

Ms. HERNANDEZ. Really, I don't know, and I don't understand. And I know that yesterday some comments were made by Judge Kennedy about the fact that he was trying to sort of set out something so that we—and it's MALDEF, because we litigated the case—could come back again. But, as I've already stated the issue was *res judicata*.

But I think this shows his lack of understanding, and to me that is even more distressing. He comes from California. He has lived among us all of his life. If I was here testifying about someone from the Midwest or even the Northeast, to say that they are not familiar with Hispanics, with the history of our discrimination, I could understand that I have to educate someone. But we're dealing with someone that comes from the Southwest, who has lived among us, and should be much more sensitive to the subtleties of the discrimination and to the subtleties of exclusion when they're in a political process.

And that's where I have the greatest of concern as to what's going to happen. And I have come to you to express that concern. And I guess the question, before you ask me, is what do I want?

Senator KENNEDY. You're a heck of a litigator and educator. [Laughter.]

Ms. HERNANDEZ. And what I want is to go back and to ask Judge Kennedy to give further assurance and clarification as to how he views Hispanics. My concern is that he might not feel that we deserve the same type of protection as the black community and other protected minorities that are protected on civil rights.

I want that assurance. I want to see what he states on the record. I'm also concerned on the issue of women, the *AFSCME* issue. I'm concerned on the *Spangler* issue, I'm concerned with the *TOPIC* issue, and basically the common threat that one sees in those cases is the threat that he kicks people out of court, that he doesn't give them that opportunity. And even when they do win, even when they do satisfy the stringent requirements of a federal district court judge, that he overturns those decisions.

He is a man of intellect, no question about it; a man of devotion, but he's also a man of the establishment and, unfortunately, we have not been part of that establishment.

And what I want is an expansive of consideration of that perception of what America is.

Thank you.

Senator KENNEDY. Thank you very much. Your testimony's very powerful.

The CHAIRMAN. I yield to the Senator from Pennsylvania. The reason we're doing this is because both the witnesses have to catch an airplane and then we'll go to the rest of the panel, if you have any questions for us.

Senator SPECTER. Thank you, Mr. Chairman.

The CHAIRMAN. Ms. Hernandez is her name.

Senator SPECTER. Ms. Hernandez, I came in late on your testimony because I have a conflicting assignment with the Intelligence Committee which is having a session right now, but I wanted to return and ask a few questions.

The subjects which you raised have been discussed at length with Judge Kennedy. In my final round yesterday, I discussed with him

the *Aranda* case and the *Spangler* case and the *AFSCME* case versus *Washington State* in terms of the continuity that, in each case, the Judge either overruled fact findings below, or did not permit the fact finding process to go forward.

In the course of the questioning of Judge Kennedy, he cited assurances of his sensitivity to the underlying fact situations and the people involved. At this juncture, I'm interested to know, by the way that you have testified, why you don't take a position for or against him? Why not?

Ms. HERNANDEZ. In studying his record, and we have studied his record extensively, we know that there have been some other cases which one could construe favorably for minorities. And that has weighed heavily in our situation.

What I want at this juncture is not just an assurance, but for him to verbalize or to state in writing his philosophy, rather than just saying I assure you. I want him to say he believes in certain things, and this is why he believes. Further than that, I would venture to say, as I indicated before, that at this juncture, based on our reading of the record, that if we were to get that and to see the analysis made, justifying his belief, that we would not have the grounds to oppose him.

We do not take opposing a Justice to the Supreme Court very lightly. And in fact, we did not participate or oppose O'Connor, Scalia or Rehnquist.

And so we're not here saying that because he decided one wrong case or one case where MALDEF was involved, that that's sufficient enough. But I don't think that there is enough there. I've listened and I've read very carefully what he said. And there are assurances, but I want those assurances further delineated in writing.

Senator SPECTER. Well, I think that's a very sensitive and understandable position.

When I questioned Judge Kennedy about *Aranda* and the other cases, I put in the record cases which he had decided favorably to the Mexican-American community and other civil rights cases, and we can find that question for Judge Kennedy for the record and we can supply you with a copy of the answer, and you can communicate further with the committee. I'm sure that can be worked out, can't it, Mr. Chairman?

