APPENDIX

JOSEPH R BIDEN JR DELAWARE CHAIRMAN

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AND STAFF DIRECTOR

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON DC 20510-6275

September 20, 1991

The Honorable Clarence Thomas
United States Court of Appeals for the
District of Columbia
Third Street and Constitution Avenue, N.W.
Washington, D.C. 20001

Dear Judge Thomas:

I submit the following written questions from Senator Levin and myself to clarify certain issues raised during your testimony before the Committee from September 10 through 16, 1991. Please answer these questions in writing as soon as possible.

Thank you for you cooperation.

Sincerely,

Joseph R. Biden, Jr.
Chairman

Enclosure

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?

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

CLARENCE THOMAS
UNITED STATES CIRCUIT JUDGE

September 24, 1991

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Biden:

I have enclosed responses to your written questions that accompanied your letter of September 20, 1991. Pursuant to the agreement between Jeff Peck of your staff, and John Mackey at the Department of Justice, I will provide answers to Senator Levin's written questions as soon as possible.

Sincerely,



Clarence Thomas

Attachments

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Judiciary Committee

1. As I sought to make clear in my testimony, I believe that Eisenstadt was correct on both the privacy and equal protection rationales.

2. (a) The court's holding in Community for Creative Non-Violence ("CCNV") v. Lujan, 908 F.2d 992 (D.C. Cir. 1990) (R.B. Ginsburg, Sentelle, Thomas, JJ.), did not involve the First Amendment, because CCNV did not raise a constitutional challenge to the Park Service's decision. Rather, CCNV's challenge was based on, and the case decided under, the Administrative Procedure Act. The Park Service had issued a Policy Statement describing its administration of the Christmas Pageant of Peace; it followed that statement when deciding on the inclusion of proposed displays in the pageant. CCNV claimed that its proposed display was within the category of displays described by the Policy Statement and therefore was eligible for inclusion. It did not claim that the statement violated the First Amendment. In the Policy Statement the Park Service said that the pageant was designed to present traditional American symbols of Christmas. CCNV contended that its proposed display both communicated a traditional Christmas message and constituted a traditional Christmas symbol (i.e., a particular way of communicating the message). Because of the stated purpose of the pageant, the Park Service considered only the question whether the display was a traditional symbol, and concluded that it was not. Reviewing this determination under the deferential standard set forth in the Administrative Procedure Act, the court held that the Park Service's decision was not arbitrary or capricious.

In explaining that the Park Service's decision was not based on the display's message, the court was referring to the distinction between specific symbols and more general messages that underlay the Park Service's Policy Statement. The question whether the Park Service's decision was "content based" in the constitutional sense did not arise because CCNV did not raise it. Although First Amendment issues had been considered in earlier litigation, see CCNV v. Hodel, 623 F.Supp. 528 (D.D.C. 1985), in this case CCNV did not challenge the Policy Statement on constitutional grounds.

(b) A set of facts much like the one described in this question could easily come before the Court, so I must be circumspect in my answer. I will assume that the sit-in would constitute expressive conduct of the kind protected by the First Amendment, see, e.g., Brown v. Louisiana, 383 U.S. 131 (1966), and that the ordinance and its application would be found to be content-neutral. I will also assume that the sidewalk at issue, although public property, constitutes a "traditional public forum," see, e.g., Frisby v. Schultz, 487 U.S. 474, 480-81 (1988). All of these conclusions depend on the facts of a particular case, and therefore could be otherwise. Under these circumstances, the Court has held that the government may enforce

reasonable time, place, and manner restrictions if they are "narrowly tailored to serve a significant government interest" and "leave open ample alternative channels of communication." Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1990). See also United States v. O'Brien, 391 U.S. 367 (1968).

This balancing is fact-based and thus its application would require more information than is presented in the question. It is likely that the government's interest in maintaining the sidewalk for its primary purpose -- pedestrian traffic -- would be found to be significant. Whether the restriction is narrowly tailored would depend on facts such as the width of the sidewalk and the usual level of traffic. Moreover, it would be necessary to inquire into the availability of alternative channels of expression.

