

QUESTIONS FROM SENATOR BIDEN

1. After reviewing the transcript of your testimony, I am uncertain as to whether you unambiguously believe that single individuals have a fundamental liberty right which includes a right of privacy on matters of procreation. For example, on Thursday, September 12, 1991, at page 50 of the transcript, you and I had the following exchange:

"The Chairman. ... Now, you said that the privacy right of married couples is fundamental, and as I understand it now, you told me -- correct me if I am wrong -- that the privacy right of an individual on procreation is fundamental. Is that right?"

Judge Thomas. I think that is consistent with what I said and I think consistent with what the Court held in Eisenstadt v. Baird."

Shortly thereafter -- on the same day -- you had the following response to a question asked by Senator Kennedy, at page 82 of the transcript:

"Judge Thomas. Senator, without commenting on Roe v. Wade, I think I have indicated here today and yesterday that there is a privacy interest in the Constitution, in the liberty component of the Due Process Clause, and that marital privacy is a fundamental right, and marital privacy then can only be impinged on or only be regulated if there is a compelling State interest. ..."

Because you spoke only about the marital right of privacy with Senator Kennedy, I returned to the issue the next day, at page 119-20 of the transcript.

"The Chairman. Judge, very simply, if you can, yes or no: Do you believe that the Liberty Clause of the Fourteenth Amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?"

Judge Thomas. Senator, I think I answered earlier yes, based upon the precedent of Eisenstadt v. Baird.

The Chairman. Well, you know, what folks are going to say is that Eisenstadt v. Baird was an equal protection case. All right? That is not the question I am asking you. Let me make sure and say it one more time. Do you believe the Liberty Clause of the Fourteenth Amendment of the Constitution provides a fundamental right to privacy for individuals in the area of procreation, including contraception?"

Judge Thomas. I think I have answered that, Senator.

The Chairman. Yes or no?

Judge Thomas. Yes, and --

...

Judge Thomas. I have expressed on what I base that, and I would leave it at that."

To clarify the statements you made during the hearing concerning the right of privacy, I ask you to answer the following question:

Do you believe that the due process component of the Fourteenth Amendment's liberty clause -- independent of the equal protection clause or the case of Eisenstadt v. Baird -- provides a fundamental right of privacy for individuals, both married or single, that includes a fundamental right of privacy with respect to procreation and contraception?

2. With respect to the First Amendment's protection of free speech, and specifically the protections accorded to conduct that is part speech and part action, please answer the following series of questions:

- (a) While on the Court of Appeals, you joined the opinion of Judge Sentelle in Community for Creative Non-Violence ("CCNV") v. Lujan, in which the court upheld the National Park Service's denial of a request by CCNV to include its statue in the christmas pageant of peace.

The Park Service had rejected the statue because it was not a "traditional" Christmas symbol. The Court of Appeals upheld this decision because it was made "without regard to [CCNV's] message" and thus the First Amendment was not implicated.

Doesn't a decision that a statue is not a "traditional" christmas symbol involve its content and thereby implicate the First Amendment?

- (b) Assume animal rights activists wanted to stage a silent sit-in on the public sidewalks in front of a research clinic at which experiments involving animals were performed. A city ordinance prohibited any person from sitting on the sidewalks in commercial areas because such activity might obstruct the flow of pedestrian traffic.

Does the First Amendment protect this conduct?

Would you permit the city to apply its ordinance to the protestors, or would you require the city to permit the sit-in, albeit with certain requirements -- perhaps ensuring a lane was kept clear for passing pedestrians?

3. This past term, the Supreme Court decided Rust v. Sullivan, which involved a challenge to regulations adopted by the Secretary of Health and Human Services that prohibited women's health clinics which receive federal funds from counseling patients about abortion, or from referring a patient elsewhere for such information, even if the patient asked the doctor for such information.

In fact, if asked, doctors in such clinics were instructed to inform patients that the clinic did not think abortion was an appropriate method of family planning.

Chief Justice Rehnquist, in upholding the regulations, concluded that:

"the government can, without violating the constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program which seeks to deal with the problem in another way. In so doing, the government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another."

Rust v. Sullivan, 111 S.Ct. 1772 (1991).

Without addressing the issue of reproductive freedom, do you believe that the First Amendment does or does not protect the conduct -- doctors communicating with their patients -- at issue in Rust?