and the Supreme Court upheld your position. Now, I just wanted to bring that out.

I think it is also important just to conclude with this comment. These are very difficult areas of law. Reasonable people can disagree and without any prejudice on the part of anyone. And I contend that, Chairman Thomas, once you get on that Court, you are going to be watching out for the people, the little people out there that many are worried about, who need help and who need their rights resolved and watched over. And you will do it in a fair and reasonable, responsive way, as you did at the EEOC.

I have to say the EEOC still has plenty of room for improvement, as does every agency of Government. But compared to what it was in 1982 when you took over, it is worlds apart. And you are the person who helped bring about the effective and good changes. That needs to be said by somebody like me who has watched it for all these years and takes a special interest in it and who wants that agency to work right and well.

So I just wanted to say that and correct the record and commend you for the service you have given, and I have absolutely no doubt that you will give equal service, if not better service, on the Supreme Court in the interest of everybody in America.

Thank you, Mr. Chairman. I think I took about 15 minutes. I didn't intend to take more than 10, but I apologize.

The CHAIRMAN. Thank you very much, Senator.

The Senator from Massachusetts, Senator Kennedy.

Senator KENNEDY. Thank you very much, Mr. Chairman.

I wanted just to return very briefly to a couple of areas that we talked about last Friday, Judge Thomas. Welcome back.

Judge Thomas, I want to come back briefly to the subject that we talked about on Friday, your view of Justice Oliver Wendell Holmes. On Friday, when I asked you for your view about Justice Holmes, you said that—and I quote—

> He was a great judge. Of course, when you have opportunities to study him, we might disagree here and there. But I had occasion to read a recent biography of him, and obviously now he is a giant in our judicial system.

I then read your quotation from a speech you gave at the Pacific Research Institute in 1988, including a portion in which you quote a statement by Walter Burns on Holmes. And you correctly stated that I was quoting your reference to Walter Burns' view of Holmes. But I just want to read the entire passage into the record so that your view of Justice Holmes in 1988 is not misunderstood.

You stated, and I quote:

> We cannot expect our views of civil rights to triumph by acceding the moral high ground to those who confuse rights with willfulness. The homage to natural rights inscribed on the Justice Department building should be treated with more reverence than many busts and paintings of Justice Oliver Wendell Holmes in the Department of Justice. You will recall Holmes as one who scoffed at natural law, that brooding omnipresence in the sky. If anything unites the jurisprudence of the left and the right today, it is the nihilism of Holmes. As Walter Burns puts it in his essay on Holmes, most recently reprinted in William Buckley and Charles Kessler's "Keeping the Tablets"—

and here you quoted Mr. Burns—

> "No man who ever sat on the Supreme Court was less inclined and so poorly equipped to be a statesman or to teach what a people needs in order to govern itself."

End of quote of Burns.

And then you continued, "Or as constitutional scholar Robert Falkner put it"—and here you quoted Mr. Falkner—"What John Marshall had raised, Holmes had sought to destroy" That's the end of the quote of Falkner.

And you continued:

> And what Holmes sought to destroy was the notion that justice, natural rights, and natural law were objective, and that they exist at all apart from willfulness, whether of individuals or officials.

So I think it is quite clear from the full quotation, Judge Thomas, that you were harshly critical of Justice Holmes for what you described as his nihilism in his effort to destroy your view of natural law. It doesn't sound to me like you thought he was a great judge in 1988.

Judge THOMAS. I guess, Senator, much of that perhaps resulted from the concern about some statements in cases like *Buck* v. *Bell* of Justice Holmes'.

Senator KENNEDY. Well, which is Judge Thomas' opinion of Justice Holmes: the one you gave on last Friday or the one you gave in 1988?

Judge THOMAS. Well, as I indicated, Senator, I have concerns about statements like "three generations of imbeciles is enough or sufficient." I think that we certainly would find problems with that. What I indicated to you was that I did take the time to go back and re-read about him. Even though I may have had disagreements, that was not the end of the inquiry. I spent a considerable amount of time going back and trying to understand him more during my tenure on the bench.