3. The First Amendment clearly protects communications between doctor and patient. The Constitution limits the extent to which the federal government may directly regulate such communication.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D.C. 20001

CLARENCE THOMAS
UNITED STATES CIRCUIT JUDGE

September 30, 1991

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Biden:

I have enclosed responses to the written questions of Senator Levin that accompanied your letter of September 20, 1991. By copy of this letter to Senator Levin, I am also providing copies of my responses directly to him.

Sincerely,

Clarence Thomas

Attachments

cc: Honorable Strom Thurmond
Ranking Minority Member
Senate Judiciary Committee

Honorable Carl Levin
United States Senate

Questions from Senator Levin for Judge Thomas

1. You've said that your personal political opinions would not taint you as a Supreme Court justice. Please list two Supreme Court cases in which you disagree personally with the effect or policy implications of the court's decisions, but believe were correctly decided?

2. Do you believe the Supreme Court's decision in Moore v. City of East Cleveland was correctly decided?

3. Which two U.S. Supreme Court justices of the last fifty years do you most admire, and why?

4. In the area of affirmative action, do you personally draw a distinction between goals and quotas?

5. Do you personally oppose a company's policy of setting nonbinding goals (i.e. not fixed quotas) for the promotion of minorities in a work force that was historically without any minority promotions?

6. When you said that Chief Justice Rehnquist "failed all Americans" in upholding the special prosecutor law, did you personally believe what you were saying or were you just reflecting what you perceived to be the executive branch's position?

7. You were quoted in 1980 regarding your sister as saying that "she gets mad when the mailman is late with her welfare check," and that "What's worse is that now her kids feel entitled to the check, too. They have no motivation for doing better or getting out of that situation." Were those three statements factually true when you made them?

8. You have been quoted as saying that Congress is "a coalition of elites which failed to be a deliberative body that legislates for the common good or the public interest," and that Congress is "no longer primarily a deliberative or even a law making body," and that "Congress is out of control," and that there is not "a great deal of principle in Congress itself." Did you personally believe those statements when you wrote or spoke them? Do you believe those statements today?

9. In 1987 you told the Heritage Foundation that "I, for one, do not see how the government can be compassionate...." Is this also your current position?

10. In 1989 you wrote that "Faced with enemies more ruthless and zealous than those in Jefferson's time, can this nation possibly go forward without a science of the rights of man?" Do you believe the rights of man is a science?

1. In stating that the personal views of judges should play no role in judicial decisionmaking, I believe that I was stating a truism. I believe that proper judicial decisionmaking requires a judge to determine first what his or her role is in a particular case, and then to discharge his or her responsibilities in an impartial manner.

Although there may be Supreme Court decisions that involve policy implications with which I may have disagreed while a policymaker, but which were correctly decided, as a general matter I do not believe that it is appropriate for me to endorse the results in specific cases. I also believe that the policy implications of decisions are matters for the political branches. A judge's objective must always be to determine the intent of the legislature.

2. As I explained during the hearings, I believe it generally would be inappropriate for me to identify precedents I do or do not believe are correctly decided. I have no agenda of precedents I wish to revisit. However, in response to a question from Chairman Biden, I explained that I believe the notion of family is one of the most personal and private relationships we have in this country, and that had Moore been decided differently it could have had ramifications for those in the same situation I was in as a child, living with my grandparents. As I indicated to the Committee, I have no reason to disagree with the method of analysis applied in Moore.

3. It is difficult to state categorically that I most admire any particular justice. I have great admiration for the second Justice Harlan for his principled decisionmaking and his constant efforts to identify the appropriate role of the Supreme Court in relation to the other two branches of government. I also greatly admire Justice Thurgood Marshall for his courageous efforts to assure that the rights of all citizens were protected.

