Judge THOMAS. I am the same person, my outlook, I believe in our country, I believe in trying to look at a problem and solve that specific problem, to look at a statute or a case and be true to my obligations with respect to that statute or that case.

I do not believe, however, that there is a role in judging for the expressions of the kinds of personal views or the policymaking or the personal opinions that you have in the executive branch.

Senator KOHL. That is all right, but would you say that I can assume that, in general, the kinds of philosophies that you had expressed, however we interpret those, when you were in the executive branch, are not that dissimilar from the kinds of philosophies that you carry today?

Judge THOMAS. I am the same person. I think the role, again, the judicial philosophy versus being a policymaker is different. I think that there is an indication of the kind of person I am when I was in the executive branch and my outlook on life.

The only point that I am making is that, to the extent that those are political statements or policymaking statements, I don't think they are relevant in my role as a judge.

Senator KOHL. Thank you very much, Judge Thomas. I don't suppose I will be speaking to you again, at least not in this capacity. I found you to be an intelligent, bright, and humorous person.

With respect to the process itself, Mr. Chairman, I think that one of the things that has come out of this confirmation hearing is that we need to do as much as we can to ensure that the hearings in the future leave us all, at least most of us, with a little more definite feeling about what kind of a person, in terms of philosophy, we are voting on.

Thank you very much, Mr. Chairman.

The CHAIRMAN. Thank you very much.

I have questions. It is my turn to come around. What I will do is I will ask a few of them and then I will yield to the Senator from Pennsylvania who has questions on his last round, and then I will conclude.

Judge I would like to go right back to methodology, if I may, without any preamble. I would like to talk to you about the *Michael H.* case, and famous footnote 6, if I may. I don't want to bore the listening public with the esoteric underpinnings of that debate, but let me just simply ask you: Do you concur with the rationale offered by Justice Scalia as to how one is to determine whether or not an interest asserted by a person before the court, an interest asserted that there is a fundamental right that that person has, whether or not you must go back and look at the most specific level of that interest as asserted, like he suggests, or as has historically or traditionally been viewed, a broader look back at the more general interest asserted, as Justice Kennedy and Justice O'Connor indicated, notwithstanding the fact they concurred in the opinion with Justice Scalia in the *Michael H.* case? Would you speak with me a little bit about that?

Judge THOMAS. Senator, again, that is a very recent case and I am in the position of not wanting to comment on that specifically, but I am very skeptical——

The CHAIRMAN. I am not asking you to comment on the case. I am asking you to comment on the footnote.

Judge THOMAS. I am skeptical, when one looks at tradition and history, to narrow the focus to the most specific tradition. I think that the effort should be to determine the appropriate tradition or the tradition that is most relevant to our inquiry, and to not take a cramped approach or narrow approach that could actually limit fundamental rights.

I think that Justice Kennedy's reference to *Loving* v. *Virginia* was a very catching reference in his reference and one——

The CHAIRMAN. Excuse me, Justice Kennedy's reference to *Loving* v. *Virginia?*

Judge THOMAS [continuing]. Was a very telling reference and one that certainly caught my attention. But I think that I would be skeptical of that kind of an approach, Senator, very skeptical of——

The CHAIRMAN. The Kennedy kind of approach?

Judge THOMAS. The Scalia approach.

The CHAIRMAN. I hope so. Justice Kennedy's references to *Loving* I think are—and there are other cases we could point to and not just *Loving*—as to whether or not we go back and look in history as to determine whether or not there is a protected fundamental right. In the case of *Michael H.*, the issue there, as you know as well or better than I do, was whether or not a father who, in fact, was the father by blood of the young person in question, whether or not he had any rights to visitation, notwithstanding the fact that the child was born at the time when the mother was married to another man. Justice Kennedy asserts that—Justice Scalia asserts that when you go back to determine whether or not there is a personal right to privacy of a father to be able to visit his child, that you go back and not look at whether or not fathers have those rights, but whether illegitimate fathers have those rights, and he concludes, as you well know, that nowhere in our English jurisprudential tradition are illegitimate fathers treated the way that "fathers are treated."

When you narrow the scope to look that way, you can come out with the ability to suggest that there is no historical background or tradition that protects illegitimate fathers, ergo, in *Loving* v. *Virginia,* as you know better than I, it was a case that ended miscegenation in this country, at least in Virginia and the country, and if you apply the Scalia method, you would go back and say is the right of marriage, one that we always look to, and Scalia says no, no, you don't look at marriage, you look at whether or not the miscegenation laws were legitimate, they have always been viewed as that in our unfortunate background, therefore. So, that is why it is so important, as you well know, and, as I understand it, you are not taken with the Scalia approach.

Judge THOMAS. Skeptical.

The CHAIRMAN. I hope you are more than skeptical, Judge.

