

But one must look to the person and what he or she has done with that experience, and to date he doesn't have a clean slate. He has been in positions of power. He has been in positions of authority. He has been in a position to influence policy in a way that it would impact other people similarly situated. And we have the record on what he has done in those instances.

Mr. LUCY. I would certainly have to, Senator, support what was just said. In his public record as a public official, as a policymaker or policy implementor, he has never shown the kinds of sensitivity that ought to flow out of that past experience.

One of the Senators earlier on mentioned the fact that the polls show his—not necessarily approval rating but openmindedness waiting to hear. By and large, minorities want to be fair. But when you look at the record, his record doesn't suggest that he understands that.

I think, as he indicated, he believes discrimination exists. I think he is honest about that. But I think he believes it exists as it impacts on individuals as opposed to on groups.

I would so eagerly want to say to him, Senator, that when the sign said "No Irish Need Apply," that didn't mean Mr. O'Reilly or Mr. O'Rourke. That meant all. And he doesn't seem to grasp that even coming out of his own background. His resistance to class action remedies for the purpose of changing behavior strongly suggests that he thinks it is an individual personal situation.

Senator KENNEDY. My time is up, and I promise I won't ask a question of the next panel if I can ask Mr. Lucy the last one. But he will, I imagine, point out that the Constitution protects individuals, not groups.

Mr. LUCY. Well, certainly you would think that he would be aware of that in his own role and would have made more effort in his policymaking role to really apply the class action pursuit that had been given to them under the authority of the EEOC.

I would only add, Senator, that on the trade union side we are representing those who theoretically come through as beneficiaries of this entire civil rights-equal opportunity set of laws.

Senator KENNEDY. Thank you very much.

The CHAIRMAN. Senator Simpson.

Senator SIMPSON. Thank you, Mr. Chairman.

Welcome to this panel. I know many of you and have worked with many of you. And I have disagreed with many of you. I have always enjoyed that, and I mean that. Antonia Hernandez, you and I worked long and hard with the immigration issues, and I think that we would both agree that we have been fair with each other and always direct. And I have great respect and rich regard for you.

And I have known John Buchanan for many years. I do not know the other folks as well, but I know, indeed, of your reputation as well and have had you testifying here, the chairman has.

So you speak powerfully in opposition to Clarence Thomas. I understand that. I guess I would ask a question of Ms. Hernandez because I know her well. We have worked together on serious issues with immigration reform, illegal immigration. We have often, as I say, disagreed, but we have done so in a very honest and candid

and straightforward manner. And yet one part of your testimony caught my eye.

On page 6, it was the point of—you state, “Clarence Thomas’ opposition to affirmative action is based on his belief that the Constitution must in all circumstances be colorblind.” You then recite a number of cases you believe would be overturned if Clarence Thomas were on the Supreme Court.

My question is this: What is wrong with a colorblind society? Is that not what we have been seeking in this quest for perfection for decades?

Ms. HERNANDEZ. You are absolutely right. That is what we have been seeking and that is what I, more than anyone, want to have a society where the color of my skin or the gender is not an important factor, but my character.

The fact of the matter is that we are not dealing in a perfect world and we are dealing with a society that still has discrimination, it is much more difficult, it is much more subtle, and we must deal with societal discrimination.

The interesting thing—you were not here when I mentioned it—is I know Clarence very well. I worked with him when he was in the AK. I discussed his philosophy and point of view and his opposition to class remedies and tried to come up, as you know, I tried to come up with ways to deal and come up with solutions and ways we could prepare society and the legal profession in dealing on a one-to-one basis.

It is OK to believe in the goal of equality. It is not OK not to face reality and understand the discrimination that exists and attempt to deal with it. I am sometimes troubled by how we as a society zero in on this whole issue of dealing with problems on an individual basis when it deals with discrimination, and not dealing with situations on an individual basis in other matters.

When you deal with the banking situation, you don’t say, well, we are going to deal with, you know, fraud or mismanagement or problems in regulation on a one-to-one situation. You look at what is causing the problem, you see if it is systemic, you see if it is larger than that one situation, and you pass policies so that it doesn’t happen. Yet, when you are dealing with discrimination, all of a sudden it has to be 1 on 1 as it comes up and not having the systems to deal with those fortunate enough to go to an AK or to other agencies who protect their rights.

Senator SIMPSON. We have heard Martin Luther King’s name brought into this debate over these days many times, on both sides, interestingly enough, but the greatest civil rights leader, I think many would agree, was Dr. Martin Luther King and he asked only that he and his children be judged “based on the content of their character, and not on the color of their skin,” and isn’t what he was asking for was a colorblind judgment, and isn’t that just exactly what Judge Thomas is advocating?

Ms. HERNANDEZ. I also advocate that, but the fact of the matter is that we do not have that today and we must deal with that.

Senator SIMPSON. I think Judge Thomas has said that. But to have him criticized on that basis, I don’t understand that. That escapes me. I think that is what people have been talking about.

Well, did you set a quick clock on me?

The CHAIRMAN. We sure did. We gave everyone else 15 minutes, and you 5. [Laughter.]

No, Senator, we are giving everyone 5 minutes.

Senator SIMPSON. Oh, it is because Howard is done, is that it?

The CHAIRMAN. That's it. [Laughter.]

Senator SIMPSON. Well, I will come back. Thank you, Mr. Chairman.

The CHAIRMAN. Senator DeConcini.

Senator DECONCINI. Thank you.

Welcome to the panel. I appreciate the effort that you put in in analyzing this Judge, I must say, you have spent more time studying his opinions than I have, although my staff has spent a great deal of time analyzing them.

I am really interested in the comparison, Ms. Hernandez, that you make regarding the privilege and immunities clause of the 14th amendment and the equal protection clause. I specifically went to Judge Thomas, when it was my turn, and asked him whether or not he accepted, understood and would follow the three tests used by the Court under the equal protection clause of the 14th amendment. We discussed the three and the heightened scrutiny test, and he said yes, he understood it, that it did apply to alienage, as well as gender, and yet that doesn't satisfy you, is that correct? And can you make the distinction why, if he accepts those three standards, that the question of undocumented aliens would not fall into that intermediate scrutiny, assuming that we can believe him that he does accept that, that is what he told us?

Ms. HERNANDEZ. Well, there are two points. One is that the Constitution does distinguish, even if you just take the equal protection clause of the 14th amendment, there are distinctions in coverage between a citizen, a legal resident, and very few benefits to an undocumented person.

What we are really talking about is the difference between citizens and legal resident aliens, and the Court has spoken on those issues. In granting certain rights to legal resident aliens, they did not give the strict scrutiny, they found an in-between.

Senator DECONCINI. Yes, they found the intermediate scrutiny, right?

Ms. HERNANDEZ. That is assuming that you accept the equal protection clause. The problem that we have is in reading Clarence Thomas' writings, he would hold the privilege or immunities clause supreme and paramount above the equal protection clause, and if his legal philosophy and constitutional philosophy is that and you carry it in a consistent manner, it is very clear what it says.

Senator DECONCINI. Yes, and that is partly from his article in the Harvard Journal of Law and Public Policy, is that right, the article that he wrote in 1988—

Ms. HERNANDEZ. Yes.

Senator DECONCINI [continuing]. Entitled "The Higher Law Background of the Privilege and Immunities Clause of the Fourteenth Amendment." Is that where that comes from?

Ms. HERNANDEZ. That is part of it.

Senator DECONCINI. I did not get into the distinction here that you make, and I appreciate it, but I did go to the 14th amendment equal protection clause, and I was satisfied, whether you agree