to difficult problems, to think deeply about those who will be affected by the decisions that I make and the decisions made by others. But I have always carried in my heart the world, the life, the people, the values of my youth, the values of my grandparents and my neighbors, the values of people who believed so very deeply in this country in spite of all the contradictions.

It is my hope that when these hearings are completed that this committee will conclude that I am an honest, decent, fair person. I believe that the obligations and responsibilities of a judge, in essence, involve just such basic values. A judge must be fair and impartial. A judge must not bring to his job, to the court, the baggage of preconceived notions, of ideology, and certainly not an agenda, and the judge must get the decision right. Because when all is said and done, the little guy, the average person, the people of Pin Point, the real people of America will be affected not only by what we as judges do, but by the way we do our jobs.

If confirmed by the Senate, I pledge that I will preserve and protect our Constitution and carry with me the values of my heritage: fairness, integrity, openmindedness, honesty, and hard work.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very, very much for a moving statement, Judge.

Let me begin at the very outset by pointing out to you I, for one, do not in any way doubt your honesty, your decency, or your fairness. But, if I could make an analogy, I am interested in what you think, how you think. I don't doubt for a moment the honesty, decency, or fairness of Senator Hatch. I don't doubt for a moment the honesty, decency, or fairness of Senator Metzenbaum. But I sure have a choice of which one I would put on the bench.

Because they are both honest—I mean this sincerely now. It is an important point. At least you understand what I have in mind. The fact you are honest and the fact you are decent and the fact you are fair, the fact you have honed sensibilities mean a lot to me. But what I want to do the next half hour and the next several days is to go beyond that.

I will concede easily those points because it is true. No question. As we lawyers say, let's stipulate to the fact you are honest, decent, and fair, and let's get about the business of finding out why anyone who ever had the nuns can remember their eighth grade nun. Mine was Mother Agnes Constance. I don't know why I remember it so vividly. I suspect we both know why we remember so vividly.

Judge THOMAS. Dare not forget.

The CHAIRMAN. And we both know they never forget.

I made a speech not too many years ago, a commencement speech, at St. Joseph's University. After the speech was over I felt that finger that I am sure you felt in the middle of your back, and I heard, "Joey Biden, why did you say 'I' instead of 'me' " in such and such a sentence. It is a true story. I turned around and it was my seventh grade nun. So we both have at least that in common, and let's see what we can find out about whether or not we have in common, if anything, about the broader philosophic constructs upon which the Constitution can and must be informed.

Judge, as Senator Danforth said, he hopes we have read your speeches. I assure you I have read all of your speeches, and I have

read them in their entirety. And, as I indicated in my opening statement, what I want to talk about a little bit is one of the things you mention repeatedly in your speeches so that I can be better informed by what you mean by it.

Whether you are speaking in the speech you delivered on the occasion of Martin Luther King's birthday, a national holiday and whether it should be one, to a conservative audience, making the point that he should be looked to with more reverence or whether or not it was your speech to the Pacific Institute or whether or not it is the Harvard Journal, whatever it is you repeatedly invoke the phrase "natural rights" or "natural law."

And, as I said at the outset, here is good natural law, if you will, and bad natural law in terms of informing the Constitution, and there is a whole new school of thought in America that would like very much to use natural law to lower the protections for individuals in the zone of personal privacy, and I will speak to those later, and who want to heighten the protection for businesses and corporations.

Now, one of those people is a Professor Macedo, a fine first-class scholar at Harvard University. Another is Mr. Epstein, a professor at the University of Chicago. And, in the speech you gave in 1987 to the Pacific Research Institute you said, and I quote: "I find attractive the arguments of scholars such as Stephen Macedo who defend an activist Supreme Court that would"—not could, would—"strike down laws restricting property rights."

My question is a very simple one, Judge. What exactly do you find attractive about the arguments of Professor Macedo and other scholars like him?

