

TESTIMONY OF MICHAEL MARTINEZ, NATIONAL PRESIDENT, HISPANIC NATIONAL BAR ASSOCIATION; AUDREY FEINBERG, CONSULTANT, THE NATION INSTITUTE; ANTONIA HERNANDEZ, PRESIDENT AND GENERAL COUNSEL, MEXICAN-AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND; HENRY SCOTT WALLACE, LEGISLATIVE DIRECTOR, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS; AND KRISTINA KIEHL, CHAIR, VOTERS FOR CHOICE

Mr. MARTINEZ. Thank you, Mr. Chairman. I am happy to be here today.

I am president of the National Hispanic Bar Association, and in the 15-year history of our association's existence this is the first time we have presented oral testimony on a U.S. Supreme Court nominee.

Our purpose in being represented at the confirmation hearings of Judge Kennedy are twofold. We wish to discuss our evaluation of his qualifications to sit on the highest court of the land, and we wish to constructively discuss Judge Kennedy's legal opinions which we believe shed light on his philosophy and understanding of the Hispanic community. We have not and do not consider whether we agree or disagree with a particular opinion of Judge Kennedy's or with his judicial philosophy. We simply evaluate as our brethren in the ABA do. We are a bar association. And we evaluate based on qualification and not, hopefully, subjective criteria.

Our judiciary committee, as well as our board of governors, has worked diligently to review Judge Kennedy's opinions. The board evaluated (1) his analytical skills, (2) his ability to communicate his ideas in an understandable fashion, (3) his sensitivity to diverse communities in our country, and (4) his judicial philosophy.

Based upon our review of his decisions and writings we have come to the following conclusions and observations. In general, there is no doubt that Judge Kennedy has the intellectual capacity to be a U.S. Supreme Court Justice. His analytical skills are documented throughout his distinguished career. He has the ability to communicate in a clear and concise manner. He also understands the laws which have come before him. It is clear that experience and hard work have made Judge Kennedy a credit to our legal profession.

A review of his opinions also sheds light on his personal judicial philosophy and view of our social institutions. These opinions reflect a person that in some instances gives deference to institutions over individuals. A man who believes that individuals should bring their own actions rather than allow non-injured third parties to vindicate the rights of others.

Since our interest and concerns are much broader than civil rights, we do not seek to label Judge Kennedy as pro or con civil rights or minority or Hispanic interests. Instead, we seek to evaluate him on neutral criteria which gives us an indication of the overall quality of a Supreme Court Justice. However, cases involving civil rights or brought by or on behalf of minorities are of particular interest to our association, and in this case they disclose Judge Kennedy's lack of a clear understanding of some of the problems faced by us in the Hispanic community.

For instance, in the *TOPIC v. Circle Realty* case, decided in 1976, Judge Kennedy held that only direct victims of discriminatory housing practices had a cause of action. His reasoning in this case is plausible, but only if one viewed the 1968 Fair Housing Act in a vacuum. As this panel knows, that decision was overruled by the U.S. Supreme Court because, in fact, the Fair Housing Act was not intended to be interpreted in a vacuum.

In *Aranda v. Van Sickle*, decided in 1979, Judge Kennedy again turned to a very narrow interpretation of the law. Although acknowledging impediments to Hispanics voting in municipal elections, he ultimately ruled in favor of the municipality, while at the same time leaving the door open in the event of some future violations of law.

In *Spangler v. Pasadena City Board of Education*, decided in 1979, Judge Kennedy concurred in a decision terminating jurisdiction of the court over a school system previously ordered to correct racial segregation practices. Once again Judge Kennedy based his opinion upon a narrow interpretation of the law and gave deference to the school administration's good faith efforts. As in *Aranda*, the judge left the door open for future action if the alleged discriminatory practices were not remedied. This is not a practical solution because it is costly, time consuming, and in the case of many Hispanics it is simply not available to them to return to the courthouse.

The above cases make a statement about Judge Kennedy. He believes in our system of government and perhaps gives undue deference to institutions. Hispanics more often than not also give deference to our institutions; however, Hispanics do not have the monetary or educational attainment to be able to singlehandedly vindicate their rights or even to often recognize when their rights have been violated. Sometimes Hispanics must look to public interest organizations for assistance in vindicating their rights, as occurred in the *TOPIC* case.

Sometimes discrimination is not overt, as in the *Aranda* case. Sometimes discrimination is subtle, but can and must be remedied. Simply leaving the door open for a return visit to the court as Judge Kennedy has done in his opinions is not a very practical solution for the pressing needs, the immediate pressing needs of the Hispanic community.

Although we only have time to discuss a few cases, they are instructive in that they demonstrate that Judge Kennedy is cognizant of the discrimination faced by many in our society. Many of the problems faced by Hispanics cannot be solved by blind and unquestioning faith in the system. Judge Kennedy should understand that those that are most affected by systemic failures are the least able to vindicate their rights.

Based on the standards previously enunciated, we know Judge Kennedy is qualified to be a Supreme Court Justice. His analytical skills, his ability to communicate, and his judicial philosophy speak highly of his professionalism and legal abilities. Our association understands that no nominee for the U.S. Supreme Court comes to this Senate Judiciary Committee with a clean slate. However, we urge him to become more familiar with our Hispanic community. We have every confidence that Judge Kennedy will serve with dis-

tion as our U.S. Supreme Court Justice, and our association is prepared to assist him whenever possible.

I wish to thank you, Mr. Chairman, and the other members of the Senate Judiciary Committee for the opportunity to express the views of our association on such an important nomination, and I look forward to appearing before you in the very near future to comment on the nomination of a Hispanic for a Justice of the U.S. Supreme Court.

Thank you.

[The statement of Michael Martinez follows:]