The CHAIRMAN. Thank you very much, Father.

Judge Gibbons, it is good to see you again. As I should note for the record, everyone in the third circuit took and takes great pride in you. You are one of the fine judges in this country, and it is a pleasure to have you here. It really it. I am not being solicitous.

STATEMENT OF HON. JOHN GIBBONS

Mr. GIBBONS. It is a pleasure to be here, Mr. Chairman.

I am the Richard J. Hughes professor of constitutional law at Seton Hall University.

The CHAIRMAN. Did I say Rutgers?

Mr. GIBBONS. You said Rutgers, and I have had the pleasure of teaching there as well.

The CHAIRMAN. I beg your pardon.

Mr. GIBBONS. And as you mentioned, I was, until January 15, 1990, chief judge of the third circuit, and I served as a judge on the court of appeals for 20 years.

Until September 6 last, I was vice chairman of the board of trustees of Holy Cross College, and it was in that capacity that I came to know and to respect Clarence Thomas.

In my dealings with him, I was left with the clear impression that Judge Thomas is intellectually gifted, open-minded, not doctrinaire, and receptive to persuasion. He is, I am convinced, anything but the rigid, inflexible conservative that some have charged him with being.

The most puzzling charge against him is that Judge Thomas will be unsympathetic to human rights claims. One experience that I shared with him serves to illustrate the contrary. On September 14, 1985, I presided at a meeting of the Holy Cross Board of Trustees which took up the issue of divestiture by the college of investments in companies doing business in South Africa. The choice was between complete divestiture on the one hand, and on the other, divestiture only of those companies which did not adhere to the so-called Sullivan principles governing company treatment of employees and others. Strong, and on the whole quite reasonable, arguments were put forth by board members in favor of the Sullivan principles position. Some members even had connections with companies which they were convinced were doing a great deal to improve the lot of black South Africans.

When Clarence Thomas' turn came to speak, he eloquently urged the board to opt for total divestiture. His reasons are relevant, I think, to this committee's inquiry. He insisted that every person had a prepolitical right to be treated as of equal worth, and that any regime which by law refused to recognize that right was so illegitimate that it should be replaced.

Largely because of Clarence Thomas' reasonable articulation of a human rights position, the board was persuaded to opt for total divestiture.

This incident occurred long before Clarence Thomas was under consideration for the Supreme Court, or even the court of appeals. Thus, his philosophical position on the existence of prepolitical human rights which governments should recognize was well thought out long before the question of his judicial philosophy was

ever an issue. It was no surprise to me, therefore, that in some other forums he articulated a similar philosophical position.

There is, of course, a difference between political philosophy and jurisprudence. It is entirely conceivable that one may recognize the injustice of inequality and at the same time insist, as legal positivists do, that judges may not resort to philosophical notions of justice to go beyond the text of a law enacted by others. Judge Bork, for example, is an articulate spokesman for the legal positivist position who unquestionably personally abhors many of the instances of injustices about which, he thinks, judges are powerless.

In his answer to Senator Biden's question on Tuesday last about a constitutional right of privacy, Judge Thomas on the other hand acknowledged the legitimacy of the Supreme Court's recognition of that nontextual human right.

The recognition by the Supreme Court, in interpreting the Constitution, of nontextual prepolitical human rights poses for a democracy the majoritarian dilemma, no better articulated than by the late Alexander Bickel. Bickel also articulated the most significant restraint upon life-tenured Supreme Court Justices; namely, their dedication to the Court's tradition of deciding great matters of principle only after meticulous scholarship and adversarial development of the competing arguments.

One aspect—I see my light is on, Mr. Chairman, and I regularly enforced it against lawyers. So I suppose I should stop or at least ask for permission to continue.

The CHAIRMAN. If you are almost finished, please continue, Judge.

Mr. GIBBONS. All right. One aspect of that tradition is the Court's self-imposed limitation on its law-pronouncing function; its unwillingness to answer legal questions except when necessary for the pronouncement of judgments. Judge Thomas' refusal to state in advance how he would vote on any specific legal issue likely to come before the Court is thus entirely consistent with the Court's traditions of craftsmanship and scholarship. It is, I suggest, unwise for Senators to press prospective nominees for answers to such specific questions, for they thereby seek to have the nominee violate the best safeguard that we have against judicial activism.

Many thoughtful students of the judicial process were alarmed some time ago when rumors that Federal judicial nominees were at one stage being screened by the Justice Department on the basis of a litmus test on specific issues. It doesn't really matter whose litmus test is being applied. Asking for a prior commitment on any legal issue likely to come before the Court is wrong, and giving such a commitment in order to obtain confirmation would be even more wrong.

I was going to comment, Senator Biden, about my review of his written work as a judge, which is probably the best evidence, but I know you are pressed for time.

The CHAIRMAN. We will put the entire statement in the record, and I have a question for you about that anyway. So you will have an opportunity to do that.

[The prepared statement of Mr. Gibbons follows:]