

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