The CHAIRMAN. Yes, we will.

Ms. HERNANDEZ. Let me make one point, Mr. Specter on that point.

On the cases where he has ruled favorably, the *Flores* case and the others, they have been individual cases or dealing with an individual's rights, and there had been a trial and a finding. And it has been—let me put it to you this way. The law has been so well settled that for him to have overturned the cases would have been really unusual. And I am not trying to minimize his participation in those cases.

But they have been individual cases. All of the cases where I raised the concerns, and they have been raised before, deal with constitutional issues covering a group of people, dealing with issues that are much more difficult and where—

Senator SPECTER. More systemic in dealing with.

Ms. HERNANDEZ. More systemic in dealing with the problem. And that is the common thread to both the systemic issues and to the individual issues that he has decided.

Senator SPECTER. Ms. Hernandez, there was one aspect of the case which I would like your comment about.

I had questioned Judge Kennedy on the aspect of the case that summary judgment is to be limited under the law of the ninth circuit to situations where there are clear-cut factual record and were not to be applied where intention or motivation was an issue.

Then I noted in the opinion of the district court there was a reference to denial of discovery, which I found particularly troublesome, where the district court judge said that the plaintiffs had asked for a vast and extensive discovery burden and had not made sufficient assurances that the results would be other than cumulative. And based on my own experience in the federal court, it seemed surprising to me that summary judgment would be issued in a context where discovery was not completed because that discovery could provide a factual basis to warrant additional relief.

Are you personally familiar with specifics of the discovery request and whether it was reasonably calculated to provide the critical facts which might have defeated the summary judgment motion?

Ms. HERNANDEZ. Oh, definitely. In fact, we have gone back to the Archives to get the entire file. And to be fully prepared, I have spoken extensively to the attorney who litigated the case for MALDEF.

And what is interesting in this case is that it is highly unusual, as you know, when parties in federal court ask for discovery, it is denied, and then a summary judgment is granted. In fact, the feeling of our lawyers was that we had such a strong case on appeal because if you have read the findings that the district—

Senator SPECTER. Do you know what the discovery would likely have shown specifically to defeat the motion for summary judgment?

Ms. HERNANDEZ. It would have shown the polarized voting, particularly, throughout the years, which is very important. We were seeking to show, not so much intent but the pattern of employment practices within this city government, the non-responsiveness of the city government to Hispanic concerns, essential elements that go to proving of the pattern of discrimination.

Interestingly enough, if you read the findings of the district court, some of those findings were particularly outrageous, saying that the low voting participation of Hispanics was due to apathy; that if they really wanted to participate in the process, all they had to do was vote.

And so when we took the case up on appeal, we were certain that it was such a strong appeal, that the motion for summary judgment was not going to be upheld.

Senator SPECTER. I have one final question, if I may.

The CHAIRMAN. You can have all the time you want. They both have an airplane at six. It's up to you and them to decide.

Ms. HERNANDEZ. Well, at this point in time, you might as well ask the other questions. It's at Dulles, and there's no way that I'm going to make Dulles.

Senator SPECTER. Yours also at Dulles, sir?

Mr. MARTINEZ. No, that's fine. Whatever time it takes.

Senator SPECTER. Well, I'll ask a short question and you can decide on the length of the answer. [Laughter.]

Is it true that the case was litigated in a context of all or nothing as was asserted here yesterday, that counsel only wanted at large district representation, and would not have settled for more limited equitable relief to cover the polling places or the failure to employ minorities at the various Commissions?

The CHAIRMAN. Ms. Hernandez, you can refer him to the record. You answered that extensively, and I feel like I've snookered the rest of the committee here, the rest of the panel. I had no idea that it was at Dulles or, quite frankly, I would have never let you go first because I think I've done a disservice to the remainder of the panel.

That's in the record, Arlen. She's answered that extensively.

Ms. HERNANDEZ. Thank you.

The CHAIRMAN. Ms. Kiehl, would you stand to be sworn since you were the only one not sworn?

Do you swear that the testimony you will give is the truth, the whole truth, and nothing but the truth so help you God?

Ms. KIEHL. I do.

The CHAIRMAN. Now I apologize to the rest of the committee, and I can assure you, Ms. Hernandez, (a) if I need a lawyer, I'm going to you; (b) if you need a job, please come to me.

