Senator HATCH. I certainly appreciate that special deference and I will probably take it.

Judge Thomas, I think it is appropriate at this point for us on the committee to remember a very important point, and that is that you are a sitting Circuit Court of Appeals judge in what many feel is the most important Circuit Court of Appeals in this country, the Court of Appeals for the District of Columbia Circuit. It is considered to be so important because of the wide ranging matters it handles.

So, you are a sitting judge on one of the Nation's highest courts, and whatever the outcome of these hearings may be, you are still going to be a judge for the rest of your life, for the rest of your professional life, if you so choose to be.

You simply do not have the freedom to answer every question as a sitting judge, every question that every Senator might have on this panel or might wish to be answered, and that goes for questions from both sides of the aisle, not just the other side of the aisle.

Now, I kind of resent the implication made several times that you are selectively answering only those questions that suit your political agenda. Believe me, I have many questions I would like to ask you about your own political beliefs and your particular political philosophy, and I would enjoy having answers to them. But I respect your duties as a sitting judge and your responsibilities as a nominee to our Nation's highest Court, when you say that you don't want to impinge upon your right to sit on some of these very important issues as they come up in the future, nor do you want your right to sit on those issues and to hear those issues questioned. And they could be questioned, if you got into your particular points of view at this time, assuming you have them.

So, I suggest to you, just keep answering the questions in the very responsible manner that you have been answering them. That is the way any good judge would answer these questions, in my opinion.

Now, Judge, the court on which you sit, the Court of Appeals for the District of Columbia Circuit, handles quite a few cases of statutory construction; is that correct?

Judge THOMAS. That is correct, Senator.

Senator HATCH. Now, you have sat on approximately, as I understand it, 170 judging panels; am I right?

Judge THOMAS. I think 150 or so cases I have sat on.

Senator HATCH. More than 150 cases, and let me just ask you this question. In your decisions, have you resorted to legislative history in construing these statutes?

Judge THOMAS. Senator, as I have indicated, when the statute is ambiguous, and in an effort to discern the intent of Congress, there have been instances in any number of cases when either myself or another judge with whom I sat, an opinion which I signed onto referred to and included legislative history. Where relevant, it is an important part of our interpretation of statutes from this body and in other areas.

Senator HATCH. Well, in your decisions, have you relied upon natural law?

Judge THOMAS. No, Senator. As I indicated earlier in my prior discussions with the Chairman, I indicated that, in adjudicating cases, the limited role of natural law with respect to our Framers, but beyond that the reference is to the history and tradition of our country.

Senator HATCH. Well, I think that is an important distinction.

Now, when a Senator asks you, as the nominee, do you believe the Constitution protects the woman's right to choose to terminate her pregnancy, I believe the nominee is being asked to decide the principal underlying issue in abortion cases, and certainly in a number of cases that are expected to come before the Court in the immediate future.

Now, it is irrelevant, in my opinion, if the Senator adds, "Oh, but don't tell me how you're going to decide a particular case." Once you give the answer to the first question, does the Constitution protect a woman's right to choose to terminate her pregnancy, if you give the answer to that question, you are well on your way to deciding particular cases involving abortion which are certain to come before the Supreme Court.

Now, let's not kid ourselves, we all know that. It is, in my view, inappropriate to keep this up. Thus far, you have been asked about 70 questions on abortion. Now, I don't know why you are being singled out, because Justice Souter was only asked 36 questions on abortion, and that was way too many, since he hadn't decided how he was going to vote, either.

Now, as I heard your testimony the day before, you said that you are basically undecided on that issue, and that you are reserving your judgment until the time when you can listen to all the facts and all of the issues and all of the case law and all of the other materials pertaining to that particular issue. Am I wrong in stating it that way?

Judge THOMAS. Senator, I indicated that I think it is important that I retain an open mind and that I don't have an opinion on that important case.

Senator HATCH. Well, if you answered that question that I cited at the beginning, which is probably the pivotal question, I think questions would be raised as to whether or not you would be impartial in cases that may be in front of you in the next year or so.

