

The CHAIRMAN. I appreciate your frankness because one of the things that has—well, my time is up. I do appreciate your candor on the part of all three of you.

Let me yield to my colleague from South Carolina.

Senator THURMOND. Mr. Chairman, I was late. I will forgo any questions.

The CHAIRMAN. OK. Senator Kennedy.

Senator KENNEDY. Let me just ask the panel generally, given what—I think you probably answered in these early exchanges, but given what Mr. Thomas, Judge Thomas has stated about his position on the right to privacy prior to the time of the confirmation hearing, and then also his response to the various different questions. Do you find that there is a consistency here? How do you react to those exchanges? Are there consistencies, inconsistencies, given the wide range of both articles, writings, and his response in various degrees to the different members here on the right to privacy?

Mr. GREY. Just briefly, Senator, I had trouble with his testimony here that he had not thought about *Roe v. Wade* or had not spoken to other people about *Roe v. Wade* or expressed his opinion on that. It seemed hard to believe.

Then as far as consistency goes, you know, I think he has equivocally moved toward accepting something that he hasn't accepted before, as far as we know, which is the right of single people to have privacy, constitutional privacy rights under *Eisenstadt*. That question has been discussed already.

Ms. LAW. On abortion, this was not a confirmation conversion. There was a substantial difference between his prenomination statements, which were very critical of *Roe v. Wade*, and his statements here where he runs away from the issues. There is a way in which we could feel more comfortable with a confirmation conversion because you might try to evaluate whether it was sincere or not. But he did not affirm a concern with the core issues of women's capacity to control reproductive choice in the abortion context period, no matter what the circumstances. So there is that consistency, but there is a real inconsistency in terms of his willingness to go to be aggressive in attacking *Roe v. Wade*.

Mr. MICHELMAN. A quite obvious inconsistency is that between Judge Thomas' testimony here that he has an open mind about the abortion rights question and his prior declarations about that topic, which we all know about and are in the record and include the Heritage speech.

I don't have any problem with a man's changing his mind. I don't have any problem with a man's saying, I once thought and said because I thought it was true that Lehrman's article is a splendid example of constitutional argument with which I agree, and I have come to understand that it is not and let me explain to you what was wrong with my prior judgment.

What to me is troubling—and I want to say this committee invited, offered to Judge Thomas every opportunity to engage with it in that kind of colloquy, in serious open discussion about the issues involved in the abortion rights controversy and about how his prior views on that topic relate to his present views. And what is baffling

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.