Senator KENNEDY. Well, that was then and last Friday is now?

Judge THOMAS. No. Last Friday, as I indicated, I had gone back recently and read a biography of him subsequent to the speech. That was the point.

Senator KENNEDY. Well, as I understand—and we will leave it at this—your view last Friday is your current view, and your statements that you said in 1988 was your view of Justice Holmes in 1988.

Judge THOMAS. Well, my point that I was making, notwithstanding criticisms, the point that I made last Friday is that he was a great Justice, whether we agree or whether I agree with him or not or whether others agree or disagree with him. The point that I am making now is that even though I might have had a point of view in 1988 that was critical, that did not stop me from going back and reading and learning more about him. I think that the important point that I am trying to make is merely having a point of view is not the end of the process for me. It is, indeed, the beginning of the process of learning and growing and attempting to change if there is evidence there.

Senator KENNEDY. Let me go on to the voting rights. We talked briefly about it last Friday. You made some comments earlier in the course of the hearing this morning. In 1988 you stated:

> Unfortunately, many of the Court's decisions in the area of voting rights have presupposed that blacks, whites, Hispanics, and other ethnic groups will inevitably vote in blocs. Instead of looking at the right to vote as an individual right, the Court

has regarded the right as protected when the individual's race or ethnic group has sufficient clout.

In reviewing the Supreme Court decisions, the principal decisions decided on the voting rights case, *White* v. *Register* and the *Thornburgh* case—there is the *Allen* case as well, but that deals with preclearance provisions. But on basically that very issue, these, as I understand it, are the principal cases, and both on their very face rejected the bloc voting:

In *White* v. *Register*, we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups. To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion with voting. The plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and elections were not equally open to participation by the group in question, that its members had less opportunity than did other residents in the district to participate in the political process and elect legislators of their choice.

We are talking here about how State legislatures in Texas and North Carolina had at-large elections, allegedly, and I think supported by the evidence considered in both of these cases decided by the Supreme Court, that the at-large elections rather than the single-member district elections were being used to diminish and undermine the effectiveness of the rights to vote of individuals, the blacks in Dallas, Hispanics in San Antonio, blacks in the *Thornburgh* case, similar statements in the *Thornburgh* case, I think even stronger.

Those and the *Allen* case were the three, as I understand it, the major guiding beacons in terms of the Supreme Court's upholding the importance of the right to vote, certainly in judging the actions of legislatures, which in many instances, particularly in the Texas Legislature, had a history of supporting segregation activities at that time.

And we have seen subsequent to those decisions the changes in the membership in those particular districts rather dramatically, I might mention.

Well, what were you so critical of in terms of those cases, the principal cases?

Judge THOMAS. The comment wasn't about the *Thornburgh* case, Senator. The concern that I raised, I think the word I used was "presupposed" bloc voting, and that had to do with—and as I noted, I think, on Friday, I was not engaging in an exegesis of the voting rights cases. The comments were made in a speech that was about individual rights and the concern for individual rights and what would happen to individuals versus—when you considered groups versus individuals. And I simply used as an example and referred to, I think in one paragraph, maybe two, the Voting Rights Act as one of the examples, and then I moved on.

The point that I was trying to make was that—and it was my—there was a school of thought. There was thinking, I remember, involving—being involved or reading about the debates in the early 1980's about the Voting Rights Act that felt that the early cases that presupposed or would lead to proportional representation. It was that kind of mentality that I felt presupposed that blacks would vote a particular way, that there was the stereotypes. And throughout all my speeches, I argued against the use of stereo-

types. I think there was even some debate up to and immediately prior to the amendments to the Voting Rights Act in 1982 concerning proportional representation. But I was not, as I indicated, going through any cases and specifically saying here is the precise language in that case, but rather to that general school of thought that interpreted those cases to require proportional representation.

I think that was also a concern, as I remember—and, again, I was not directly involved in the debates over the Voting Rights Act. But I think that there was some concern even then with the legislation that came from the House of Representatives that it might lead to—the results test might lead to proportional representation. The language, of course, in the Voting Rights Act, in the amendments, preclude that. And, of course, the *Thornburgh* case makes it clear that you don't presuppose now that there is bloc voting, but rather it has to be proven.