Judge THOMAS. Senator, again, it has been quite some time since I have read Professor Macedo and others. That was, I believe, 1987 or 1988. My interest in the whole area was as a political philosophy. My interest was in reassessing and demonstrating a sense that we understood what our Founding Fathers were thinking when they used phrases such as "All men are created equal," and what that meant for our form of government.

I found Macedo interesting and his arguments interesting, as I remembered. Again, it has been quite some time. But I don't believe that in my writings I have indicated that we should have an activist Supreme Court or that we should have any form of activism on the Supreme Court. Again, I found his arguments interesting, and I was not talking particularly of natural law, Mr. Chairman, in the context of adjudication.

The CHAIRMAN. I am not quite sure I understand your answer, Judge. You indicated that you find the arguments—not interesting—attractive, and you explicitly say one of the things you find attractive—I am quoting from you: "I find attractive the arguments of scholars such as Steven Macedo who defend an activist Supreme Court that would strike down laws resisting property rights."

Now, it would seem to me what you were talking about is you find attractive the fact that they are activists and they would like to strike down existing laws that impact on restricting the use of property rights because, you know, that is what they write about.

Judge THOMAS. Well, let me clarify something. I think it is important, Mr. Chairman.

The CHAIRMAN. Please.

Judge THOMAS. As I indicated, I believe, or attempted to allude to in my confirmation to the Court of Appeals, I don't see a role for the use of natural law in constitutional adjudication. My interest in exploring natural law and natural rights was purely in the context of political theory. I was interested in that. There were debates that I had with individuals, and I pursued that on a part-time basis. I was an agency chairman.

The CHAIRMAN. Well, judge, in preparing for these hearings, some suggested that might be your answer. So I went back through some of your writings and speeches to see if I misread them. And, quite frankly, I find it hard to square your speeches, which I will discuss with you in a minute, with what you are telling me today.

Just let me read some of your quotes. In a speech before the Federalist Society at the University of Virginia, in a variation of that speech that you published in the Harvard Journal of Law and Policy, you praised the first Justice Harlan's opinion in *Plessy* v. *Ferguson*, and you said, "Implicit reliance on political first principles was implicit rather than explicit, as is generally appropriate for the Court's opinions. He gives us a foundation for interpreting not only cases involving race, but the entire Constitution in the scheme of protecting rights." You went on to say, "Harlan's opinion provides one of our best examples of natural law and higher law jurisprudence."

Then you say, "The higher law background of the American Government, whether explicitly appealed to or not, provides the only firm basis for a just and wise constitutional decision."

Judge, what I would like to know is, I find it hard to understand how you can say what you are now saying, that natural law was only a—you were only talking about the philosophy in a general philosophic sense, and not how it informed or impacted upon constitutional interpretation.

Judge THOMAS. Well, let me attempt to clarify. That, in fact, though, was my approach. I was interested in the political theory standpoint. I was not interested in constitutional adjudication. I was not at the time adjudicating cases. But with respect to the background, I think that we can both agree that the founders of our country, or at least some of the drafters of our Constitution and our Declaration, believed in natural rights. And my point was simply that in understanding overall our constitutional government, that it was important that we understood how they believed—or what they believed in natural law or natural rights.

The CHAIRMAN. For what purpose, Judge?

Judge THOMAS. My purpose was this, in looking at this entire area: The question for me was from a political theory standpoint. You and I are sitting here in Washington, DC, with Abraham Lincoln or with Frederick Douglass, and from a theory, how do we get out of slavery? There is no constitutional amendment. There is no provision in the Constitution. But by what theory? Repeatedly Lincoln referred to the notion that all men are created equal. And that was my attraction to, or beginning of my attraction to this approach. But I did not—I would maintain that I did not feel that

natural rights or natural law has a basis or has a use in constitutional adjudication.

The CHAIRMAN. Well, Judge, let's go back to Macedo, then. What was the political theory you found so attractive that Mr. Macedo is espousing?

