

at this time to my colleague Senator Grassley. It will not affect who gets to ask questions next, except Senator Thurmond indirectly. You are next in line after me.

Senator THURMOND. Oh, you are through?

The CHAIRMAN. No.

Senator THURMOND. Well, go ahead.

The CHAIRMAN. I was just trying to—

Senator THURMOND. Mr. Chairman, you go next.

Senator GRASSLEY. Thank you, Mr. Chairman.

The CHAIRMAN. It is seldom that it is recognized that I am the chairman by the chairman, but I am delighted that I am the chairman. [Laughter.]

Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

Judge Thomas, if I could go back to an area that we discussed yesterday, the privacy area, and set a little background by reminding you, in response to the chairman's question, you agreed that "single people have the same right of privacy as married people on the issue of procreation." And you agreed with the chairman that "the privacy right of an individual is fundamental."

Yesterday I tried to find out parameters on the constitutional right to privacy, and let me make very clear I don't expect you to prejudge any case. But if I could, I would like to get an idea of the framework of the test to be applied in analyzing privacy rights. You have endorsed the rationale and the holding of *Eisenstadt*. Yesterday Senator Simpson and I raised the *Bowers* decision.

Now, the dissenters in *Bowers* found that *Eisenstadt* compelled the opposite results from the outcome that the majority reached. So the four people who were on the dissent did so on the basis of *Eisenstadt* to recognize a broad and sweeping constitutionally protected privacy right. So I hope that this puts in context my concerns and why I am bringing this up again.

I wonder if your endorsement of *Eisenstadt* could lead you to the same conclusions that the *Bowers* dissenters reached.

Judge THOMAS. Senator, I don't think that the majority in *Bowers* in any way felt compelled to undercut *Eisenstadt* in order to reach the conclusion that they did. Again, I have not gone back and re-read the majority opinion in that case, but I believe what the majority did is simply say that in looking at our history and tradition, the fundamental right of privacy did not include homosexual sodomy. I believe that was Justice White. But the point is that it left intact the holding in *Eisenstadt* that the right of privacy attached to the individual.

Senator GRASSLEY. Well, that helps me a little and makes me feel better than the answer that you gave yesterday.

You agree that the right of privacy is not absolute; indeed, protection is derived from the liberty clause of the 14th amendment as part of the Constitution. And so then in conclusion—and this is the only question I have of you in this round—I would like to read for you a portion of the majority opinion in the *Bowers* decision, and it is a few sentences long so I hope I read it carefully for you.

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

That this is so was painfully demonstrated by the face-off between executive and the Court in the 1930's which resulted in a repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those clauses, particularly if it requires redefining the category of rights deemed to be fundamental.

“Otherwise”—and this is the last sentence.

Otherwise, the judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

While you have probably stated this already, but as a sort of summary, can you agree that this expression of judicial restraint is an important consideration in determining the parameters of the right of privacy?

Judge THOMAS. Senator, I think that in areas in which a court or a judge is adjudicating or interpreting the more openended provision of the Constitution that judges should restrain themselves from imposing their personal views in the Constitution; that their adjudication must be rooted in something other than their personal opinion. And as I have indicated and the Court has attempted to do, attempted to root the interpretation or analysis in those areas in history and tradition of this country, the liberty component of the due process clause, and I think that that is an appropriate restraint on judges.

Senator GRASSLEY. Is what you just said, your way of telling me that you agree with those statements?

Judge THOMAS. Yes.

Senator GRASSLEY. Thank you, Mr. Chairman, and also thanks to my colleagues for the courtesy of going out of order.

The CHAIRMAN. This may be an appropriate time to take a break. We will break until 3:30.

[Recess.]

The CHAIRMAN. The hearing will come to order.

Let me say that, after consultation with Senator Thurmond and with Judge Thomas, it looks like our best efforts to get finished today—finished in the sense that Judge Thomas' testimony is finished—are not going to work. We would be here well into the night for that to happen. But it also appears after consultation with Judge Thomas and with Senator Thurmond, that we can get still a good hour-and-a-half more, maybe even more than that, in today, and can then resume at 9:30 on Monday morning. And I believe that we can finish by lunch on Monday. That will be the Chair's express intention, and it looks like that is very reasonable that that could be done.

So, Judge, instead of being finished today at 5, you will in all probability be finished at lunchtime on Monday. With that, why don't we just get under way and see how much more we can get finished tonight, if everyone is agreeable.

Now, unless I have miscounted, I believe it is my turn to ask some questions, Judge. I would like to go back and ask one very straightforward question because it has been mentioned 87 different ways by 6 or 8 different people. And I don't think you in any way have confused it. I think maybe we have confused it—we, the members of this committee, Republican and Democrat, and as I read some of the press accounts, the press even seems mildly con-