I would just add that I do not recall you replying to questions Tuesday or yesterday with the specificity that you have been pressed with these abortion cases. One year ago this week, Justice Souter declined to say anything about abortion. He was approved 13 to 1 in this committee, 13 to 1, and he refused to say anything about it. I think the burden is on those who would condition your confirmation on answering questions about abortion to tell the American people why you are being treated any differently from Justice Souter—70-plus questions thus far, versus 36.

I think when you say you are going to keep an open mind, you are undecided, you are going to look at everything and you are going to do it in the best way you can and make a decision in the best way you can, I think we ought to take your word for that, especially since you have a reputation for integrity and honesty. I don't think anybody questions that.

So, I ask the question, why are you being treated differently from all of these confirmable people in the past? Now, I know it cannot be that throwaway line in a 9-page single-space speech to the Heritage Foundation. I don't think you should be judged by that. I think you should be judged by your testimony here. I think that reed is so thin, that it is invisible. But so much for that.

I just have to say that you have been asked double the questions of Justice Souter. What are we going to have, 64,000 questions on abortion before we are done with this approach? You would think, from listening what is going on here, that it was the only issue the Supreme Court has to decide.

I have to say I think it is a tremendous mistake to condition the confirmation of a Supreme Court nominee on any single issue. I have to admit, I feel very deeply about abortion, too, and I wouldn't mind knowing, if you knew, how you would rule in advance myself. But, I am not going to ask you, because it is a controversial issue, it is a difficult issue. It is one you are going to have to hear, it is one where, if you gave your opinions now, I think you would seriously erode any confidence anyone would have when you are on the bench trying to make the final decision on any number of cases that might come before you that you will fairly weigh the arguments in that case.

So, I think there is a time when enough is enough. Frankly, I think you have more than adequately said you will do the very best you can honestly to decide those issues, based upon the materials that are brought before you when you are sitting on that Court, and that as of the present moment you haven't an agenda and you have not made up your mind how you will vote on those issues. Indeed, how could you, because nobody knows what those facts are going to be, nobody knows what the particular case is going to be, except some of those that may be pending at the present time. Well, enough on that.

The subject of affirmative action came up on yesterday and today, I have to say, and I have some questions on that, but let me just make a few comments first.

Affirmative action can mean different things. It can mean reviewing one's employment practices to eliminate discriminatory practices. It can mean increasing an employer's outreach and recruitment activities aimed at increasing the numbers of minorities and women in the applicant pool from which all applicants will then be considered fairly, without regard to race or gender.

There are similar activities aimed at widening the pool of applicants, and I am going to ask about those. This form of affirmative action has widespread support in this country for it. You have spoken and you have written about it and you have written for it, and I am not aware of any single Member of the U.S. Senate who opposes that position.

Now, I believe that discrimination against anyone should be ended and it should be remedied, and there is still much discrimination against minorities and women, and I think we should do everything we can to root that out in this society, and I favor the kind of affirmative action that I have just described, which you have supported in the past.

But there is another form of affirmative action which is highly controversial, deeply divisive, and I have to say, wrong. By whatever euphemism or label used to describe or mask it, this form of affirmative action calls for preferences on the basis of race, ethnicity, and gender. Lesser qualified persons are preferred over better qualified persons in jobs, educational admissions, and contract awards, on the basis of race, ethnicity, and gender.

Some argue that there is a distinction between a quota and so-called goal and timetable, but that, in my view, is misleading and it is of no practical meaning. It isn't the label that is objectionable, but the practice, and the practice is unfair preference given to one American citizen over another. It doesn't matter what one labels a numerical requirement that causes or induces preferences. If you are discriminated against because of it, the harm is all the same, regardless of the "feel good" label someone else might happen to put upon it, and the harm to the victim is the same, if the employer is private or public.

