

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

Cross board, and I can personally attest to your capacity to evaluate lawyers, judges, having known of your work in some detail, would you rate him well qualified for the Supreme Court?

Mr. GIBBONS. I personally would, and indeed, I said as much to the representative of the American Bar Association who called me.

Senator SPECTER. Thank you very much, Chief Judge Gibbons. Thank you, ladies and gentlemen.

I yield now to my colleague, Senator Brown.

Senator BROWN. Mr. Chairman, I have long waited for you to become chairman of this committee. I have a motion for the adoption of constitutional amendments for the balanced budget and line-item veto and term limitation. [Laughter.]

Senator SPECTER. Without objection, agreed to.

Senator BROWN. Thank you.

Senator SPECTER. And now, Senator Brown, with my departure, you are the Chairman. [Laughter.]

Senator BROWN. Judge Gibbons, we have heard from a number of witnesses and some distinguished scholars today about how Judge Thomas might rule on the Court. They made a number of observations, but several of them were very serious charges. These scholars had not had an opportunity to read any of Judge Thomas' cases. My understanding is that you have read all of his decisions while he has been on the Circuit Court of Appeals. Would that be correct?

Mr. GIBBONS. Yes.

Senator BROWN. In those decisions, do you find that he has relied on natural law in any of those decisions?

Mr. GIBBONS. No.

Senator BROWN. Some of these scholars—

Mr. GIBBONS. I might say that none of them presented any occasion where that would be likely, since most of them dealt with statutory issues.

Senator BROWN. In reviewing the Judge's writings, they indicated they found and believed that he would follow a very simplistic approach, see things and be unable to grasp the complexities of issues that might come before the Court. Having read his cases, and I assume some of his other writings, could you give us your view of whether or not that would be his approach to constitutional questions?

Mr. GIBBONS. I do not think in adjudicating constitutional issues it is possible for just to take simplicity issues. They are dealing with cases that are intensely litigated and they are decided at the end of the litigation process. The competing considerations are usually well developed and it is hard in a collegial body of nine Justices or even in the court of appeals, where the typical panel is three, to take a simplistic approach. Your colleagues on the bench will not let you, you have to engage in a rigorous intellectual effort for which you have become fully prepared by studying the relevant materials.

I am fully confident that he will engage, as a member of the Court, in the kind of internal debate that is necessary for the intelligent moral resolution of complex constitutional issues, many of which cannot be determined on the basis of facts.

Senator BROWN. Thank you.