Ms. HERNANDEZ. The last time I worked for the Senate, I lost my job when the Democrats lost control of the Senate. I don't think I can deal with that instability any more. [Laughter.]

Thank you.

The CHAIRMAN. Well, I'll try my best to see to it that it's stable, and I won't say any more.

Let me thank you for your testimony. Good luck in making the race for Dulles.

Mr. Martinez, you're welcome to stay, if you'd like, but I understand—

Mr. MARTINEZ. If I can just make a comment, I think I can answer some of the—

The CHAIRMAN. No, you can't make a comment unless you have a plane to catch for real.

Mr. MARTINEZ. Well, I do, but it's at National, not Dulles.

The CHAIRMAN. Go ahead and make your comment then.

Mr. MARTINEZ. Thank you. Thank you.

We had planned on being on the first panel, as you know, but we weren't quite as controversial as people wanted, so we're here to—

The CHAIRMAN. No, that's not the reason you were not on. If you're going to keep that up, I'll see to it you miss your plane at Dulles and move to the next person. Okay?

Mr. MARTINEZ. Mr. Specter, I think the answer to your questions that in the cases that we've discussed, there was an attack on the institution itself, a societally accepted institution, that most of us are brought up to accept as being correct or acting in our interest 99 percent of the time, an educational institution or a governmental institution.

When the attack was upon one of those municipal elections, how the municipality was going to govern itself, or how was an educational institution going to govern itself, or placement of schools, or children attending schools, Judge Kennedy seemed to be much more stringent in his standard.

When there was a ministerial function to be performed that was being attacked, such as in the *Flores* case or in the *Apollo Tire* case, where individuals were just seeking a remedy for themselves, or they wanted a liquor license from the municipality, or they filed complaints with the NLRB, it was much easier for them to find his behalf, sort of taking the little guy's side. There was no direct attack on the institution.

We think he is very qualified and will make a fine Supreme Court Justice.

We also think, though, that we are all products of our background. And we defer many, many times to things that we can see and understand, because we participate in them. And they have been good to us. And they have been good to our families. And we traditionally belong to that club. And we have gone to that school. And we give it deference.

And I think what we have been talking about here today is maybe giving deference, undue deference, to the institutions, without being fully cognizant or appraised of individuals who have not been part of the system, who cannot only do ministerial attacks on the system, but oftentimes need other people to assist them in solving their problems, such as in the *TOPIC* case that was mentioned, when third parties were needed to help them vindicate their rights.

There was no direct relief sought by the individuals discriminated against. In fact, they probably did not even know they were being discriminated against. That is why there was segregation that worked so well.

And in the case of *Pasadena School Board*, where the attack was on the direct authority of the school district, what would it have hurt to have allowed federal jurisdiction to have continued on the school board, over the school board administration?

If they were not doing anything wrong, it would not have impeded them except to file an annual report.

No, I think that the subject that we are talking about here is greater than Judge Kennedy; it is greater than we are dealing with in this room. It is acculturation.

What we are talking about is how we think from the time we are born. But in this case—in this case—it is so much more important.

Because as a law professor, not having availed himself of the different cultures, as Ms. Hernandez pointed out, in our society, especially in California, which by the year 2000 the Census Bureau tells us will be at least 52 percent minority, most of those being Mexican-Americans, it seems incongruent to us that a person could live there that long, espouse a philosophy of equality, and yet have a history where there is little association with the diverse cultures.

And we say not that about Judge Kennedy the judge but about Judge Kennedy the law professor.

So what we ask here today is not that he be unqualified, or that we be against him. I think she eloquently stated the point that we ask merely that he be more cognizant; that he take these things

into account; that he treat people's rights, whether they be against or for a ministerial function denial, the same as—those are treated the same as when they are seeking to vindicate their rights against an institution that he may be feeling comfortable with.

Senator SPECTER. Thank you very much.

Mr. MARTINEZ. Thank you.

The CHAIRMAN. Do you have any reason to believe that this process we are going through now will impact positively on that prospect?

Mr. MARTINEZ. I do. I think questions that you bring out, certainly as I have been hearing today, are of immense assistance to everyone.

