

Mr. CHAMBERS. Senator Biden, the question again goes to the second point that I was trying to raise in the testimony about the qualifications of the candidate.

The CHAIRMAN. That is what I want to get to.

Mr. CHAMBERS. OK.

The CHAIRMAN. OK. That is what I want to get to in my question. Now, I want to stick, actually, with the question of credibility first. One of the arguments Judge Thomas raised, one of the statements Judge Thomas would counter with, I say to Mr. Rauh and all of you, whenever I would press him on any of the number of speeches that he made—and I think I have read as many as anyone in this room, including my staff, and I know they have read all of them.

He would say something along the following lines: well, if I wished to say what you are asserting, I would have explicitly said it. For example, in the Lehrman quote, in the footnote that he refers to, in the Cato speech where he says, do you want to understand why I criticize *Roe*? Go look at my—and then he goes back and there is this labyrinth he takes you through. I wondered whether he ever wrote the footnote or someone else wrote the footnote for him. I don't say that critically. A lot of footnotes are written for a lot of people, including Justices.

You wrote a hell of a lot of footnotes, Mr. Rauh, for brilliant Justices, I suspect. I do not suspect they were brilliant; they were brilliant, but I suspect you may have written some of those footnotes.

Having said that, how do you respond to the assertion by Judge Thomas that "If I wanted to criticize *Roe*, I would have criticized *Roe*. Why would I not have just criticized *Roe* way back in 1981 and 1982 and 1983? Why didn't I just say by the way, this is not just a splendid example of the application of natural law; this is also a view held by Mr. Lehrman that I believe is correct, and I think *Roe* is a wrongly decided decision, and I think it should be overturned"?

Why would a man like him have not said that 6, 8, 9 years ago when he was making some of these speeches—not all of them; some of them are as late as 1987, 1988—why would he not have done that?

Ms. HERNANDEZ. Well, let me try—

The CHAIRMAN. But you know him, so maybe I'll start with you, Madam Secretary.

Ms. HERNANDEZ. Let me try by saying that most of his writings, his speeches, centered around his chairmanship of the EEOC and battling those issues and speaking on his philosophy and point of view dealing with the matter at hand.

Some of his articles and speeches when he left the area of affirmative action or where he left the area of his views when he was with the Department of Education, and he commented on an article that he liked in the speeches that he made, it was that indirect comment. I think that it was lack of opportunity as far as his ability to speak on the many issues of the day. He was preoccupied, and his hands were full with the issues at hand.

But we listened very carefully to his testimony, and if you listened very carefully, and particularly a couple of times when you tried to push him, even when he conceded on certain policies, and

we were very careful in his response—in fact, let me give you an example on the legal position on his testimony to Senator Specter, dealing with goals and timetables, and you got some comments there.

He sort of conceded in his response that such policies might sometimes be okay, but only from a policy point of view. He declined to give even his tentative approval from a legal perspective which is what he was going to be called to deal with as a judge and has been called to deal with as a judge. And when he conceded when pushed, it was from a political point of view.

The CHAIRMAN. Well, I understand that—and I know my time is up—but one of the things that I'm trying to get at here is to try to deal with some precision about what he did say and what he didn't say. And there is no question—in my view, there is no question—that there was an overwhelming effort on the part of Judge Thomas, I suspect—I'd be willing to bet anything—at the direction of the White House not to answer anything about the law, period, if you could avoid it—anything. That's one issue, whether or not we should "allow a nominee to get away with that", quote-unquote, and that is something we are going to have to decide as a matter of policy here in this committee.

But that is not the same as saying that because he didn't speak to the law, his views on the law are able to be clearly arrived at by this panel or anyone else listening from what he didn't say.

Ms. HERNANDEZ. That's true.

The CHAIRMAN. So that's the only point I'm trying to make sure—I have to deal with, in determining whether to vote for or against him, his credibility in terms of whether he is telling me what he is thinking; whether or not we should, at what point, is this the time—we keep changing the standard as we go, legitimately, in my view—that is, as more nominees stonewall, this committee, at least some of us, get more upset about the stonewalling, for example. Justice Scalia answered nothing at all, zero, zip, nothing. Two members of this Committee said, "Oh, no, we're not doing that again." Each nominee is answering a little more. Whether they answer enough or not is a different question.

I'm trying to focus on what he said in his writings, and as I looked at every one of them, the worrisome passages of all of his speeches have been throwaway lines or paragraphs, almost all of them without any connection to the subject matter of the speech, almost without exception.

Now, the privileges and immunities speech by itself is something to worry about on its face, and you made that point very well. But all the lines we have heard so much about today—not today, but that I have raised; I think I was the first one to raise them—all of them are in the context of a single paragraph dropped at the beginning or the end of a speech unrelated to the paragraph.

When I questioned him at length about Professor Epstein, what worried me most about it after I listened to him wasn't that he agreed with Epstein, but that he didn't know what Epstein was saying.

So—and I'm going to stop talking here—but you understand the dilemma that I have and that I want you to speak to, and that is that the man said, look, if I wanted to say Epstein's notion of the