I can see you on a bench, in the midst of clamoring counsel—you won't get as many in the U.S. Supreme Court, but they are there.

So in my mind there is that decision to be made by the woman, and I have trouble with it myself. It should not be made by legislators or judges, especially male legislators and male judges.

I am going to ask you only one more question on that topic, and it won't be the last one you will hear. I can assure you that.

Do you promise—you used the word "promise" when you sat before us first, that first day. Do you promise this committee to consider the abortion issue as you face it on the Court with an open and equitable and fair mind and with sympathy and compassion for all who are involved in that terrible decision?

Judge THOMAS. Senator, I would not only make that promise on this important issue, not only to this committee but, if confirmed, to the American people, and to myself. It is my solemn oath. I cannot sit as a judge if that is not the way that I proceed on those cases. And that is a promise that I take very deeply and understand and appreciate and feel strongly about, on all cases, that I approach them with an open mind and for the individuals involved with an open heart.

Senator SIMPSON. One final point. Earlier this morning Chairman Biden asked you about the—I think it was the 1972 *Eisenstadt* case which held that a State could not prohibit a single person from purchasing contraceptives. That holding was extended in a 1977 case of *Carey v. Population Services*, which struck down a New York statute which allowed only licensed pharmacists to distribute

contraceptives to persons over 16 and prohibited the sale of contraceptives to persons under 16 except by prescription. However, I ask you, these use-of-contraceptives cases do not imply that there is a fundamental right somewhere of privacy for every single aspect of sexual relations, do they?

In other words, for example, the Court ruled in 1986 that there was no fundamental privacy right to engage in homosexual sodomy. I believe that was the decision. And I ask this question because I think you were hindered by a lack of time in your response, partly because of my urging to conclude. And so I would ask you to conclude that. I don't know that you did. I am not here to rehabilitate you. I didn't hear what came out.

Did you have anything further to add on that?

Judge THOMAS. Nothing more than this, Senator: The Supreme Court, as I noted earlier, has wrestled in cases such as the one you just mentioned, *Bowers v. Hardwick*, with the contours of the right of privacy. And it is a difficult area, and it is one that I am sure that the Court will be revisiting. But beyond that, I think that my comments on the whole issue in the area of privacy have been pretty full.

Senator SIMPSON. Well, Mr. Chairman, I will go on to a different subject, and there is no time for that. But I did want to—

The CHAIRMAN. Take some more time, seriously.

Senator SIMPSON. No, no, Joe. That is fine. I will come back. I am going on to the issue of affirmative action. I wouldn't have time. But I did want to share with you what I found on the outside of the Justice Department building—would you like to hear that?—up on the wall there.

Senator METZENBAUM. Why don't you continue on?

Senator SIMPSON. What is that?

Senator METZENBAUM. I like a sedative in the afternoon.

Senator SIMPSON. You would like me to go on?

Senator METZENBAUM. A sedative.

Senator SIMPSON. Are you trapping me? You would like me to—no, I shan't.

Senator METZENBAUM. Continue on.

The CHAIRMAN. I would love to hear what is on the wall.

Senator METZENBAUM. Please, don't stop.

Senator SIMPSON. This is over the main entrance. This is in my 35 seconds left.

The CHAIRMAN. I don't want any graffiti.

Senator SIMPSON. No; it is no graffiti. I didn't put it on there, nor did any of the committee.

It says over the main entrance to the Justice Department at 9th and Pennsylvania Ave. in Washington, DC, it says, "Justice is founded in the rights bestowed by nature upon man. Liberty is maintained in security of justice."

Isn't that fascinating? [Laughter.]

I just thought I would throw it in there.

The CHAIRMAN. It is not only fascinating, but I wish more judges believed it.

We will recess for 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.