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Jeffrey J. Peck, Staff Director
Committee on the Judiciary
United States Senate
224 Dirksen Building
Washington, DC 20510

Dear Mr. Peck,

Enclosad is a version, revised for publication, of my oral testimony to the Committee given on Monday, September 16. I would be most grateful if you could print this in lieu of the transcript of my remarks, delivered orally from notes. I have preserved the order, content, and approximate length of my remarks, while correcting some of the roughness that shows up in a transcript of extemporaneous remarks.

It was a privilege to testify before the Committee. My - thanks to you and to Chris Schroeder for helping to make it possible, and to Senator Biden for his exceptional courtesy as Chairman.

Sincerely,

Thomas C. Grey

Oral Version of Thomas Statement

Thomas C. Grey
Sweitzer Professor of Law,
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9/16/91

Thank you, Mr. Chairman. You know that all three of us, along with a number of other law professors, have signed a statement which expresses our views in writing, and I hope the senators will read it.

I will try to be even more brief than my colleagues. Frank Michelman said something of what I wanted to say on the role of the Senate, so I will shorten what I had to say about that.

On that score, though, I do want to point out something that I think is wrong in the Washington Post editorial endorsing Judge Thomas' confirmation, which Senator Thurmond entered into the record. The editorial says: "It is still pretty widely accepted that a president has a right to choose justices who reflect his own philosophical predisposition, and that if the nominee is to be rejected, it should be on some other grounds, grounds of moral, mental, or professional disqualification."

Now I think that is not the understanding of the Constitution held by most scholars who have studied the nomination and confirmation process. It's not the one verified by our history; it's not the one backed up by the original intent, as best that can be ascertained; and it's not one that has consistently been followed by the Senate.

The confirmation process was meant to be and has been a political process. That doesn't mean that adjudication is itself political in the same sense. It rather means that the Constitution sets up a political process to screen who will become lifetime federal judges. This screening process is in the hands of two kinds of politicians: the President on the one hand, and the senators on the other. These politicians are supposed to exercise their political judgment on the question whether a person should become a federal judge -- in this case, a Supreme Court justice.

As others have pointed out, judges -- this particular justice, if confirmed -- will serve for a whole generation. The law of the United States for a generation or more is at stake in proceedings like these. And it seems to me that this body has a responsibility for the outcome equal to that of the President, and so must exercise its independent judgment on whether this nominee is appropriate for this job.

This doesn't mean that senators should necessarily vote

against confirming any judge they wouldn't have appointed themselves. That would probably be an unworkable system.

It does mean, though, that senators should apply the same criteria to confirmation as the President applies in nominating judicial candidates. I ask you to consider for yourselves what criteria -- political criteria -- this President has applied in this case, and in other cases.

Then, I would suggest that senators take essentially the same attitude toward the confirmation vote as you think the President should appropriately take toward the question whether to veto or sign legislation. The President doesn't veto every bill he would rather not have seen passed. That would be unworkable. But he does consider the same criteria that the Congress has consulted in deciding whether to pass the legislation in question.

I think the analogy of the presidential veto provides a historically attested way of looking at the advice and consent power. It suggests a role for the Senate that is appropriate given the theory of our institutions -- appropriate as a guide to this body in carrying out its function of checking the President in the appointment of a Supreme Court justice.

Now I am going to move along to the question of natural law. Senator Leahy said a lot of people were asking him about it in Vermont over the weekend, and a lot of people have been asking me as a law professor: what is this natural law business that they are talking about in the Thomas hearings?

I don't think the concept is quite as arcane as some have tried to make it seem. In a broad sense, for a judge to follow natural law is simply to do justice, and there is nothing wrong with the idea that judges are there to do justice while they apply law in deciding cases. If that's all it means, natural law is an idea that I think most senators would endorse. I would certainly endorse it.

In this broad sense, natural law simply means the practical application of human reason to difficult questions of right and wrong -- the application, I would add, in all humility, given what we know about the limitations of human reason.

Let me say what I think has frightened some Americans about the idea that Judge Thomas will be a judge who will apply natural law in constitutional adjudication. I will come back in a moment to his statement that he does not plan to do so.

What has frightened people comes from another approach to

natural law that lurks in the background. This other approach to natural law is not necessarily a bad thing when an individual uses it in making personal decisions about right and wrong. But, in constrast to the broad notion of natural law as attempting to do justice by applying reason, this approach does seem inconsistent with the attitude toward deciding cases we expect from our judges.