So what I was talking about was this general assumption about had to do with the school of thought with respect to proportional representation and the presupposition that minorities all voted the same way or thought the same way or acted the same way.

Senator KENNEDY. Well, I am interested in your view of the legislative history because Senator Mathias and I were the principal sponsors of the extension of the Voting Rights Act, very much involved in the debate, and the legislation specifically includes in title II, explicitly says that no group is entitled to legislative seats in numbers equal to their proportion of the population. At least among those that were very much involved in the legislative history as well as the Supreme Court——

Judge THOMAS. That is where——

Senator KENNEDY. The only point I raise is when you mention here many of the Court's decisions, I was just trying in my own mind—and recognizing the importance of voting rights, to find in my own mind what were the areas of the Supreme Court decisions in voting rights that you are most critical of. But I understand now—and I would like to move on—that with regards to *White* and *Thornburgh* that you support certainly their——

Judge THOMAS. I absolutely support the aggressive enforcement of voting rights laws and certainly support the results in those cases. I think I said that or attempted to say that last Friday.

Senator KENNEDY. Let me move on to another area that was touched on during the course of the hearings but which I would like to just clarify. Judge Thomas, in your exchange with Senator DeConcini yesterday, you talked about your role in *Adams* v. *Bell*. The Secretary of Education, Terrel Bell, was the defendant in that lawsuit. Back in 1977 the Court had ordered the Office of Civil Rights in the Department to process discrimination complaints more properly and conduct compliance reviews within specific timeframes. And you arrived as the head of the Office of Civil Rights in May of 1981. So we have the Court going back to 1977, you arrive in 1981. You were the official responsible for compliances with the court order. Your agency was accused of ignoring the court-ordered timeframes to act on race discrimination complaints, sex discrimination complaints, and other discrimination complaints in a timely manner.

The plaintiffs in the case petitioned the Court to hold you in contempt for violating the court order, and the Court held a hearing on the petition in March 1982, which is 9 months after you had taken office. You told Senator DeConcini the judge did not hold you in contempt or take any other steps. You said, and I quote, "I think ultimately what the judge realized was that we were doing all that we could, that it was impossible for us to comply with it"—meaning the order, and that is the end of the quote.

That, as I understand it, is not quite right. I would like to quote from the contempt hearing on March 15, 1982. The judge concluded that instead of enforcing the civil rights laws, you were dragging your heels, carrying them out in your own way and according to your own schedule, instead of complying with the timetable ordered by the Court. Here is what the judge said, and I quote:

I would like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

It is true that the judge did not take the extreme step of actually holding you in contempt of court, but this is what the judge went on to say, and I quote the judge:

We do find, though, that the court order has been violated in many important respects and that we are not at all convinced that these violations will be taken care of and eventually eliminated without the coercive power of the court.

So the judge said very clearly that you violated the court order in many important respects, used the word "violated." He was concerned that you were still not making the good-faith efforts to comply. He was clearly threatening you with contempt. He was obviously pretty upset with you.

What do you think he meant when he said he might have to use the coercive power of the court to get you to comply with the court order?

Judge THOMAS. Senator, when I responded to Senator DeConcini, I think I also noted—and I did not go back and review the transcript—that I had not had an opportunity to review the entirety of the record or any orders by the court. It has been, again, now about 10 years.

With respect to what the court was doing, the petition that was filed with the court was filed prior to my going to the Office of Civil Rights. I went to the Office of Civil Rights, I believe, in May of 1981. That was filed sometime, I believe, in February or March. I can't remember exactly when.

The office had never been able to comply with those timeframes under the consent decree, and, indeed, we improved—in the brief time that I was there, I actually became Assistant Secretary in July. Even though I was there before, I was actually sworn in in July of 1981. During that brief period, we were able to improve the performance and to comply with the timeframes, certainly did better than the individuals prior to us, but still were not able to comply. And we devoted 95 percent of our resources in an attempt to comply.