Yesterday and today, reference was made to the *Johnson* case. This is a 1987 Supreme Court decision. All 238 positions in 1 job category were held by males at this particular employer's business—and this is an important point, this next point: There was no finding in this case of discrimination against women by the employer. Notwithstanding the out-of-context quotes from the lower court record that we heard today, there was no finding of discrimination.

Under a nondiscrimination standard, Mr. Johnson would have been selected. Among the seven qualified persons, he was recommended for the job and did have a slightly higher rating than the woman who was ultimately selected. What happened next is that the county affirmative action office got involved and the county affirmative action coordinator recommended to the hiring official that the woman be hired.

Now, he did hire her, taking into account qualifications and affirmative action matters. Now, promoters of preferences, they like to say, well, the person preferred was qualified. But, if a better qualified person, even if ever so slightly, loses a job to someone less qualified because race or gender counts against him or her, that is unlawful discrimination.

Now, I have to say it is unfair, and I think that is what basically you have said. This preference was taken under a plan that I believe one of my colleagues yesterday described as not a "quota," but just an "affirmative action plan." But I stress the label, whether it is called a quota or affirmative action plan or anything, is not the key. It is the practice of preference based on race, gender, and other irrelevant characteristics that is the key here.

The reason to oppose a quota is because it causes preferences, not because the word "quota" sounds bad. So, it is not enough to say we oppose quotas. We must oppose preferences and we have to oppose the various means by which preferences are required, caused, or induced.

Now, title VII as enacted bans preference. Title VII is not a heavy-handed interference with the private sector, as its opponents claimed back in 1964. It is the embodiment of the principle of equal opportunity and nondiscrimination.

In a 1979 decision that George Orwell could appreciate, the *Weber* case, the Court construed title VII to permit preferences in training. Now, there a white male was discriminated against. In the *Johnson* case, the Court extended its creative interpretation of title VII to hiring. Five members of the *Johnson* court said *Weber* was wrongly decided, that it turned title VII on its head, but two of those five adhered to stare decisis and not only let *Weber* stand, they extended it.

It is desirable to increase minorities and women in various jobs, and that is a desirable thing and I am for that and you are for that, but not at the price of discriminating against other hard-working innocent persons who are not privileged people in this country. I have to add that there have been many instances where preferences for members of one minority group have disadvantaged members of other minority groups and women. Preferences for women have disadvantaged minority males as well as white males. In an increasingly multicultural society, the preference problem is less a black-white issue.

The victims of preference do not have 150 groups out there lobbying for them, but they do have a moral right to be free of discrimination. That moral right was codified in the statute, at long last, in 1964 for all Americans. I think it is that statute to which all judges ought to be faithful. The victims of preference know that, however labeled or candy-coated, preferences are unfair, they are immoral, and they don't even have to be lawyers to understand it turns the statute on its head.

I don't think it is divisive to defend the principle of equal opportunity for every individual. I think it is divisive to compromise that principle. If one wishes to require equal opportunity for all individuals, regardless of race, ethnicity, and gender, our laws and Constitution as written already require that. There is no need to establish a numbers requirement.

A racial, ethnic, or gender numerical requirement, however labeled, is intended to be met. It is not intended merely to increase recruitment of minorities and women into the applicant pool, which can be required in its own right. It is intended to induce preferences of lesser qualified over better qualified persons, in order to reach the so-called "right numbers" in hiring and promotion, educational admissions, and contract awards, and that is as true in the private sector as in the public sector.

Now, Judge Thomas, you criticized this kind of preferential affirmative action while in policy positions, so I want to explore just for a minute forms of affirmative action and ask your position on them while at the EEOC. These are things I agree with and I would like your opinion, to see just where you come down.

Judge, let me ask you this: While you were at the EEOC, how did you feel about companies seeking referrals of applicants from organizations such as the Urban League, LULAC, the GI Forum, colleges and high schools with high minority enrollments, national organizations for women, black fraternities and sororities, and similar groups? How did you feel about that?