4. Yes. A goal can differ from a quota in at least two ways. First, it can be less absolute: a quota must be met, whereas a goal can be flexible. Second, a goal can be implemented with differing methods. For example, a goal that was pursued through expansion of the applicant pool and outreach programs would differ significantly from a goal that was pursued through the use of direct preferences at the selection stage; the latter would be more like a quota than the former.

5. In general, no. "Nonbinding" goals can be very useful as a management tool to determine the effectiveness of an employer's efforts to promote equal employment opportunity.

6. The tone and phrasing of my remarks, and my willingness to address such an issue, reflected my position in the executive branch. As to the substance of my comments, it was of personal importance to me that my audience understand that the system of separated powers, including the accountability of the political

branches, is a basic protection of our most treasured rights and liberties. That point is important whether or not one agrees with the majority's decision in Morrison.

7. I made the unfortunate remark concerning my sister to a single reporter seated next to me at a luncheon in December 1980 in an effort to explain how much I cared about the unintended consequences of certain social programs. I was dismayed to see the statement in print. I immediately traveled to Savannah from Washington, D.C. to discuss the statement with my sister and my family. The statement was not made in a public forum. The statement was not intended to show any resentment toward my sister, with whom I am very close.

8. Again, the tone of my comments reflected my position in the executive branch and several difficult but unrepresentative experiences with the congressional oversight process. I shared with many observers, both within and without Congress, the fear that Congress was devoting too much attention to the day-to-day operations of executive agencies and not enough to the formulation of public policy. In my testimony, I gave the decision on military action in the Persian Gulf as an example of Congress at its best: the great issues of war and peace were powerfully debated, and each Senator and Representative took a public stand on the ultimate question.

9. I believe that remark to have been seriously misunderstood. It was not an objection to government programs of aid to the needy. As I attempted to explain in response to questions from Senator Simon, my comment rested on my philosophical understanding of the proper role of government. To my way of thinking, programs of public assistance rest on our obligation as an organized society to the disadvantaged: as part of its basic function, government must provide for the least fortunate, just as it is obliged to protect us from private violence. I regard the fulfillment of that obligation as a basic responsibility, not an act of compassion.

10. I did not mean to suggest that the study of the rights of man is a "science" in the sense that physics is a science. Rather, my point was that, as a matter of political theory, organized societies can rationally conclude that all persons are inherently equal. As I attempted to make clear in my testimony before the Judiciary Committee, I believe that a judge must separate political theory from law.

ROBERT C BYRD WEST VIRGINIA, CHAIRMAN

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United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

October 3, 1991

The Honorable Joe Biden
Chairman
Committee on the Judiciary
Suite 224, Dirksen Senate Office Building
Washington, D.C. 20510

Dear Joe:

I would appreciate your submitting the following two questions to Justice Clarence Thomas on my behalf:

1. Do you believe that a Presidential line-item veto is constitutional? Please elaborate as much as possible.

2. If you believe that a line item veto is constitutional, please cite the authority under which you conclude that it is.

If at all possible, I would like to have a response by Monday, October 7, 1991.

Sincerely,

Robert

Robert C. Byrd

RCB:chw

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON D C 20001

CLARENCE THOMAS
UNITED STATES CIRCUIT JUDGE

October 7, 1991

The Honorable Joseph R. Biden, Jr.
Chairman, Committee on the Judiciary
United States Senate
Washington, D.C. 20510-6275

Dear Chairman Biden:

You have asked that I respond to the questions of Senator Byrd concerning my views, if any, as to the constitutionality of a line-item veto. As I understand them, the questions assume a set of circumstances where the Congress has not acted to give the President a line-item veto.

I have not examined the question whether as a matter of constitutional law the President has inherent line-item veto authority. I will say, however, that I know of no historical examples of the exercise of such authority by a President. Let me reemphasize, however, that I have not had occasion to examine the issue.

Sincerely yours,

Clarence Thomas

Clarence Thomas ggk