The CHAIRMAN. Thank you very much, professor. I do appreciate it. I realize this is very difficult. You all have so much to offer, and you made such a trip to get here, and then we say, "5 minutes." I apologize to you and all the witnesses to come for the limitation, but I don't know quite else how to do it.

Professor Grey, welcome.

STATEMENT OF THOMAS C. GREY

Mr. GREY. Thank you, Senator.

There is statement here which the three of us have signed, along with a number of other law professors, which really expresses our views in writing, and I hope the Senators will read it.

The CHAIRMAN. It will be placed in the record.

Mr. GREY. I will be short, even shorter.

Frank Michelman said something of what I wanted to say about the role of the Senate, and so I will shorten what I had to say about that.

I just want to point out the Washington Post editorial that Senator Thurmond entered in the record, in which they basically endorsed Judge Thomas' confirmation. There is something said there that I think is wrong. 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 that most scholars who have studied the nomination and confirmation process have. It is not the one verified by our history, it is not the one backed up by the original intent, as best that can be ascertained, and it has not consistently been the practice of the Senate.

The process is a political one. It does not mean that adjudication is a political process, it means that there is a screen, a political screen placed before the judges become judges and stop being politicians, in which two kinds of politicians, the President on the one hand and the Senate on the other exercise their political judgment as to whether this person should be a Federal judge and, most dramatically, of course, a Supreme Court Justice in the case of appointments to this Court.

As people have pointed out, these judges and this Justice, if confirmed, will serve for a whole generation, the law of the United States for a whole generation is at stake. It seems to me this body has a responsibility equal to that of the President in exercising its independent judgment on whether this person is appropriate for this job.

It does not mean that the Senators necessarily should vote not to confirm any judge they would not have appointed, for that would be an unworkable system. But it does mean, it seems to me, that judges should apply the same criteria as the President applies, and I ask you to consider for yourself what criteria this President has applied in this and other cases.

Then, simply as an analogy, I would suggest that Senators might take essentially the same attitude toward the confirmation vote as they think the President might appropriately take for the question

of whether to veto or approve legislation. The President does not veto every law that he would rather not have passed. On the other hand, he considers, in deciding whether to veto, the same criteria that the Congress has consulted in deciding whether to pass the legislation in question. I believe that is historically attested and, in terms of the theory of our institutions, appropriate role for this body, the Senate, in exercising its checking function against the President in the appointment of a Supreme Court Justice.

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

I do not think the concept is quite as arcane as some have tried to make it seem. In the simple sense, natural law is simply doing justice, and there is nothing wrong with the idea that judges are there to do justice while they apply law. If that is what it means, it is an idea I think most Senators would endorse, and I would certainly endorse it.

It means, in that broad sense, simply the application, 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.

But I think it has frightened some Americans, the idea that Judge Thomas will be a Justice who applies natural law in adjudicating constitutional cases, and I will come in a moment to his statement that he will not do so. But the fear that he might do so is the sense that there is another version of natural law which lurks there, not necessarily a bad thing, when applied to personal decisions of individuals about what they think is right and wrong in politics or law, but not the right attitude for a judge.

This is the attitude that we see in Judge Thomas' continued references to self-evident truths. Now, the Declaration of Independence does declare these truths to be self-evident, of course, and in some broad sense, indeed, the rights of life, liberty, and the pursuit of happiness are perhaps self-evident truths. But I think it is fair to say that no lawsuit that ever comes before the Supreme Court or perhaps any other court involves questions the answers to which are self-evident or which can be deduced simply and dogmatically from clear, simple, self-evident premises.

So, the attitude that natural law is something simple and self-evident is the attitude that I think shows up in some of Judge Thomas' prejudicial announcements, his speeches and writings. It is God's law, it is, as he puts it in a number of places, but I will quote from the Harvard Journal of Law and Public Policy, he says, at the very end of that article, "Can this Nation possibly go forward, without a science of the rights of man?"

A science of the rights of man—now, I do not know what that science is. I do not have access to that science. I believe most Americans think they do not have access to any science of the rights of man. They may believe there are rights of man, they may believe they know what they are, but I think they believe they are matters of commitment, personal belief, in that general area, not things to be proved like scientific truths.

The point about this is that belief in that kind of natural law gives great confidence to the person holding the views that he or she thinks comes under the natural law. Liberty, there is a natural right to liberty, the Declaration of Independence tells us so. Liberty means this, it is clear to me that liberty means this: Liberty means X, it is written in the sky, it is God's truth, it is the higher law, it is the brooding omnipresence in the sky.

It is this attitude brought to the judiciary that, it seems to me, is inappropriate and is frightening, when joined to the actual views on public issues, constitutional issues, no less, that Judge Thomas has already expressed in his writings before coming before this committee.

Now, Judge Thomas has said before this committee that, in fact, he will not apply natural law in constitutional adjudication, or so it is sometimes thought. But if you go back and look at what he said on the question, you will find that he does not say quite that. He does not say simply that natural law is a matter of mere philosophic musing or political theory. He has said several times that he will not directly apply natural law, that he will view natural law at the background for his decisions on questions of what is life, liberty and property.

As he put it in the same article, the Harvard article, in 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. This is what he said before, and I think this is a version of what he said here, when he said he does not believe in appealing directly to natural law. He means that he does not think natural law can overrule the clear meaning of the Constitution.

However, it seems clear that he does believe that his convictions about natural law will inform his views of what the broad majestic phrases of the Constitution guaranteeing liberty, equal protection, protecting the privileges and immunities of citizens and the like do mean, and among those views we know what they are, and my predecessors on this panel have spoken about them.

The Lehrman speech is the most striking example. Remember what Judge Thomas said about that speech, that the right to life, that the speech was as splendid example of applying natural law to constitutional question. The article in question said that, from a right to life sprang the fetus' right to life form the moment of conception. Translating this into constitutional adjudication, into constitutional doctrine means 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.

Basically, implicit, indirect or background use of natural law is all you need, if you hold the kinds of firm, simple, dogmatic convictions about the content and method of natural law reasoning that seem to be held by Judge Thomas. It is all you need, if you want to translate your most deeply-held personal convictions into the law of the land. Those personal convictions in his case include the agenda of the relatively far right portion of the American political spectrum, and I think it would be a great mistake, it would be a tragedy if the Senate confirmed someone with those views who has

implied his intention to implement those views on the Supreme Court as a Justice of the Supreme Court.

Thank you, Senator.

[The report referred to follows:]