Judge THOMAS. Senator, I think that particularly in those instances in which the question is how does a company reach minority applicants, I have felt that those avenues, among others, were

very, very helpful. You can use similar approaches in education in which you have contact with organizations that are supportive of minority students and who can provide access with that student to the institution.

I think that all of those accesses are important. Again, those are efforts to get minorities at the door of employment and to make that opportunity available to them.

Senator HATCH. Good. How did you feel about employers providing briefings to the groups I mentioned on the employers' premises, as well as plant tours, explanation of job openings and so on? Do you have any problem with that?

Judge THOMAS. Senator, I think those are important. Again, the idea is to get information, and I think some employers go so far as to actually have programs in high school in which they mentor the students or programs in which they actually provide summer training.

We had one at EEOC in which we had interns who were hired into the agency, as well as stay-in-school programs and co-op programs where we had an opportunity to take a look at the students and to really provide them with opportunities down the road.

Senator HATCH. I agree with that. What was your view about employers asking their minority and female employees to refer job applicants to the employer?

Judge THOMAS. Again, it is a way to provide access to individuals. It works both ways. It is a two-way street. Individuals who might not have come to that employer or, on the other hand, the employer may not have known of are provided access, and I think that is, again, as important as the other avenues that we have mentioned.

Senator HATCH. I agree with that, too. What was your view about employers actively recruiting at predominantly minority and female schools, colleges, and universities?

Judge THOMAS. Similarly, Senator, it is an opportunity for an employer to find individuals at institutions that have trained them and prepared them for the workforce. As you know, I have been very supportive of efforts of that nature. There are programs that we had—again, the co-op programs that I mentioned—at predominantly minority institutions, and the idea was to actually not only help in preparing a student to become a part of the work force, but also for us to conduct an interview over time. And we have been able to get, or were able to get some very, very good employees out of that program.

Senator HATCH. That was one of the methods that helped you, wasn't it?

Judge THOMAS. It was.

Senator HATCH. I certainly agree with it. What was your view about an employer recruiting in schools where there were fewer minorities or women, seeking out those fewer minorities or women to encourage them to apply?

Judge THOMAS. Again, I think that that is an important effort. Again, Senator, it provides access and it provides contact.

Senator HATCH. What was your view about employers advertising for applicants in media with a predominantly minority or female audience?

Judge THOMAS. Again, Senator, when you are attempting to recruit and you are looking for employees, individuals who are minorities, you have to, again, look at the readership or the distribution of the media that you choose. And I think it is important. It may not be as aggressive sometimes as I think it should be, but I think it is very, very important.

Senator HATCH. What is your view about employers establishing motivation, training, and employment programs for hard-core unemployed of all races and both genders?

Judge THOMAS. I think it is consistent with what I have said earlier, Senator. I think we have an obligation to include those individuals who have been left out of our society in our society, in the economy, in our schools, our educational programs, et cetera. I think that that is an important obligation and one that is certainly discharged in part in that way.

Senator HATCH. Did you object to employers establishing equal opportunity offices?

Judge THOMAS. I support that, in fact encourage it. I had felt that those offices should actually be enhanced. They shouldn't be afterthoughts in organizations, that they would have to be a part of the employment decision or the promotion decisions. They would have to be in the chain of command as opposed to a satellite office.

Senator HATCH. So these and other affirmative action steps can be taken to enhance the opportunity to compete for jobs. But when the time comes for hiring and promotion, has it been your view that these decisions should be made without regard to race or gender?

Judge THOMAS. Senator, that has been my view, and at EEOC we were able to accomplish both ends. We were able to improve the number of minorities and women in the upper ranks of the agency, and at the same time make the decision based on the best qualified. It is a record that I was particularly proud of and one that I think exemplifies the approaches that you are talking about.

Senator HATCH. Judge, could you explain your views about the adequacy of the current title VII penalties for intentional discrimination?

Judge THOMAS. Senator, let me just simply restate what I have said in the past. I think that title VII—for the kind of injury that we are talking that title VII needs to be stronger. I have said that in the past, and that is an important point.

