The CHAIRMAN. Thank you, Mr. Brown.
Dean Griswold, welcome.

STATEMENT OF ERWIN N. GRISWOLD

Mr. GRISWOLD. Thank you, Senator. Obviously, I can only summarize. It seems to me, however, that the present hearings have left open several basic and important issues. No one questions that Judge Thomas is a fine man and deserves much credit for his achievements over the past 43 years. But that does not support the conclusion that he has as yet demonstrated the distinction, the depth of experience, the broad legal ability which the American people have the right to expect from persons chosen for our highest court.

Compare his experience and demonstrated abilities with those of Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall or Lewis H. Powell, for example. To say that Judge Thomas now has such qualifications is obviously unwarranted.

If he should continue to serve on the court of appeals for 8 or 10 years, he may well show such qualities, and I hope he does. But he clearly has not done so yet.

I have no doubt that there are a number of persons—white, African-American, or Hispanic, male or female—who have demonstrated such distinction. I do not question that the President has the right to take ideological factors into consideration, and it seems equally clear to me that this committee and the Senate have a similar right and power. But that is no reason for this committee or the Senate approving a Presidential nominee who has not yet demonstrated any clear intellectual or professional distinction.

And the downside—and this worries me profoundly—is frightening. The nominee, if confirmed, may well serve for 40 years. That would be until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of natural law. He has made several references to natural law in his speeches and writings, though it is quite impossible to find in these any consistent understanding of that concept. This is very disturbing to me because loose use of the idea of natural law can serve as support for almost any desired conclusion, thus making it fairly easy to brush aside any enacted law on the authority of a higher law what Holmes called a brooding omnipresence in the sky.

That is bad enough, but the nominee has now said to this committee that he does not think that natural law plays any role in constitutional decisions. And this is frightening, indeed, for it is quite clear in the 200 years of this country under the Constitution that natural law concepts do have an appropriate role, sometimes in modern times called moral concepts, law and morals, not in superseding the Constitution but in construing it.

There are a number of excellent articles in this difficult field. The great Princeton scholar, Corwin, wrote on the higher law background of American constitutional law. Professor Fuller wrote a book on the morality of law. The philosopher, not a lawyer, Raul,

wrote a book on a theory of justice. And, finally, I would refer to Alexander Bickel's book on the morality of consent.

As an example of what I have in mind, I might refer to the *Dred Scott* case. It was one where the Court did not make adequate use of natural justice. If it had done so, recognizing that Scott had become a citizen when he was taken to free territory, it might have averted the Civil War.

A more current example is privacy. It is not mentioned in the Constitution, but the Supreme Court has rightly found it there by interpreting several of the Constitution's clauses together in the light of deep-seated natural justice concepts, including the Court's conclusion and understanding that this is implicit in the basic concept of the Founding Fathers when they drafted the Constitution.

We also find natural law, natural justice concepts in such areas as cruel and unusual punishment, in rights of conscience where I would refer to the case of *Welsh* v. *United States* involving a conscientious objector during the Vietnam war who expressly disclaimed any religious basis for his objection. He simply said that it was against his conscience and he would not serve, and the Supreme Court held that that came within the proper construction of the statutes which Congress had enacted for conscientious objection.

Finally, I would turn to the whole area of process, including the application of statutes enacted by Congress providing for affirmative action. We have, for example, the one-man, one-vote cases which have a large element of natural justice in them.

We have cases going back more than a century rejecting discrimination on the ground of race, *Griswold* v. *Hopkins* in 1886. We have more recently the case of *Moore* v. *City of East Cleveland*, the place where I was born, where the Court held that a city ordinance forbidding families to live together unless they were parent and child, and this had a grandparent and two grandchildren who were not brothers and sisters, but were cousins, and the Court held that the city ordinance was invalid, essentially on natural justice concepts. We have *Gideon* v. *Wainright*, the appointment of counsel, which has a large element of natural justice.

Now, with respect to affirmative action, we have, of course, a terrible history in this country. For more than 200 years, the white settlers here grievously victimized persons of African descent, whose descendants today are African-American citizens. Not only were they held in slavery, but they were denied education and all cultural advantages.

It took a Civil War to ends this massively unjust regime. But then we had the period of share croppers and lynching and Jim Crow. Though the slaves were free, their opportunities were severely restricted by force of law. It was not until the middle of this century that we began to move ahead, and under the leadership of Lyndon B. Johnson, the Congress enacted a number of constructive statutes designed to provide a greater equality of opportunity.

We should not forget that the 13th, 14th, and 15th amendments were adopted as a result of the Civil War. They were essentially focused on African-Americans. They were designed to pull African-Americans up to a position of equality. Everyone was protected by the due process clause, but the African-Americans needed it

most. The same was true of the equal protection clause. As Justice Blackmun has so well said in his opinion in the *Bakke* case:

> In order go get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot, we dare not, let the Equal Protection Clause perpetuate racial supremacy.

Anyone who has lived through the past 50 years can see that we have made some progress. When I was a young man in the Department of Justice, now 60 years ago, it would have been inconceivable that the President would nominate a black man to the Supreme Court, or that the Senate would give serious consideration in such a case. There were then no black lawyers in the Department of Justice, no black FBI agents.

We have made progress, but not enough. I hate to think that the progress we have made will come to a halt by a literalistic interpretation of the Civil War amendments, thus frustrating the accomplishment of what they were clearly intended to do.

In conclusion, I would only say that, having followed these hearings through the newspapers, but very closely, it seems to me that there are many significant issues as to which no information has been given.

What is the nominee's approach to other important questions which frequently come before the Court, the whole area, for instance, of separation of powers, of the allocation of function between the President and the Congress and the judiciary?

What about the problems of preemption, which occupy perhaps 10 or 15 percent of the Court's cases, the question of when an act of Congress can supersede a statute enacted by a State?

Finally, I would refer to the area of intergovernmental immunities, relations between State and the Federal Government. I join with Mr. Brown on behalf of the Lawyers Committee on Civil Rights Under Law, of which I have been a member by invitation of President Kennedy since 1963, in hoping that the Senate will not confirm this nomination.

Thank you.

[The statement of Mr. Griswold follows:]