Judge THOMAS. The only thing that I could think of with respect to—and I will tell you how I got to the issue of property rights and the issue of the approach or what I was concerned about. What I was concerned about was this: If you ended slavery—and it is something that I don't know whether I alluded to it in that speech, but it is something that troubled me even in my youth. If you ended slavery and you had black codes, for example, or you had laws that did not allow my grandfather to enjoy the fruits of his labor, prevented him from working—and you did have that. You had people who had to work for $3 a day. I told you what my mother's income was. By what theory do you protect that?

I don't think that I have explicitly endorsed Macedo. I found his arguments interesting, and, again, that is the——

The CHAIRMAN. But he doesn't argue about any of those things, Judge.

Judge THOMAS. I understand that. I read more explicit areas. I read about natural law even though my grandfather didn't talk about natural——

The CHAIRMAN. But, I mean, isn't it kind of—I guess I will come back to Macedo. You also said in that speech out at the Pacific Research Institute, you said, "I am far from being a scholar on Thomas Jefferson, but two of his statements suffice as a basis for restoring our original founding belief and reliance on natural law, and natural law, when applied to America, means not medieval stultification but the liberation of commerce." You speak many times—I won't bore you with them, but I have pages and pages of quotes where you talk about natural law not in the context of your grandfather, not in the context of race, not in the context of equality, but you talk about it in the context of commerce, just like it is talked in the context, that context, by Macedo and by Epstein and others in their various books, a new fervent area of scholarship that basically says, "Hey, look, we, the modern-day court, has not taken enough time to protect people's property, the property rights of corporations, the property rights of individuals, the property rights of businesses." And so what we have to do is we have to elevate the way we have treated protecting property. We have to elevate that to make it harder for governments to interfere with the ability of—in the case of Epstein the ability to have zoning laws, the ability to have pollution laws, the ability to have laws that protect the public welfare.

Then you say in another place in one of your speeches, you say, "Well, look, I think that property rights should be given"—let me find the exact quote—"should be given the exact same protection as"—you say, "Economic rights are as protected as much as any other rights," in a speech to the American Bar Association.

Now, Judge, understand my confusion. Economic rights now are not protected as much as any other rights. They are not protected that way now. They are given—if they pass a rational basis test, in effect, it is all right to restrict property. When you start to restrict

things that have to do with privacy and thought process, then you have to have a much stricter test. And so you quote Macedo. You talk about the liberation of commerce and natural law, whatever you want to call it, natural law or not. And then you say economic rights—and, by the way, you made that speech to the ABA the day after you made the speech where you praised Macedo.

Can you tell me, can you enlighten me on how this was just some sort of philosophic musing?

Judge THOMAS. Well, that is exactly what it was. I was interested in exactly what I have said I was interested in. And I think I have indicated in my confirmation to the court of appeals that I did not see a role for the application of natural rights to constitutional adjudication, and I stand by that.

The CHAIRMAN. Judge, you argue Harlan did just that and that it was a good thing for him to have done. He applied this theory of natural rights, as you say, in his dissent in *Plessy* v. *Ferguson.*

Judge THOMAS. I thought that——

The CHAIRMAN. He should have, you say.

Judge THOMAS. Well, the argument was I felt that slavery was wrong, that segregation was wrong.

The CHAIRMAN. Right.

Judge THOMAS. And, again, I argue—and I have stood by that—that these positions that I have taken, I have taken from the standpoint of philosophical or from the standpoint of political theory.

The CHAIRMAN. Well, Judge, let me find——

Judge THOMAS. Let me, if I could have an opportunity.

The CHAIRMAN. Sure, oh, please.

Judge THOMAS. My interest in this area started with the notion, with a simple question: How do you end slavery? By what theory do you end slavery? After you end slavery, by what theory do you protect the right of someone who was a former slave or someone like my grandfather, for example, to enjoy the fruits of his or her labor?

At no point did I or do I believe that the approach of natural law or that natural rights has a role in constitutional adjudication. I attempted to make that plain or to allude to that in my confirmation to the court of appeals. And I think that that is the position that I take here.

