EDWARD M. KENNEDY ORAL HISTORY PROJECT

FINAL EDITED TRANSCRIPT

INTERVIEW WITH MARCIA GREENBERGER

February 21, 2007
Washington, D.C.

Interviewers

University of Virginia

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Knott: Perhaps the best place to begin is to ask you how you first met Senator Kennedy, perhaps some of your earliest recollections of him.

Greenberger: Well, my earliest recollections are my most vivid, in fact. I had started working on women's rights issues at the end of 1972, the end of November, so almost 1973. One of the first things I began to work on was an issue that was health related. It was brought to our attention and my attention by Kennedy's staff.

It had to do with a problem that had surfaced about poor women who were either on welfare or in state institutions who were being given an experimental birth control drug that had not been approved for marketing, called Depo-Provera. It has relatively recently been approved, but this, of course, was many years ago, and it was not. At that point, there was a lot of concern about cancer risks, among other things. The drug worked by injection. It was effective for three months and also prevented menstruation for women who were taking the drug. It happened that a number of welfare departments were publicly criticized, to put it mildly, about that time, for requiring women on welfare to be sterilized. In fact, there was a shocking example of that policy for a 12- and a 13-year-old whose mother was on welfare, and the welfare department required those two young girls to be sterilized, to stay on welfare.

I had come to start a women's rights project of an early public interest law firm, called the Center for Law and Social Policy, that worked on health issues generally. Part of my focus was to add a women's rights component to it. This was of concern for the Center for Law and Social Policy, and clearly my concern, too.

A particular welfare department in Georgia, where this had happened and there was a whole set of government requirements prohibiting that kind of obvious and totally improper coercion, responded by requiring women on welfare to get Depo-Provera. That way they could require these women to come in; they could see that they were getting the injection; they knew it would be effective for three months; and they could require them to come back. There was nothing in the woman's discretion about choosing to use it or not choosing to use it in the privacy of her own home. Some welfare departments or state government institutions gave it without any consent to some institutionalized women who were difficult to care for because they weren't capable of dealing, in a sanitary way, with their menstruation. They decided they would give them this experimental drug to simply remove the problem.

I was teamed up, through Senator Kennedy's office, with Nathan Kase, the chairman of the Department of OB-GYN [Obstetrics and Gynecology] at Yale Medical School, to investigate a particular case in West Virginia that had come to Senator Kennedy's staff's attention. I think it was West Virginia anyway. I'm not 100 percent certain of the state now. A set of women in a rural area, on welfare, were being required to take Depo-Provera. As a young woman lawyer in those days, just beginning my career after having practiced a couple of years in tax law—and there was nothing like this in my tax practice, I assure you—I went off into a pretty wooded and desolate area with Nathan Kase and interviewed some women. We got transcripts from them and assessed them as witnesses, ultimately, for a hearing that Senator Kennedy held, exposing this problem. As a result, the practice was ended all over the country.

It was a searing experience for me, having to confront both the cruelty of the system and the vulnerability of the women. It was a very anxiety-provoking experience for a young lawyer, to go off and do these interviews—we had many stereotypes about what we might find when we were interviewing with family members and the like—then testifying before Senator Kennedy. I did testify in the hearing, and he was thoroughly, thoroughly prepared, and asked probing questions in a very gentle way. One of the women we interviewed came to testify and was very courageous in doing so. It was an extraordinary experience. He was extraordinary in his leadership. From time to time, to this day, we reminisce about that issue and those hearings. The witness was a young woman, maybe in her very early twenties. She was married and required to be on this drug, and just knew it was wrong and stood up for her rights. She was very courageous.

That was my first introduction, and it taught me that he was somebody who probed issues that really affected people. He had a very well-prepared, dogged, savvy staff. At that point, Larry Horowitz was the staff person who worked on health issues. He obviously moved up in the ranks over the years, in Senator Kennedy's office. I'm sure he's somebody you will talk to about many issues, but he was the key staff person on that project. Of course, Senator Kennedy himself was very compassionate, but also very prepared, very savvy about the role of the federal government, the role of hearings, the ability to use both his public forum and lawmaking potential to make a big difference. That practice changed because of him, solely because of him. Those are traits I've seen many, many times over, to this day.

Heininger: How had the practice come to Kennedy's attention? Do you know?

Greenberger: I don't recall. I may have known. Larry Horowitz, if he remembers, would know. A number of things mark Senator Kennedy's tenure in the Senate, from my perspective. One is excellent staff. He had a superb investigator who went out and looked for issues that could potentially be happening to people who wouldn't have the wherewithal to speak up on their own behalf, so there might have been some of that. But, because of his staff and because of this outreach, people also knew to come to him, and there was an enormous set of networks. I also suspect that it was because, in that part of the country, President [John F.] Kennedy—and this is all speculation on my part—was such a hero. The name Kennedy, from those earliest days, meant justice for people who were very much disenfranchised. I'm not certain about the details of this particular instance, as I said.

Heininger: But they then came to you. They had already identified the problem and they came to you?

