NOTES FOR APPEARANCE OF ERWIN N. GRISWOLD
BEFORE THE COMMITEE ON THE JUDICIARY OF THE UNITED STATES SENATE
-- TUESDAY, SEPTEMBER 17, 1991

In the time available to me, I can only summarize. I will first say, though, that the present hearings seem to me to leave open several basic and important issues.

I. Qualifications

No one questions that Judge Thomas is a fine man, and deserves much credit for his achievements over the past forty-three 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 judicial tribunal. Compare his experience and demonstrated abilities with Charles Evans Hughes or Harlan Fiske Stone, with Robert H. Jackson or the second John M. Harlan, with Thurgood Marshall and Lewis H. Powell, for example. To say that Judge Thomas has such qualifications is obviously unwarranted. If he should continue to serve on the court of appeals for eight or ten

years, he may show such qualities, but he clearly has not done so yet.

I have no doubt that there are a number of persons, male or female, African American or while or Hispanic, 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 down side is frightening. The nominee, if confirmed, may well serve for forty years. That is until the year 2030. There does not seem to me to be any justification for taking such an awesome risk.

II. Natural Law

Judge Thomas' present lack of depth seems to me to be demonstrated by his contact with the concept of "natural law." He has made various references to "natural law" in his speeches

and writing, 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. This is frightening indeed -- for it is quite clear in the two hundred years of this country under the Constitution that "natural law" or "higher law" concepts do have an appropriate role -- not in superseding the Constitution but in construing it.

Corwin, "The Higher Law Background of American Constitutional Law," 42 Harv. L. Rev. 149 (1928), 365 (1929)

Fuller, "The Morality of Law" (1964)

Rawl, "A Theory of Justice" (1971)

Bickel, "The Morality of Consent" (1975)

The Dred Scott case, for example, 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 ws 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.

Cruel and Unusual Punishment

Weems v. United States, 217 U.S. 349 (1910)

Robinston v. California, 370 U.S.660 (1962) -- The crime of being "addicted to the use of narcotics."

Solem v. Helm, 463 U.S. 277 (1983)

Rights of Conscience

Welsh v. United States, 398 U.S. 333 (1970) -- not a religion case. The petitioner asserted his beliefs were not religious.

III. Due Process

Voting

Reynolds v. Sims, 377 U.S. 5333 (1964) - one man, one vote case

Denial of education to children of illegal aliens

Yick Wo v. Hopkins, 118 U.S. 356 (1886)

Moore v. City of East Cleveland, 431 U.S. 494 (1977), quoting Harlan, J.: Respect for the teachings of history [and] solid recognition of the basic values that underlie our society.

Appointment of Counsel

Gideon V. Wainwright, 372 U.S. 355 (1963)

Affirmative Action

For more than two hundred years, the white settlers in this new country grievously victimized persons of African descent, whose descendants today are our 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 end 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 greater equality of opportunity.

We should not forget that the Thirteenth, Fourteenth and Fifteenth Amendments were adopted as a result of the Civil War. They were essentially focused on African Americans. They were designed to pull the African Americans up to a position of

equality. Every one 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 this opinion in the Bakke case (Regents of the University of California v. Bakke, 437 U.S. 265, 407 (1978):

> In order to 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 perpetrate racial supremacy.

Frankfurter, J., in *Railway Mail Association v. Corsi,* 326 U.S. 88, 97 (1945)

> A State may choose to put its authority behind one of the cherished aims of American feeling by forbidding indulgence in racial or religious prejudice to another's hurt. To use the Fourteenth Amendment as a sword against such State power would stultify that amendment.

Any one who has lived through the past fifty years can see that we have made some progress. When I was a young man in the Department of Justice, now sixty 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 F.B.I. 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.

IV. Other Questions

What is the nominee's approach to other important questions which frequently come before the Court?

Separation of Powers

Preemption -- When dos a federal statute over-ride state law?

Intergovernmental immunities