Senator BROWN. Professor Grey, my understanding is that you, along with Professor Tribe of Harvard, are two of the most preeminent scholars in America, at least in terms of the writing that you have done on natural law. For me, it is hard to imagine that Stanford would not have the claim on preeminence over Harvard, but perhaps there is disagreement in the academic community about that.

The CHAIRMAN. But not at Stanford, there is no disagreement at Stanford, is there?

Mr. GREY. I am speechless. [Laughter.]

Senator BROWN. You mentioned at least a reference to two kinds of natural law, or at least I suspect there may even be more, but at least two general approaches to natural law. You described one as a lurking kind, which I assume would be one that we might deal with alarm. Could you help us with how you would differentiate the one that is benign and the one that may be thought of as of concern?

Mr. GREY. My colleague Frank Michelman, I agree with what he said and I will paraphrase it. Basically, there is an approach which I think has been very widely followed by the great Justices of our Supreme Court, which is the attempt to develop through reasoned elaboration a structure of doctrine based on the text, based on the history and based on the fundamental values, trying to draw these together in a coherent way, and treating individual cases as tough problems to be wrestled with in the light of that set of materials, which includes fundamental values which might be called natural law.

Then there is another approach, which treats legal and political and moral problems like problems in Euclidean geometry, where there are certain axioms, fundamental truths which are self-evident, which dictate answers, and that is not—I definitely detect that tendency in Judge Thomas. It is not unique to him, though it is relatively rare among lawyers today. I think it was somewhat common in the 17th and 18th centuries for lawyers to believe or at least aspire to some kind of deductive geometric kind of legal science which could answer all tough questions.

Senator BROWN. You have a concern over someone who views it as a simplistic answer to legal problems?

Mr. GREY. That is right.

Senator BROWN. My few years of exposure to law professors taught me that nothing is simplistic. I assume, then, that you, in reviewing his statement that he would not use natural law as a means of interpretation of the Constitution, that that has not allayed your fears or concerns in this regard?

Mr. GREY. No. Actually, I found Judge Thomas more consistent than other people did on this, as I read very carefully what he said in his writings on the subject before the hearing, which did not—he said, for instance, the quote that I gave from the Harvard Journal article, Justice Harlan, who he took as a model, the first Justice Harlan, his reliance on political principles was implicit, rather than explicit, as is generally appropriate for Supreme Court opinions, and he went on to say that he would do that, too, that he would regard him as background or make indirect, rather than

direct reference or see natural law as incorporated, because the Framers believed in it in text of guarantees like the liberty clause.

My concern was just that once you get it in indirectly, if you have the kind of approach Judge Thomas displays in his prejudicial speeches, indirect is enough and implicit is enough to march very confidently to these very firm conclusions that he tends to reach about economic rights, about privacy rights, and so on, about color blindness as the proper approach to racial equality questions, march very confidently and swiftly to those conclusions, and that is what disturbs me.

Senator BROWN. In his 120 or so opinions on the circuit court of appeals, are there any of them in which you see signs of the use of this simplistic natural law?

Mr. GREY. As I said, Senator, I have not read a one of his opinions. I passed on them, relying on the fact that both his proponents and his detractors had said that there was no guidance there to be gained on his constitutional philosophy.

Senator BROWN. The Bar Association has found, I guess to quote their standard—and you appreciate that my guess is standards I suspect are not chiseled in stone, but perhaps may be more flexible than they appear from paper, but what they say is the nominee must have outstanding legal ability, wide experience, to meet the highest standards of integrity, judicial temperament, and professional competence.

They indicated, after talking with roughly 1,000 people in interviews, 150 deans and faculty members of law schools and 300 practitioners, I suspect that those are cumulative figures, that the 1,000 includes everyone and the others are breakout, in reviewing the judge's record, do you come to the same conclusion the Bar Association does? Do you conclude that he has outstanding legal ability, wide experience, and the highest standards of integrity, temperament, and professional competence?

Mr. GREY. Again, Senator, I have not read the opinions, which were a big source of their evaluation. I have read his speeches and I have read his published law review articles, and I thought the scholarship there was not particularly strong, but he does not put himself forward as a professional legal scholar, so as far as his competence goes, I have no strong views.

I certainly do not see him as a standout nominee, but as a number of Senators have pointed out, not everybody who goes on the Supreme Court is a standout nominee, and indeed some people who have had less than stellar backgrounds have turned out to be great Justices, so really that part is not something to which I can really speak.

Senator BROWN. Am I correct in assuming that the other members of the panel do not agree with the Bar Association evaluation, either?

Mr. MICHELMAN. I certainly would not try to judge Clarence Thomas' qualifications on the basis of his scholarship. He was not primarily a scholar. I think that it is fair to look in his scholarship and his speeches for indications of the bent of his mind, the tendency of his thinking, his habits of thought, but I would not look there to try to appraise that material on some standard of scholarship, to ask whether he is qualified for the Supreme Court.