A lot is being demanded or was demanded of title VII, and as Chairman of EEOC I felt that it was undervalued, that the damage to individuals was being undervalued, that there should be more damages and that there perhaps should be stronger penalties.

Senator HATCH. Well, I agree with your comments, and I agree with your statement. And there are many ways that we can accomplish the integration of minorities, women, and others into the work force without using preferences. And your effort have been a prime example of how to get that done, and your tenure at the EEOC shows that. And I want to compliment you for it.

Now, some have charged you and your statements in these hearings that natural law is not an independent rule of decision in adjudication, that your testimony on that is inconsistent with your

earlier writings and speeches, and that this represents a confirmation conversion. Now, that is pure nonsense as I view it.

First, if you did think that independent recurrence to natural law in adjudication was proper, one would expect to see some evidence of that in your decisions on the court upon which you now sit, the Court of Appeals. But what your opinions show is a careful consideration of the written law, and that is why I started off with questions about construing statutory law. Moreover, a careful review of your writings and your speeches reveals a recurring theme that natural law demands limited government and limited government demands that judges not overstep their constitutional authority. Is that a fair comment?

Judge THOMAS. It is a fair comment.

Senator HATCH. In the September 9, 1991, New Republic magazine, no shill for the Bush administration, reporter Jeff Rosen reviewed the judge's writings, and he concluded that they "show that his views have been not only caricatured but turned on their head. Far from being a judicial activist, Thomas has repeatedly criticized the idea that judges should strike down laws based on their personal understanding of natural rights. Far from being bizarre or unpredictable, Thomas' view of natural rights is deeply rooted in constitutional history. Like many liberals, Thomas believes in natural rights as a philosophical matter, but unlike many liberals, he does not see natural law as an independent source of rights for judges to discover and enforce."

Now, I am personally delighted that this particular reporter understood your use of natural law before these hearings began. And I think he pretty well summed it up.

Now, you have indicated to us that natural law is enforceable as a matter of adjudication only to the extent that natural law has been incorporated into the constitutional or statutory provision before you. Is that correct?

Judge THOMAS. That is accurate, Senator.

Senator HATCH. OK. Now, many constitutional and statutory provisions do reflect or incorporate natural law and appropriately restrict private moral choices. For example, the 13th amendment forbids anyone from choosing to enslave another human being. There is nothing novel about this.

Similarly, the Civil Rights Act of 1964 forbids hotels and restaurants from making the private moral choice to exclude black people from being their patrons and employers from making the private moral choice to exclude black people from jobs.

Likewise, the Fair Housing Act restricts the rights of landlords and realtors to make private moral choices to discriminate on the basis of race.

Now, Judge Thomas, I understand that it is your position that your personal views of natural law are not independently enforceable under the liberty component of the due process clause. Is that correct?

Judge THOMAS. That is right, Senator.

Senator HATCH. What you are telling us, as I understand it, is that your approach to the due process clause would be similar to that taken by Justice Harlan; namely, that history and tradition provide the substantive context to that clause.

Judge THOMAS. That is right, Senator.

Senator HATCH. Now, isn't this approach to interpretation of the due process clause that you and Senator Biden agreed upon a traditional approach to the interpretation of the amendment? Isn't it a traditional approach?

Judge THOMAS. Senator, I believe that the approach that I have suggested is, indeed, a traditional approach.

Senator HATCH. I need approximately a minute, Senator Biden, if I may.

The CHAIRMAN. Sure. Go ahead.

Senator HATCH. Indeed, isn't it a basic principle of constitutional interpretation that we look to the natural law or other consideration when, but only when, it aids us in understanding the written law of the basic document?

Judge THOMAS. I think we look to the Framers' intent. We look to what they were attempting to do in an aid to interpret those provisions. I think that is correct.

Senator HATCH. So as I understand it—and I think as anybody who has been watching these proceedings who has listened carefully would understand it—is it your position that natural law is not an independent basis for decision, but rather it can inform our understanding of the substantive context of the document, including history and tradition?