What I suggested to Senator DeConcini is perhaps that I did not—I should have gone back and perhaps looked at some additional steps in communications with the court in order to prevent the

matter from reaching the point where it could be suggested that I was in any way not acting in good faith or in defiance of the court order.

Senator KENNEDY. Well, didn't the judge draw some conclusion in terms of your performance and the previous official's performance?

Judge THOMAS. Again, I have not reviewed the record, Senator. It has been quite some time ago.

Senator KENNEDY. I believe it did, but you can correct the record and take a look at it and comment on it.

The judge may not have taken the harsh step of holding you in contempt, but he did take other steps. Contrary to what you told Senator DeConcini, he set a deadline for the completion of a study that you had told the court you needed prior to taking any action. He set a deadline for both parties to consider the results of the study to agree on the revisions of the court-ordered timeframes, if any were necessary.

Also, you had told the court—you told the committee this week that you had expedited the study when you arrived at the Office of Civil Rights. In both instances, you cited this as an example that you were making your best effort to comply with the court order. I would not say the judge thought you were making the best effort. In a March 1982 hearing your lawyer commented that you had told the court you expected the study to be completed within the next month or two, the judge responded, "I think he kind of hedged on that prediction. I think if we were going to leave it up to Mr. Thomas, you might not get it this year." That is what the judge said. He sounds pretty skeptical that you were going to comply with the order.

Judge THOMAS. As I indicated, Senator, the study that we were referring to was begun prior to my arriving at the Office for Civil Rights. And as I remember—again, it has been quite some time—it had been scheduled for completion at one point, and I expedited the schedule so that we could have that study in place so that we could make the appropriate changes consistent with that study.

Senator KENNEDY. This is what the judge stated in reference to your predecessor, Mr. Tattle:

I contrasted Mr. Tattle on the one hand, who was sitting in the same position Mr. Thomas was 4½ years ago. Mr. Thomas and I contrasted Ms. Chong and Mr. Rigau. It seems the difference between these two people is the difference between day and night. Now, Rigau admitted that they were behind in their work as far as the Office of Federal Contract Compliance was concerned, but he manifested an active interest in improving the machinery. Things weren't getting any worse. I think they were probably better. And while things weren't completely in accordance with the time frames, Mr. Tattle went out of office in the fall of 1978 or 1979.

This was the fall of 1979.

Things were on their way to being improved; whereas, at the time he took over, things were in bad shape. That is my basic problem. I don't like to hold people in contempt. On the other hand, I like to see some kind of manifestation by the people that administer these statutes that they realize they are under the constraints of a court order and accordingly are going to make a good-faith effort to comply.

Judge THOMAS. He was not——

Senator KENNEDY. You can put in the record, whenever you get a chance to examine the transcript——

Judge THOMAS. But he was not my immediate predecessor. My immediate predecessor was Cindy Brown.

The difficulty that we faced, Senator, that I did not allude to—and it is one that the office continued to labor under, and I think it was an important difficulty—is that when the Department of Education was created out of HEW, to my knowledge the Department of Education Office for Civil Rights had about 80 percent of the work and 60 percent of the staff and was inundated. I think it was in a much different position from the HEW staff. But that is something that is a part of what you inherit when you move into a department, and it was a very difficult problem.

The assurance that I made and that I make here—and it is a very firm one—is that we attempted to do all we could to dig ourselves out from under the workload. That is quite a bit different in terms of accomplishing than it was, say, at EEOC where I was not a part of a larger department that controlled decisions over the deployment of personnel and budgets.

Senator KENNEDY. Well, did you complain about the staff and the resources?

Judge THOMAS. Absolutely. In fact, internally I complained, as my successors complained, but there were competing interests. As you remember, at that time the Department of Education itself, the full Department, was undergoing a RIF. And though the OCR did not have the same budgetary constraints, it was held to the same standards and not permitted, for example, to hire staff.