Judge THOMAS. Well——

The CHAIRMAN. At any rate, let me move on, if I may, for a moment now to the issue of separation of powers, if I may, and go back to *Morrison* v. *Olson,* if I may. I won't bother you with the quotation. We have talked about it before, which is the quotation about *Morrison* being the most important case since the *Brown* v. *Board of Education.* We have talked about this passage several

times, and you talked about it with Senator Leahy, and I want to ask you why you thought the independent counsel case was the most important since *Brown*.

Your answer, if I understood it when we spoke about it the last time, was that you were addressing an audience for whom the topic of separation of powers would seem, to quote you, "obscure" or a topic that "doesn't excite people in the audience." Now, is that correct?

Judge THOMAS. And also it dealt with any case that dealt with the structure of our Government. For example, *INS* v. *Chadha* deals with the structure of our Government and the congressional veto. I think those are important cases, because I think the Supreme Court has very few cases directly addressing the structure of our Government.

The CHAIRMAN. I can understand the need, we all do in each of our businesses, you when you were in the executive branch and us in the legislative branch, trying to get the attention of an audience that may not want to pay attention to an esoteric subject. It never happens in these hearings, but it occasionally happens in other places, so I understand the technique, and I don't say that critically, I mean that sincerely.

I never did get around to asking you whether you actually do consider *Morrison* v. *Olson* the most important case since *Brown* v. *Board of Education*.

Judge THOMAS. I think it is one of the most important cases. I think it is among the important cases. Of course, I say that because I think the cases that deal with the structure of our Government are important cases.

The CHAIRMAN. Well, I am sure you know why I was drawn to this quote and comment, and it wasn't so much because it had a darn thing to do with *Brown* v. *Board of Education* and looking whether you thought something else was as important or the most important since then.

As you know, there is a group of people beyond yourself who consider the independent counsel case very important and maybe even the most important case since *Brown*, and I am thinking of the libertarians who are devotees of Mr. Epstein and others, those people who have two major items on their agenda and they state them very forthrightly. One is to use the takings clause of the fifth amendment to limit the power of society to regulate. You and I have talked about that. And the other is to limit the power of society to regulate by revitalizing the doctrine of separation of powers.

Now, when you gave that speech at the Pacific Research Institute, did you realize the significance of the independent counsel cases for the people with what I will characterize as with these views?

Judge THOMAS. This is the first I have heard of that. I have heard of the takings argument, but I haven't heard of the separation of powers argument.

The CHAIRMAN. Well, the reason why again it was brought to my attention, I am reading Solicitor General Fried's book, as we mentioned in another context, and Solicitor General Fried and I have had our little disagreements before this committee and he has

never been accused, at least in the circles I travel in, of being a liberal.

In the book he wrote about his years as Solicitor General in the Reagan administration, he refers to a group of executive branch employees, primarily in the Justice Department, whom he refers to as "Reagan revolutionaries." Professor Fried writes of the so-called revolutionaries and what they thought about the Independent Counsel case and why they thought it was such an outrage, such a horrible decision, that is, upholding the Independent Counsel.

But they also thought something else, he said. They thought that if they could get the Court to strike down the Independent Counsel statute, they would have a basis for striking down all independent agencies, because the rationale that allows the Independent Counsel case to be struck down would allow the Securities and Exchange Commission, the Federal Trade Commission, the Federal Communications Commission, the Federal Reserve Board—which is one of their primary targets—to be struck down.

According to General Fried, this group wanted all of these agencies placed under the thumb of the President, rather than continuing to operate with a modicum of independence from the day-to-day political influence, and I quote from his book, on page 154, "Order and Law."

He says, "To the revolutionaries of the Reagan administration, the independence of the independent regulatory commissions, for instance, the ICC, the FTC, the FCC, the SEC, and, most importantly, the Federal Reserve Board, was on a fence against the principle of the unitary Executive and of the separation of powers."

"So," he goes on to say, "that is why *Morrison* was such a big deal to so many people, and still is to so many people, bright, attractive and energetic people who would like very much, nothing wrong about it, but would like very much to change the regulatory process in agencies of this country."

If Justice Scalia's opinion, the lone dissent that you found so remarkable—and that is your word, remarkable—in the *Morrison* case, had been the majority opinion, all of these agencies would be unconstitutional, if Scalia's dissent were the majority opinion, including the Federal Reserve Board, an independent agency that has served this country extraordinarily well in recent years, most might suggest, because the rationale of Scalia's opinion does not stop at the Independent Counsel statute, it would outlaw all independent agencies.

Now, Judge, do you believe that the separation of powers requires the abolition of independent agencies in the Federal Government?

Judge THOMAS. Senator, I have not thought that. In fact, I was on the other side of that debate, but let me just walk through it a second.

The CHAIRMAN. Please.

Judge THOMAS. EEOC was one of the rare independent regulatory agencies in the executive branch.

The CHAIRMAN. If I could stop you there, as you know, there was a debate at the outset as to whether or not EEOC was, in fact, truly an independent agency and designed to be one, unlike the FCC and others which clearly unequivocally were meant to have

independence in that the President could not dismiss without cause.

