

debate, there is generally a consensus reached and the board ceases the discussion at that point, and the consensus is taken as decision.

And that is precisely what happened at that meeting. The meeting was a vigorous meeting. There were strong positions taken on both sides. But eventually a consensus was reached, and at least some of us were able to get what we wanted out of that particular meeting.

Senator SIMON. Judge Gibbons, you were on the board then, I assume.

Mr. GIBBONS. I presided at the meeting in the absence of the chairman.

Senator SIMON. And could you pull that mike a little forward and give your recollection of the meeting?

Mr. GIBBONS. Yes. I presided at the meeting in the absence of the chairman, and my recollection of what transpired and Clarence Thomas' role in it is exactly as I have stated here. The press report that you read is not an accurate description of what took place at the meeting.

There was a vigorous debate over the difference between the Sullivan principles approach and the total divestiture approach, and Clarence Thomas firmly and persuasively argued for total divestiture.

Senator SIMON. If I can ask either one of you, how do you mesh that with his position in opposition to sanctions, serving 10 years on the board of a publication that regularly ran articles taking the position of the South African Government? And yet in his testimony there was no indication that he ever protested those articles—may I just ask how either of you feel about that and how you can mesh those positions, or, well, your thoughts on that.

Father BROOKS. I think the position on the divestiture is based on his understanding of the immoral nature of the Government of South Africa at the time. I really can't—I just don't know. I don't know what motivated him, and I don't know the circumstances under which he wrote the articles, gave the talks, and so forth. I really don't think I can be of much help to you on that.

Senator SIMON. Judge?

Mr. GIBBONS. Nor can I. I was never even aware of it, and he certainly never discussed it at the board meeting. But his position on divestiture was quite clear.

Senator SIMON. I thank you all very much.

I yield to my colleague from Pennsylvania.

Senator SPECTER. I join my colleagues in welcoming you here and thank you very much, Sister Virgilius, and you, Father Brooks, for your personal insights and your knowledge of Judge Thomas.

Dr. Sudarkasa, I note an article which you had written for Newsweek, in August, on the issue of affirmative action. And you say you were not a conservative, but you applaud Judge Thomas' approach on affirmative action. And you raise an interesting point on those who got into college when you went without any affirmative action, knowing that you had "made it on our own," and the concern about students who got in on affirmative action resenting the notion they did not make it to college on their own merit.

Is your net conclusion that there ought not to be any preferences on college admission?

Ms. SUDARKASA. I appreciate your asking the question because I think my position really is not clearly understood.

First of all, for 3 years at the University of Michigan, I had the responsibility of advising the university on the implementation of its policies that would give equitable admission to African-American and other minority students. I have not actually identified myself with Judge Thomas' position on affirmative action. As a matter of fact, in the statement I just gave, I said that I think that he has to understand that while looking at the tension between the practice of affirmative action and the principle of equality, that there is also the issue of equity which has to prevail if one wants to remedy past discrimination.

What I tried to point out in the Newsweek article, however, is that while I have a different position from Judge Thomas' on affirmative action, I understand how he and many of his generation come to the positions they hold. Because when I was a professor of anthropology and associate vice president at the University of Michigan, many students came to me with brave concerns about the way they were being treated by their peers, as well as by faculty members, because of the perception that they came into the university on something other than their own merit.

And I make the point that—well, not in that particular article, but in another. Affirmative action is a little more than two decades old, let's say a quarter of a century old. There is nothing sacrosanct as the only means by which we can attain equity and justice for those who have been discriminated in this society. I believe firmly that there must be a redress for past discrimination.

However, I think that if we listen carefully to the critics of some aspects of affirmative action practice, we may be able to improve upon that particular means of access. It is not simply that one is either for affirmative action or against it. One can be for affirmative action and still seek out ways to improve it.

Senator SPECTER. Well, in what you are articulating, you say there should be a remedy for past discrimination, in your words, "a redress for past discrimination," which is somewhat different from Judge Thomas.

Ms. SUDARKASA. Right.

Senator SPECTER. But you believe that Judge Thomas' views are well within the ambit of acceptability from the point of view of the African-Americans. Would you advocate the same kind of equity, equitable practices for employment as well as for educational practices?

Ms. SUDARKASA. Yes, I do.

Senator SPECTER. Judge Gibbons, welcome here. You had a very distinguished career on the Court of Appeals for the Third Circuit. You spent a lot of time in Pennsylvania on the court, which had jurisdiction over Pennsylvania, New Jersey, and Delaware, and I was very interested in your statement. And you come down to the core issue in your statement when you refer to the dilemma of when should the Court exercise the awesome power to set aside laws enacted by popularly elected legislators.

In the course of this hearing, I have gone into some detail on Judge Thomas' stated conclusions as to Congress is not a deliberative body and there is not wisdom here, and in taking up some

major cases like *Johnson v. Transportation Department of Santa Clara County*, saying that he hoped that Justice Scalia's dissent would provide a majority view in the future, although he expressly recognized the capacity of the Congress to change the law which the Supreme Court upheld in the *Johnson* case and also in other cases.

Would you be confident that Judge Thomas will respect the legislature's role and will not make law as a Supreme Court Justice but only interpret law on that delicate dilemma which you articulate in your statement?

Mr. GIBBONS. I think you have asked two things. There are some areas in which Supreme Court Justices do make law. They make constitutional law. I think we have to acknowledge that, and an effort to say that they merely find it is somewhat unrealistic.

With respect to whether or not he will show due deference to the legislative branch, I think the best reassurance you have is in the 20 published opinions he has written. They show an appropriate reliance on precedent and a fine appreciation of the deference the courts owe both to Congress and to the administrative agencies, and they show a reading of Federal statutes which properly acknowledges the primacy of the legislative process.

I am convinced he will show as a judge due deference to the legislative policy judgments made by the Congress.

Senator SPECTER. Well, Chief Judge Gibbons, when you talk about the Supreme Court making the law in the constitutional sense, I wouldn't quarrel with you. But when you deal with some of the cases that we have talked about here and you have title VII of the Civil Rights Act, which is a legislative determination, and you have the Supreme Court deciding one interpretation, as they did in *Johnson*, or as they did in local 28, the union, and then Judge Thomas specifically says that he knows that the Congress has demurred on not changing the law, but then criticizes it.

I would be interested—I have read all of his opinions, too, and the opinions of the panel when he wasn't writing them. I would be interested to know if you saw any of those opinions—because, candidly, I did not—where he dealt with this issue about deferring to legislative judgments even though he had a different personal view.

Mr. GIBBONS. No, none of them dealt with that issue specifically. But his general approach to congressional enactment, it seems to me, was consistent with an appropriate deference.

Senator SPECTER. Did you see any of that in his opinions? Because in his writings—and I am not saying I weigh too heavily his writings, but his writings were to the contrary. But did you see some of that in his opinions?

Mr. GIBBONS. Just his general approach. I have them all in the briefcase, but I am sure you don't want me to pull them out and start reading them.

Senator SPECTER. Well, you and I might do that together on another occasion when we don't have so many other witnesses to hear.

One final question, Chief Judge Gibbons, and that is: You heard the American Bar Association evaluate him as qualified as opposed to well qualified. As you state your knowledge of this man over a long period of time, having had dealings with him on the Holy