The CHAIRMAN. OK, Judge. Well, look, let's not call it natural law, natural rights, whatever. What do you mean when you say economic rights are protected as much as any other rights in the Constitution? What do you mean by that?

Judge THOMAS. Well, the simple point was that notions like—for me, at this point—and, again, I have not gone back and I don't know the text of all those speeches. But there are takings clauses—there is a taking clause in the Constitution, and there is also a reference to property in our Constitution. That does not necessarily mean that in constitutional adjudication that the protection would be at the same level that we protect other rights. Nor did I suggest that in constitutional adjudication that that would happen. But it certainly does deserve some protection. Certainly the right of my grandfather to work deserves protection.

The CHAIRMAN. The right of my Grandfather Finnegan, too, deserved protection and your grandfather to work. But the issue here

is whether or—look, let me explain to you why I am concerned about this. You know why. Let's make sure other people know why.

There is a whole new school of thought made up of individuals that up until about 5 years ago only spoke to one another. That school of thought is now receiving wider credence and credibility, to the point that former Solicitor General Charles Fried, in his book "Order and Law,"—not a liberal Democrat, Reagan's Solicitor General—said in his book about this group of scholars to whom Macedo and others like you refer—maybe you didn't mean the same thing, but this group of scholars, meaning Macedo and Epstein and others who I will mention in a moment. He says, "Fledgling federalist societies and often devotees of the extreme libertarian views of Chicago law professor Richard Epstein had a specific, aggressive and, it seemed to me, quite radical project in mind,"—meaning for the administration—"to use the takings clause"—I don't have much time so I won't go into it, but you and I both know the takings clause is that portion of the fifth amendment that has nothing to do with self-incrimination. It says if the government is going to take your property, they have to pay for it, except historically we have said if it is regulating your property, it is not taking it. If it is regulating under the police power to prevent pollution or whatever else, then it is not taking it and doesn't have to pay for it.

And what these guys want to do is they want to use that takings clause like the 14th amendment was used during the Lockner era. This is Fried speaking. It says "had a specific, aggressive, and, it seemed to me, quite radical project in mind to use the takings clause of the fifth amendment to serve as a brake upon Federal and State regulation of business and property. The grand plan was to make government pay compensation for taking property every time its regulation impinged."

Now, that is what this is all about, Judge. And, again, I am not saying that that is your view, but it seems to me when you say, which nobody else who writes in this area—I don't know anybody—and I have read a lot about this area. I don't know anybody else who uses the phrases "natural law," "property," "the takings clause," who doesn't stand for the proposition that Macedo and Epstein for, which is that we got this a little out of whack. We have got to elevate the standard of review we use when we look at property, just to the same standard, to use your phrase, the same rights as personal rights, that most Americans think to be personal, whether they can assemble, whether or not they can go out and speak, whether or not they can worship, whether or not they can have privacy in their own bedroom.

And so these guys want to change that balance, but that is why I am asking you this. I will come back to it in a minute in my second round. But let me shift, if I may——

Judge THOMAS. May I just respond?

The CHAIRMAN. Yes, please.

Judge THOMAS. First of all, I would like to just simply say, and I think it is appropriate, that I did not consider myself a member of that school of thought. And, secondly, I think that the post-Lockner era cases were correctly decided.

My interest in natural rights were purely from a political theory standpoint and as a part-time political theorist. I was not a law professor, nor was I adjudicating cases. And as I indicated and have indicated, I do not think that the natural rights or natural law has an appropriate use in constitutional adjudication.

The CHAIRMAN. Well, Judge, I would ask for the record, and I will make these available to you, that all the references you make that I have found—and there are pages of them—where you explicitly connect natural law with either specific cases or talk about informing specific aspects of constitutional interpretation be entered in the record. In my second round, I will be able to talk with you about them. You will have had a chance to read them.

[The documents follow:]