Judge THOMAS. That is right, Senator. To the extent that the Framers reduced their beliefs or their principles to the document, it could aid in determining what the Framers thought.

Senator HATCH. Well, so in this regard, it seems to me it is apparent that you follow in the footsteps of Abraham Lincoln and Martin Luther King, Jr., who argued that natural law informs the Constitution. Do you agree with that?

Judge THOMAS. I think it informs and inspires it the way that we conduct ourselves in this country, Senator, in our political processes.

Senator HATCH. Well, I agree with that, too.

Let me just say in closing of my questioning that I don't think that we should have a single litmus test to exclude somebody from serving on the Court. And I frankly don't think that it is fair to keep bombarding you with questions about abortion when you have said you are undecided on that issue. Now, any Senator can ask any question he or she desires to ask. But I think there is a point where it is overdone, and in your particular case, I think you have been singled out. And I have even heard some Senators say that unless you answer the question the way they want you to answer it, that they may not vote for you. Well, that is a decision that an individual Senator has to make, but I think it is an abominable approach. Because I don't think anybody should be rejected or should be voted against for the Supreme Court of the United States on a single issue or a single litmus test. I just don't. And if we get to that point where this becomes a politicization of the courts, we are all going to lose.

I have been very proud sitting here and listening to you, and I just personally want to congratulate you on the good way that you have answered everybody's questions and your demeanor and the

approach that you have taken. I think you are doing a great job. Just keep it up.

Judge THOMAS. Thank you, Senator.

The CHAIRMAN. Thank you very much, Senator Hatch.

Senator Metzenbaum.

Senator METZENBAUM. Thank you, Mr. Chairman.

I would just like to make a comment before getting into another line of inquiry. My colleague from Utah wants to know why you are being treated differently than Judge Souter with respect to the question of a woman's right to choose. I think it is pretty obvious that——

Senator HATCH. Not just Justice Souter; all of the prior justices.

Senator METZENBAUM. Well, all of them. You have written very extensively and have spoken out quite extensively in this area, and I think it warrants that inquiry. Beyond that, I think there is a greater sense of alarm as to the direction in which the Court seems to be moving, and I think to fail to inquire of you in that area would be irresponsible on our part.

But, Judge Thomas, to another area. In the past, you and I have had disagreements over policies which you pursued at the EEOC. But there is one area of your record at the Commission which is particularly troubling to me, and that is your record with respect to age discrimination, discrimination against senior citizens. Discrimination against the elderly does not always receive the same amount of attention or provoke the same degree of outrage as racial discrimination or sexual discrimination. But employers who dismiss or refuse to hire individuals because of age, as you know, violate the law every bit as much as employers who discriminate on account of race or sex.

That is why, Judge Thomas, in reviewing your record, I was shocked to come across a 1985 statement you made in an interview with the ABA Banking Journal, a banking industry trade publication. In that article, you suggested that discrimination against the elderly could be justifiable. You are quoted as saying that, "The age discrimination issue is as complicated an economic issue as any we confront in the equal opportunity area." You continued on, "I am of the opinion that there are many technical violations of the Age Discrimination in Employment Act that, for practical or economic reasons, make sense. Older workers cost employers more than younger workers. Employee benefits are linked to longevity and salary. In an economic downturn or when technology calls for staffing changes, employers tend to eliminate the most experienced and costly part of their work force."

Judge Thomas, at that time, you were the chief Federal official in charge of enforcing the law against age discrimination. Yet here you were characterizing age discrimination as an economic issue, and then stating that many violations of the age discrimination law make sense.

My question to you is: How could you, as a law enforcement official, make a public statement which could easily be interpreted by employers as condoning violations of that law?

Judge THOMAS. Senator, if I could have the whole quote, it would be helpful to me so I could look at the context. But let me say this: I have never condoned violations of the Age Discrimination in Em-