This is the approach that we see in Judge Thomas' repeated references, in speeches and articles, to self-evident truths. Now the Declaration of Independence does declare certain truths to be self-evident, of course, and in some sense, indeed, it is perhaps self-evident that people have human rights, including the rights of life, liberty, and the pursuit of happiness.

But I think it's fair to say that no lawsuit that ever comes before the Supreme Court -- or perhaps any other court -- simply involves the application of self-evident truths. The answers in the cases judges have to decide can't be deduced simply and dogmatically from clear, self-evident moral premises.

It's the attitude that natural law is something simple and self-evident that frightens people when it shows up in some of Judge Thomas' speeches and writings, the speeches he gave before he went on the bench. This attitude says, first, that natural law is God's law. There is, of course, nothing wrong with that, taken by itself. At the same time, though, natural law is also said to be, as Judge Thomas puts it in a number of places, "a science of the rights of man." I quote from the end of his article in the Harvard Journal of Law and Public Policy: "Can this nation possibly go forward without a science of the rights of man?"

"A science of the rights of man"! Now I don't know what that science is. I don't have access to any such science. I don't think most Americans believe they have any access to any "science of the rights of man." They may believe there are rights of man, they may even be convinced they personally know what those rights are. But I think they regard their beliefs as essentially matters of commitment, of personal belief -- not as matters for proof, not as scientific truths.

The point is that belief in this kind of natural law -- a combination of God's law and scientific truth -- gives great and indeed excessive confidence to a person whose views he thinks have this status. Such a person says: There is a natural right to life or liberty; the Declaration of Independence tells us so. The right to life or the right to liberty means X -- whatever this person believes strongly. It is totally clear to this person what these rights are. They are God's truth. They are the higher law. They are the brooding omnipresence in the sky.

It is this attitude, brought to the judiciary, which I think is inappropriate, and which seems to me frightening when joined to the actual views on public issues, constitutional issues no less, that we know Judge Thomas has already expressed in his writings.

Now Judge Thomas has said to this committee that in fact he will not apply natural law to constitutional adjudication -- or so some people think. But if you actually go back and look at what he said during these hearings on this question, you will find he did not quite say that. He did not say that natural law is for him simply a matter of philosophical musing or political theory.

What he did say in his testimony, several times, is that he would not directly apply natural law. He would, however, regard natural law as the background for his decisions on questions of what is life, liberty, and property.

As he put it in his Harvard article, when discussing Justice Harlan's dissent in Plessy v. Ferguson: "Justice Harlan's reliance on political principles was implicit rather than explicit, as is generally appropriate for Supreme Court opinions." Implicit rather than explicit -- this is what he said before he became a judge, and I think this helps explain what he meant when he said here that he does not believe in appealing "directly" to natural law.

He means that he does not think natural law can overrule the the Constitution itself. However, he clearly does believe that natural law -- meaning of course his convictions about the self-evident content of natural law -- should inform the construction of the broad, majestic phrases of the Constitution, those guaranteeing liberty, equal protection, protecting the privileges and immunities of citizens, and the like.

And we know what those convictions are. My predecessors on this panel have spoken about them. The Lehrman speech provides the most striking example. Remember what Judge Thomas said about that speech -- that it was a splendid example of applying natural law to a constitutional question. What Lewis Lehrman did was to go straight from a natural human right to life to the right of every fetus to absolute legal protection from the moment of conception.

Translating this view into constitutional doctrine would mean something more radical than any nominee for the Supreme Court has heretofore proposed -- something more radical than Judge Bork proposed, and he was rejected by the Senate.

Grey -- Thomas Statement

Basically, Judge Thomas' kind of "implicit" or "indirect" or "background" use of natural law is all anyone needs to give him full freedom in adjudicating cases -- anyone, that is, who holds sufficiently firm, simple, dogmatic convictions about the content and method of natural law reasoning. His formulation leaves him all the room he needs to translate his most deeply held personal convictions into the law of the land.

Judge Thomas' own deep personal convictions include much of the agenda of the far right portion of the American political spectrum. I think it would be a great mistake -- I think it would be a tragedy -- if the Senate confirmed someone who held those views, and who has strongly implied his intention to implement those views as a judge, to be a justice of the Supreme Court.

Thank you, Mr. Chairman.