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HISPANIC NATIONAL
BAR ASSOCIATION

TESTIMONY
BEFORE U.S. SENATE
JUDICIARY COMMITTEE

CONCERNING

JUDGE ANTHONY KENNEDY
NOMINATION TO THE
U.S. SUPREME COURT

DECEMBER 16, 1937

Thank you, Mr. Chairman, I am Michael Martinez, President of the Hispanic Bar Association. In the 15 year history of the Hispanic National Bar Association (HNBA) this is the first time we have presented oral testimony on a U.S. Supreme Court nominee. The Hispanic Bar greatly appreciates this opportunity to testify, and we are cognizant of the duty to express our frank concerns.

The goals of the HNBA include fostering respect for the law, advancing the development of Hispanic attorneys and supporting changes within our system of justice which better the lives of Hispanics and the United States in general. To accomplish these goals the Hispanic National Bar Association works closely with the American Bar Association through its representative delegate to the ABA House of Delegates. The HNBA also works closely with all segments of the legal profession to encourage and support understanding of the problems faced by our members and the Hispanic community in general in pursuing equal justice under the law. Hispanics, as you know, are underrepresented in the halls of Congress as well as in the courts. This status is not acceptable to the HNBA membership, to our clients, or to our Hispanic constituency.

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 or with his judicial philosophy. We simply evaluate, as our brethren in the ABA do, based upon qualification and not subjective criteria. Our Judiciary Committee and our Board of Governors has worked diligently to review Judge Kennedy's opinions. The Board evaluated his (1) analytical skills, (2) ability to communicate his ideas in an understandable fashion, (3) sensitivity to diverse communities, and (4) judicial philosophy. Based upon our review of his voluminous 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 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 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 the HNBA's interests and concerns are much broader than civil rights, we do not seek to label Judge Kennedy as "pro" or "con" civil rights or minority interests. We seek to evaluate him on neutral criteria which gives us an indication of the quality of U.S. Supreme Court Justice he will be. However, cases involving civil rights violations or brought by, or on behalf of, minorities are of particular interest to the HNBA and in this case disclose Judge Kennedy's lack of clear understanding of some problems faced by 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 Topic is plausible only if one views the 1968 Fair Housing Act in a vacuum. As this panel knows, however, that decision by Judge Kennedy 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 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 only leaving the door slightly open in the event of some 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 simply unavailable.

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 single-handedly vindicate their rights or even to 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 Aranda. Sometimes discrimination is subtle, but can and should be remedied. Simply leaving the door open for return visits to the court as Judge Kennedy has done in his opinions is not a practical solution to the 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 systematic 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. HNBA understands that no nominee for the U.S. Supreme Court comes to the U.S. Senate Judiciary 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 distinction as our United States Supreme Court Justice, and the HNBA is prepared to assist him whenever possible.

We wish to thank the Chairman of the United States Senate Judiciary Committee and all the members of the Committee for the opportunity to express our views on such an important nomination. We look forward to appearing before you in the near future to comment on the nomination of a Hispanic for Justice of the Supreme Court of the United States.