

to me and disappointing and worrisome is that he did not take you up on it.

And what is especially baffling and troublesome to me is that he didn't do what I would have hoped he would have done, which would have been to start it off by frankly facing up to the obvious meaning and the obvious significance of the Heritage speech and other things that he had said. That he did not do.

Instead, he said that that speech and those other writings simply do not mean what to my mind they plainly and incontrovertibly do mean. That to me is a distressing and worrisome factor about these hearings.

Senator KENNEDY. Do you think everyone at the Heritage Foundation understood what he was talking about?

Mr. MICHELMAN. I certainly do.

Senator KENNEDY. This is just speculation. Given both what he has written and what he has stated in response to questions here, what would be your prediction of what he would do in a similar kind of factual situation of the *Roe v. Wade*?

Mr. GREY. You can never be sure, Senator, but with this judge I would say I would be more confident than usual in predicting his vote, that he would vote to overrule it and would extend that overruling very far. It is important to see that it is not simply the issue of overruling *Roe v. Wade* as such. It is how far you press beyond that and how you resolve the many difficult issues that would still remain if *Roe v. Wade* were overruled.

Mr. MICHELMAN. In all candor, there is some real uncertainty here, but if the question is that I have to stake a bet one way or the other and my life depends on it, there is no doubt that I am going to bet that he will vote to overrule *Roe v. Wade*.

Senator KENNEDY. Professor Law.

Ms. LAW. I would certainly concur with that, and that would be one vote. I don't think that he is going to get other Justices to join the position that he staked out prior to his nomination. But as Professor Michelman indicated earlier, it all comes up in complex packages, and it comes up in terms of your right to speak about abortion or your right to travel for purposes of getting abortions. And I suspect that in all of those contexts, we would see him as a voice for a more extremely conservative position than we have yet seen on the Supreme Court.

Senator KENNEDY. OK. Senator Grassley.

Senator GRASSLEY. Thank you, Mr. Chairman.

I notice that this paper that you have submitted to us was written on September 5. I think there are some really inflammatory statements in here I would like to ask you about.

On page 4: If confirmed, he would interpret the Constitution in a manner that would dangerously restrict constitutional protections for civil rights and civil liberties. Then you say this report focuses upon these alarming aspects of Judge Thomas' record.

Well, I don't know whether you are talking about his record as a judge or whether you are talking about his record as a policymaker in Government. But either way, you know, what you say about Judge Thomas here doesn't appear to me to be the judge that I have looked at face to face for the last 5 days.

Did you have a chance—well, I shouldn't say did you have a chance. Did you review the legal opinions written by Judge Thomas and the 122 other opinions that he joined in? Did these play a part in your analysis?

Mr. GREY. No, not my analysis, Senator.

Senator GRASSLEY. How about you, Mr. Michelman.

Mr. MICHELMAN. No.

Ms. LAW. I looked at some of those, but it focused—the purpose of this document was primarily to raise questions for the committee. And I don't have the text in front of me, but when we say things were alarming, what we are saying is that his prior record contains a lot of alarming statements that—at that point we are not condemning him. We are just urging you to question him closely, which you have done. And on many issues, the answers have been explanatory, and on other issues they haven't been. On other issues, they have been more disturbing than the prior record.

Senator GRASSLEY. When a person has served 18 months on the second highest court in the land and he is going to highest Court in the land, and he has written 18 to 20 opinions and he has been involved in 120—some, I don't see how if you are going to judge his competence for being on the Supreme Court or what he might do there, if there is any fear in his being there, that you could ignore that.

Mr. GREY. First off, Senator, it wasn't about his competence. His competence in the basic sense hasn't really been called into question. I accepted the representations made from all sides, both Judge Thomas' supporters and his detractors, that the decisions he had been involved with on the court of appeals had not raised fundamental issues one way or the other, so that he did not provide a sound basis for making a judgment about how he would decide the kind of issues that come before the U.S. Supreme Court which we are particularly concerned with here.

Mr. MICHELMAN. It really is relatively rare—it is not that it never happens, but it is relatively rare for a judge serving on a court of appeal to face the kind of responsibility for constitutional interpretation that might be seriously revisory of prior interpretations or that might be operating in a field in which there really is no prior precedent, in a way such that a judge's underlying philosophies and values and outlooks could enter seriously into the decisionmaking. A judge on the court of appeals in constitutional cases in the overwhelming preponderance of cases will find what appear to be binding precedents from which a judgment can be reasoned.

That is not true of a Supreme Court Justice. The judicial offices we are talking about here are two quite different offices. And given what Professor Grey has said about the representations coming from all sides, that unsurprisingly in Judge Thomas' 18 months on the court he hasn't come across a case that really would have put him to the test in terms of the kind of concerns we raised. We felt it appropriate to say what we had to say.

Senator GRASSLEY. Well, we were concerned at his confirmation hearing for the court of appeals about his views on natural law, and he was asked an awful lot about them. We are concerned about it now. But you were concerned because that is part of—that is the basis for the paper here. And not once has he touched on or

used natural law as a part of the rationale for these decisions he has written. It seemed to me like that would be significant.

Mr. GREY. Senator, that is my point that I tried to make in my opening statement; that he has said that he thinks the appropriate role for natural law in constitutional adjudication is implicit and pointed to Justice Harlan's dissent in the *Plessy* case as his example. That I believe is what he is likely to do on the Supreme Court, not say the Constitution says this or the statute says this but natural law says this and that wins, but rather in interpreting the liberty clause or the equal protection clause or the privileges and immunities clause bring to bear his prior stated version of natural law in interpreting those clauses. And that is what alarms me, and that is what I fear we will see.

Senator GRASSLEY. Well, there hasn't been anything you have heard from him in the last 5 days that relieves some of that suspicion you have, that concern you had?

Mr. GREY. Well, in my case, no. He certainly sounds different—he sounded different here in tone. He sounded very measured, very different in tone from the speeches. His explanation for that was that he was speaking as a policymaker then and as a judge now.

The thing is that he was speaking as a policymaker then about constitutional questions, about questions of constitutional law, and to a certain degree a Supreme Court Justice, once confirmed, is more like a policymaker in terms of the lack of constraint than he is like a sitting judge who is before a Senate committee scrutinizing him. So in some ways, the statements as a policymaker or an independent political speaker are more revelatory of what someone is likely to do on the Supreme Court, where there is no recall and there is no recourse.

I am not saying I don't believe what he was saying. I am sure he believed what he was saying. But I think you all must understand how tempting it is to say what—to come to believe what one wants—what one knows is expected in a situation like this. It is a high pressure situation, and I would place more credence on the long-term record.

Senator GRASSLEY. Professor Law, you almost suggested a litmus test on the abortion issue. If he had been right on the abortion issue, would he otherwise be qualified to be on the Supreme Court, in your judgment?

Ms. LAW. That is a hard hypothetical. It is not, I don't think, a litmus test on any particular issue, certainly not that a person to be confirmed has to take a particular view in a particular factual context. But I think it is the case that there are some basic principles—like, for example, the principles articulated in *Brown v. Board of Education* or the principles articulated in *Griswold v. Connecticut*—that at this point in our history it is fair to ask Supreme Court Justice nominees if they agree with those basic principles.

I believe that *Roe v. Wade* should be added to that list. It is a precedent that we have had for 17 years. And I am not saying that a Justice has to take this view or that view or that view. But I do think it is essential at this point that a nominee be willing to talk about in the way Professor Grey suggested is the mainstream of our constitutional adjudication and history, talk about the values