Judge THOMAS. Well, that debate about EEOC was, for all practical purposes, conceded in the Reorganization Act of 1978. My argument, as the Chairman of EEOC, was that EEOC needed to be independent, that it was enormously difficult, as one of my Commissioners put it, we had the worst of both worlds. We were one of the few independent agencies or commissions that had to have its regulations cleared through the Office of Management and Budget and engage in a process that the other executive branch agencies had to engage in, and there were problems with that, so I advocated just the opposite, that it be truly independent.

I was aware of the academic debate years ago, particularly after the New Deal era, concerning administrative agencies. I did not participate in that debate during my chairmanship of EEOC, and I really just thought it was nothing more than the debate that you would place next to the gold standard debate.

The CHAIRMAN. It is alive and well, I must tell you. [Laughter.]

Judge THOMAS. There are some limits to the things that I can spend my time on, but I was not involved in that debate and was not aware that there was a relationship or there was a second agenda to *Morrison* v. *Olson.* This is news to me, as you explain it today.

The CHAIRMAN. Well, Judge, in light of what you know now, you do understand why this is such an important issue to question you on, don't you? If you look again at the dissent in Justice Scalia's dissent—and he has been consistent, by the way, this is not a new notion for Justice Scalia—he takes separation literally and, as you well know, he is in a position where he suggests that articles I, II, and III set out the parameters for each of the branches and they do it very precisely, and that any branch that in any way, voluntarily or involuntarily, treads on the prerogative of another, in this case if there is any executive capacity or judicial capacity that any of these agencies possess, then, in fact, they have gone beyond what is legitimately authorized in the Constitution under the separation of powers doctrine, doctrine, I might add, that is not anywhere mentioned explicitly in the Constitution.

So, this is a big deal, and if there were five Justice Scalias on the bench, we would find ourselves with a radically different means by which we would be able to have this Government function. I am not being pejorative, when I say that. For argument purposes, he may be right, but it would radically change it.

The FCC has judicial functions as well as legislative functions, it has rulemaking capacity. He argues, no, no, rulemaking capacity, that's legislative, it can't be done. In *Morrison,* he argues, wait a minute, you still have the—you put, in effect, the executive branch in the position where it has to assign a special counsel, so notwithstanding the fact you allegedly give independence, whether or not to determine whether or not such counsel exists, you have already stepped over the line, therefore, it is unconstitutional, because the legislature is taking on some executive function.

I am not being facetious when I say this, but do you understand why his dissent is so significant, if it were to be the majority view of the Court, or do you disagree with my assessment of his dissent?

Judge THOMAS. Well, in the context that you explain, I can understand your concern. My quote and my reference in the speech was that with respect to the individual rights that were affected in this particular case, but——

The CHAIRMAN. I will accept that on its face, because I believe you mean that and, believe it or not, I am delighted to hear that is the case, and not the larger case, because it is a—when I say agenda, I don't mean it again to sound so pejorative, when I talk about an agenda out there unrelated to you, but I think we should understand that there is a good deal of intellectual ferment.

I must admit, one of the reasons why the right has been so successful is there is much more intellectual ferment on the right than there is on the left today. I think the left has fallen back on its laurels in many ways. It finds there is no need to come up with new methods and means by which to promote its objectives, but that is not lacking on the right and there is an explicit desire, not at all denied by any of the young intellectuals who wish to see a change, that the way to deal with too much Government bureaucracy and regulation is to eliminate the regulatory bodies that exist, thereby giving the Executive total control over those elements of regulation, as opposed to the legislative bodies.

I won't bore you with that. I accept your answer for what it is to be the truth, and I will at this moment, unless you would like to add anything, I will yield to my colleague in a moment.

Judge THOMAS. No.

The CHAIRMAN. I suggest we break and give you a break, unless you have a comment to make on what I said, and then I will yield to my colleague when we come back, Senator Specter, and we will have you question then, Senator.

We will recess, to give the witness time to stretch his legs a little bit, about 10 minutes.

[Recess.]

The CHAIRMAN. The hearing will come to order.

The Senator from Pennsylvania, Senator Specter.

Senator SPECTER. Thank you, Mr. Chairman.

Judge Thomas, in my last round of questions, I was discussing with you the topic of the revisionist court, which is a name that I affix to our current Court because it is not a conservative court; it is a revisionist court, as I see it. And I want to discuss with you two cases which are illustrative of its being a revisionist court because they are two 1971 opinions by a unanimous Supreme Court, with the opinions being written by Chief Justice Burger in a very conservative thrust.

One of the cases is *Swann* versus the school districts, and I ask you about this case because you had written on the subject in the Boaz edition of "Assessing the Reagan Years." And you complained about "*Brown* not only ended segregation but required school integration."

My first question to you is: If you end segregation, doesn't it necessarily mean that you are requiring school integration?

Judge THOMAS. Well, I guess semantically the reference, my own reference to those different terms would have been that desegregation would be the ability to simply not be barred from certain ac-