Senator KENNEDY. Let me move on to another area. During your opening statement, you praised civil rights leaders for having changed society, and you stated, "I have benefited greatly from your efforts. But for them there would have been no road to travel." But in the past you have condemned those same civil rights leaders in five different speeches. In 1985, for example, you denounced, and I quote, "a civil rights community wallowing in self-delusion and pulling the public with it." You omitted that phrase from only two speeches during this period, the two speeches you gave to predominantly black audiences.

What did you mean when you said that the civil rights community was wallowing in self-delusion and pulling the public with it?

Judge THOMAS. Well, let me make two points there, Senator. I have many other speeches in which I extensively praised the civil rights community and its efforts, and speeches on Martin Luther King's speeches with respect to the NAACP and many organizations, and I have always given credit concerning the efforts and the major, major contributions of the civil rights movement and the civil rights groups in our society.

The difficulties that we had during the 1980's was an important difficulty, and that was this, that there was, to my way of thinking, a need to begin to debate anew some old problems and to begin to look at them with fresh ideas.

What you see in those speeches are my frustration or is my frustration that that debate never took place. Instead, you see a similar frustration expressed to the conservatives in the Heritage Foundation speech. Rather than ultimately sitting down and beginning to try to work out the problems, we were spending our time yelling across the table at each other.

I had hoped that would not have been the case during the 1980's. As we all know, much to our chagrin, and I think to the chagrin of anyone who is involved, that that did not occur.

Senator KENNEDY. Then, in a 1987 interview with Reason magazine, you were asked whether there were any areas where the NAACP and the civil rights establishment were doing good, and you interrupted the question to respond no. When the interviewer asked, "None?" you said, "None that I can think of."

In at least three speeches, you said, "Members of the civil rights movement had given in to the cult mentality and childish obedience"—this is your quote—"which hypnotizes blacks into a mindless political trance."

Again in 1988, here is a quote, "We must now not merely be critical of the many blunders and follies that have occurred in the practice of civil rights, we must show how our reliance on American principle produces better results than those of our enemies." That is pretty powerful stuff, calling leaders in the civil rights movement "the results of those of our enemies," and then in 1987, you publicly castigated civil rights leaders who, "bitch, bitch, bitch, moan and moan and whine."

Judge THOMAS. I think that was made before, Senator.

Senator KENNEDY. The point that appears of the kind of debate you were trying to begin, I remember the time also as most of those leaders very much involved with working with Congress on the extension of the Voting Rights Act of 1982, when we had initial opposition. William French Smith, right before this committee, expressed his opposition, and he was going to recommend that President Reagan veto it.

I can remember the work that was done by the civil rights groups in 1984, 1985, and 1986, when we were trying to overrule the *Grove City* case, which affected all Federal funding, whether they could be used in terms of discriminatory purposes.

I remember the work that many have done in terms of the sanctions against South Africa. I know you have a different opinion from many of the civil rights leaders, although that opinion was different evidently from what you had at Holy Cross, where you supported disengagement and the economic sanctions. They were very much involved in overriding a Presidential veto.

And I remember the civil rights leadership in 1987 and 1988, when for the first time we worked out fair housing legislation, which had been basically stalemated in the Congress. These are major kinds of proposals that they are very, very much involved in, and what we find is a series of extremely critical comments about all.

Then the time is moving on and you had in the 1987 interview, you stated, "That I find exasperating and incomprehensible the assault on the Bicentennial, the founding of the Constitution itself by Justice Thurgood Marshall, his indictment of the Framers alienates all Americans, not just black Americans." That is a strong attack on Justice Marshall. He was criticizing the original Constitution for accepting slavery.

I will give you——

Judge THOMAS. Thank you, Senator.

Let me go back and I will try to cast this generally. I will not attempt to go through each one of those seriatim, unless you would want me to.

I think in the interview, my point was that I was the wrong person to ask with respect to comments about the existing civil rights community, because of the manner in which the civil rights community had treated me and that I am no more or less human than anyone else, that there was serious disagreement, and I do not think that the disagreements were at the level that they should have been, and I suggested that.