One, they are brought out in frank discussion. I think that is a commitment we all have, to frankly discuss this.

Secondly, I think what happens is, it causes people to think. The transition we are going through here today is one from follower to leader.

I do not think anyone has mentioned that. We are going from a judge who is reviewing cases on appeal who says, hey, if I'm wrong, come back; or someone will tell me I am wrong.

So often in his cases he says, maybe the polling places, there was something wrong with that. Or maybe if the school district has not remedied the segregation, come back.

An impractical solution, from our viewpoint, because it takes money and time when you are dealing with people who are so devastated by that they cannot afford to come back.

But more than that they are saying, someone may correct me. But now—now—he is the one setting the precedent. He is the one who must provide the leadership.

He is the one that will tell us what you intended when you passed a certain law. And it is with the most recent laws that affect civil rights that he has had the most problems: the 1968 Fair Housing Act; the Voting Rights Act; the 42 U.S.C. 1983, the recent interpretations.

Those are the ones he has problems on. Why? Because those are the ones that get to the very heart of our establishments, and whether they act correctly, whether they always provide the equality that we say we stand for.

I think these hearings bring these questions not only into focus, but a man like Mr. Kennedy who I feel I know from reading so many of his opinions now and doing analysis, and discussing him with so many of my colleagues across the country is a man who will take this to heart; is a man who will search his own soul and say, maybe that is something I can do better at.

And we in the Hispanic bar association intend to assist him with that, as we do with all judiciary. What we intend to do is invite him to our national convention in Albuquerque next September so that he can affiliate with over 500 Hispanic attorneys in one place. And we can educate him and he can educate us.

The CHAIRMAN. Mr. Martinez, notwithstanding the fact that you came last, I think it is good that you are toward the end. Because quite frankly I think you may have, in the last 3 days, had the most significant insight into this whole process.

I think what you have just explained and articulated is the most significant thing that has been said in 3 days.

I for one believe you are correct. I have grave doubts about Judge Kennedy; grave doubts. And quite frankly if I was certain that he was going to rule on the Bench in the Supreme Court exactly how he has been for the last 52 years of his life, I do not see how I could vote for him, to tell you the truth; it would be awfully tough.

But I know from my own experience of standing for office, I know that all of us up here, what the educational process is.

Most of us, all of us, are a product of our background and our culture. As a matter of fact, you and I had a discussion. I asked for your help.

I come from an area where I think I am as attuned as any white American can be to the problems of black Americans, because it is where I come from; it is what I am part of.

But I did not grow up in an area or a community where there were large Hispanic, or even small Hispanic, populations. I mean it was just nonexistent.

And exposure and education are important. It wasn't until 3 years ago that I realized the extent to which Hispanic Americans have been simply the victims of prejudice in the most extreme way; as extreme as any black American in this country have been, particularly in the Southwest, but also in other parts of the country.

And how many civil rights leaders there are, and great heroes there have been.

And so this has had an impact on me, and I think I started out way ahead of the game. And I suspect that same process of going through this will have the same impact on Judge Kennedy. At least that is my fervent hope.

And I thank you for waiting. And I still think you have time to catch your plane. You have half an hour, and it only takes about 14 minutes with luck; 18 minutes without luck; half hour if you are in trouble. So you better go.

Mr. MARTINEZ. Thank you very much.

The CHAIRMAN. Thank you very, very much.

Now, the rest of the panel and those who are waiting to testify, I thank you very, very much for your indulgence.

But this is in fact, as you can tell by the questions and the interest, this is really the first real opportunity we have had to speak to the concerns of a group of a significantly large majority in America who we have not had an opportunity to—we have not had much chance to question, nor have representatives of the community spoken beforehand.

Having said that, now let us—I forget now even the order we were going in. Who would be next, based on the way I called it?

Ms. Feinberg, you will be next. Then I guess it was Mr. Wallace we called next. And then, Kristina, you will be next.

And then we will ask questions of all three.

Ms. Feinberg, thank you.

Ms. FEINBERG. Mr. Chairman and members of the committee, my name is Audrey Feinberg. I am a New York City attorney, and I am appearing on behalf of the Nation Institute, a private foundation dedicated to protecting civil liberties and civil rights.