I think that in order to gauge this man's abilities, you would have to look to the walks of life in which he primarily invested his energies. You have to look to the testimony of those who appraise his work at EEOC, and in the positions that he held professionally prior to EEOC.

If I were to judge on the basis of the testimony here, I would say that Judge Thomas is a man of considerable ability. I have never raised a question about that and I would not now. My testimony was that it is not reasonable to think of him as being in the class about which one might plausibly say he is the best qualified person.

Senator BROWN. Were any of you among the 150 professors that were consulted by the Bar Association?

Mr. MICHELMAN. I was not, sir.

Mr. GREY. Nor was I.

Senator BROWN. I see that we have got a vote on, and let me just conclude very quickly with one question. Professor Grey, you had referred to the standard to be used in selecting or approving or confirming a nominee for the Court. One of our distinguished members is quoted in the Thurgood Marshall confirmation of indicating that the basis should be on qualifications and not on philosophy. I take it your feeling is that philosophy should be a part of the confirmation process.

Mr. GREY. Yes, Senator.

Senator BROWN. I must say I agree. I think philosophy is an appropriate venue, but I wonder, would you think the standard for the philosophy used should be the standard of the President making the nomination?

Mr. GREY. No, Senator, I think the Senate should exercise——

Senator BROWN. I did not mean to imply that you did.

Mr. GREY. I am sorry, then I misunderstood the question.

Senator BROWN. I am saying what standards should we look to, in terms of philosophy.

Mr. GREY. It seems to me Senators have to make independent individual judgment about what they think will be good for the country, just as I believe the President does, using his political views, when he decides what nominee should go forward. So, Senator can be expected to disagree, because they have different views of what is the proper future direction for the Supreme Court.

Senator BROWN. Just a couple of quick observations, Mr. Chairman, and I will yield back the balance of my time.

It strikes me, if we have a President who has as different philosophy than the majority of the Senate, we find ourselves in an unusual circumstance that is not easily resolved, and perhaps there is some explanation here.

It also occurred to me, as I thought about the testimony we have received, that when Clarence Thomas had clearly indicated he believes in a constitutionally based right of privacy; two, that my recollection is that he indicated that he had not agreed with Mr. Lehrman's conclusions in response to questions brought by this panel; third, in his discussion of natural law, he specifically indicated that he would not use it to adjudicate the Constitution; and, fourth, we had as many questions as I can imagine on his attitude of *Roe* v. *Wade*.

I confess that the panel has made some interesting points, but I do not know how you would forecast this, except to say that the judge has said very clearly he had not made up his mind.

Thank you, Mr. Chairman.

Senator SIMON [presiding]. Senator Thurmond.

Senator THURMOND. Thank you very much.

I am going to ask a couple of questions. I think you can answer them in one word, unless you especially want to explain them. I have to go and vote in just about 3 minutes.

First, we will start with you on this end, Professor Grey. Isn't it true that the theory of natural law does not require that a judge reject the Constitution, statutory intent or relevant, law?

Mr. GREY. That is right, Senator.

Senator THURMOND. Professor Michelman?

Mr. MICHELMAN. The same question, yes, the same answer.

Senator THURMOND. Professor Law?

Ms. LAW. That sounds right.

Senator THURMOND. The second question: Isn't it true that a judge is bound by the Constitution and statutory law, even if he believes in natural law?

Mr. GREY. Right, though he may think natural law is part of that Constitution.

Mr. MICHELMAN. The same answer.

Ms. LAW. And it depends, I mean it will influence his interpretation.

Senator THURMOND. He is bound by those, regardless of what he believes in, isn't it?

Ms. LAW. Of course he is bound.

Senator THURMOND. The Constitution and statutory law?

Ms. LAW. Yes.

Senator THURMOND. You have all answered them favorably. Thank you very much, and good night.

Senator SIMON. We thank you very much for being here and for your testimony.

Senator SIMON. Our next panel has four distinguished witnesses. The first is the Honorable Roy Allen, State senator from Savannah, GA; the second is one of the most distinguished Americans, the Honorable Griffin Bell, former Attorney General of the United States, now practicing law in Atlanta; the third member of the panel is Judge Jack Tanner, senior Federal district court judge for the western district of Washington, in Seattle, Judge Tanner is one of the founders of the National Conference of Black Lawyers; and the final member of this panel is Margaret Bush Wilson, former chair of the board of the National Association for the Advancement of Colored People.

We are very happy to have all of you here. I am particularly pleased to welcome Judge Bell, who is an old friend, a long-time friend, and, as I indicated earlier, one of the most distinguished Americans. We are honored to have you here any time, Judge Bell.

Judge BELL. Thank you very much.

Senator SIMON. Senator Allen, we will be pleased to hear from you first.