I attempted to conduct myself in a way that we could have a constructive debate, and I reiterate the point that I have major speeches throughout my tenure that are very, very supportive and very strongly indicate my allegiance to the civil rights community and to the civil rights movement, but I do not think that allegiance and that support should undermine the ability to disagree.

And the comment that I made with respect to the unanimity, the homogeneity of our points of views I think are important. I think that there is a need for debate. I have said from my early speeches in 1981 that it is important, these issues are so difficult, and the problems are so bad, that we need all of the talent, that we needed all of the ideas possible, not just one point of view.

I did not feel that that opportunity ever occurred or that we had the chance or I had the chance personally to engage in that debate, and I thought it was a lost opportunity, and I said it on both sides of the aisle with respect to the civil rights community, as well as with respect to the Reagan administration.

Senator KENNEDY. Well, it would appear, and the record will show, whether these are expressions of disagreement or strong negative statements.

Judge THOMAS. Yes.

Senator KENNEDY. Judge Thomas, I continue to have serious concerns about your nomination. In your speeches and articles, you have taken many strong positions, but again and again you have asked this committee to ignore the record you have compiled over a decade.

On natural law, despite your previous clear advocacy of using natural law in construing the Constitution, you now tell us that you do not see a role for the use of natural law in constitutional adjudication.

On the right to privacy, you have walked away from your record and statements. You now say that you support a right to privacy, but you refuse to comment on its controversial applications.

On abortion, you have explained away your strong praise for Lewis Lehrman's extreme article supporting the right-to-life position, and said you just mentioned the article in the hope that the rightwing audience would be more inclined to support enforcement of civil rights.

You ask us to believe that an intelligent and outspoken person like yourself has never discussed *Roe* v. *Wade* with another human being.

You ask us to be confident that you will enforce a woman's right to be free from gender discrimination, despite your prior stereotype statements about women and work.

You have abandoned your previous statements that business rights are as important as individual rights or any other right. You now claim you are satisfied with the Supreme Court decisions that give less importance to business rights and greater importance to individual rights.

You have criticized Supreme Court decisions protecting voting rights and sustaining the power of Congress to appoint independent prosecutors, to investigate wrong-doing in the executive branch, now you seem to be supporting those positions.

You have trashed the leaders of the civil rights movement in many speeches, but now you emphasize your debt to them. You have trashed Oliver Wendell Holmes in one of your speeches, but last Friday you called him a giant in the law.

You have harshly criticized Congress, and, as an executive branch official in the Department of Education, you were on the verge of being held in contempt of a Federal court for failing to enforce civil rights laws.

You urge lower courts to follow a Supreme Court dissenting opinion restricting job opportunities for women, instead of the Court's majority opinion expanding those opportunities.

The vanishing views of Judge Thomas have become a major issue in these hearings. If nominees can blithely disavow controversial positions taken in the past, nominees can say those positions are merely philosophical musings or policy views or advocacy. If we permit them to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role in the advise-and-consent process.

Some say that the Senate should consider only the nominee's qualifications and not his ideological views, but the Constitution gives the Senate a shared role with the President in the appointment of Justices to the Federal courts, and for very good reason.

The Supreme Court thrives on the diversity of views of nine Justices who comprise it. It is our system of checks and balances. The role of the Senate is one of the most important checks on the power of the President to pack the Court with appointees who share a single one-dimensional view of the Constitution.

When ideology is the paramount consideration of the President selecting a nominee, the Senate is entitled to take ideology into account in the confirmation process and reject any nominee whose views are too extreme or outside the mainstream.

As we move to the next stage of these hearings, I continue to have major concerns about your nomination and about your commitment to the fundamental rights and liberties at the heart of the Constitution and our democracy. This is no time to turn back.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much.

Now, where we are at this moment is that all Republican Senators have had a third round and we should be just going down the row here, but Senator Grassley, who did not complete a third round last week, apparently has a couple of minutes he would like to use now, is that correct?

Senator GRASSLEY. Yes, at least not more than 5.

The CHAIRMAN. OK. Well, if it is all right with the Senator from Vermont, if we yield to the Senator from Iowa. Everybody will