Greenberger: Yes. There is somebody you may also be interviewing, Joe Onek. I don't know if he's on your list, but if he isn't, he'd be an interesting person. He worked for Senator Kennedy, then was one of four people who set up the Center for Law and Social Policy, one of the first of two public interest law firms, one in Los Angeles and one here in Washington. He became the head of the Center for Law and Social Policy and hired me to come, in 1972, to work on women's rights issues. He's somebody who has had a relationship with Senator Kennedy over the years, in a variety of different settings. Because he had been on Senator Kennedy's staff, and because the Center for Law and Social Policy had a health focus, among other areas, Larry Horowitz went to Joe Onek. Joe Onek, having me on the staff to look at women's issues, thought I would be the appropriate person.

Heininger: A great example of the extensive network he has.

Greenberger: Most definitely. Joe Onek, too, was an example of the superb credentials and quality of the Kennedy staff. He was a Supreme Court law clerk. He went to Harvard and Yale. I won't go into the details, but he's had an extraordinary career himself, in a variety of settings, and in fact now is counsel—just left the Open Society Institute to become counsel—to Nancy Pelosi. That's where you would find him.

Knott: Have you noticed a change in Kennedy's position over the years regarding women's issues? I know at one point, early in his career for instance, he was not pro-choice. There was a shift around the time the *Roe* decision came down.

Greenberger: As I said, I started at the very end of 1972. *Roe* was decided in 1973. I had limited contact with Senator Kennedy before the decision came down.

Regarding the Depo-Provera matter, I don't know that he would have seen this particular issue, in those days, as a rights issue as opposed to an issue that concerned reproductive abuse of poor women endangering their health and rights.

On choice, I worked on issues involving reproductive rights, from the very early days, but not legislatively until probably the middle '70s. At that point, Senator Kennedy already was pro-choice. There was a pretty clear sense that he had the commitment and understood and supported the principle and importance of being pro-choice, but also that this was not an issue for which he would be the leader. Of the array of women's rights issues that he was the most prominent leader, I would not say that reproductive rights were included.

It was also a very different time. Many Democrats, even after *he* was publicly pro-choice, were not. In 1992, there was a big shift, with [Richard] Gephardt, [William J.] Clinton, [Albert] Gore [Jr.] becoming more strongly pro-choice than they had been. There was much evolution among many people on the issue.

Heininger: You'd characterize his role on choice issues over the years as being one who has been there, but not in the forefront?

Greenberger: Not in the forefront as he has been in the forefront in so many other issues. It's not that he doesn't speak about the issue, doesn't support the issue. Perhaps the contrast is especially important for him because he has been such a major leader on some issues that he supports. Others in Congress are just not as powerful a leader as he on any issue,

Heininger: Do you think that's also the public perception of him?

Greenberger: I doubt it. The public perception of him is, if there's a liberal issue, then he's there. To the extent that pro-choice issues are viewed as liberal issues, they would assume that he's a leader.

Heininger: Let's go back to the early '70s again. You also worked on Title IX?

Greenberger: Yes.

Knott: Tell us about Title IX, the enactment process, and Kennedy's role in it.

Greenberger: Yes, OK. One other thing to say about choice, too, is that as the anti-choice movement began to focus on legislative battles, as well as they were focusing on trying to pass a constitutional amendment to overturn *Roe*, among many other things, we ended up seeing anti-choice amendments on every piece of women's rights legislation you could imagine, including Title IX. I'll get to that story in a minute.

In his role in trying to advance civil rights and women's rights, in bills that he *was* the leader on, there often ended up being an anti-choice amendment there that either was going to derail the whole thing or had to be contended with in one way or another. He was very much a leader on the issue in that context.

Title IX. I did not begin my work on women's rights until just after Title IX was passed. I had practiced tax law before that. Title IX was passed in June of '72. I started to work on women's rights in November 1972. But when I began, it was obvious that Title IX—and equal education—was of enormous concern for women and girls, and the country. Title IX had just been passed; the implementing regulations had not yet been issued, and much work remained to be sure it was interpreted and enforced properly. It became a major focus of my work.

At that point, there was a requirement, by statute, which was subsequently struck down by the Supreme Court, that regulations under Title IX and other statutes needed to be not disapproved after submitted to Congress, before they went into effect. Implementing regulations were going to have to have a Congressional imprimatur on them at that stage, so it was very much an intertwining between getting Title IX enforced, postpassage, and Congress.

Heininger: Is that an Executive stance that has changed?

Greenberger: It was, because it was struck down as unconstitutional encroachment by the Legislature on the Executive's power to enforce laws. It wasn't struck down before the Title IX regs that were promulgated in 1975 went to Congress, so there were hearings on them and the like. Title IX became an issue of major concern and a major area of focus for me personally and for the National Women's Law Center.

Heininger: If you had had to prioritize them at the time, how would you have prioritized them?

Greenberger: When I started, I picked three areas of focus: one was health, one was education, and the third was employment. Those were the three I focused on. In part, I picked them because of their importance, and partly because to one degree or another, they dovetailed with work that Center lawyers were doing in other areas, such as health. The law was new; there was much legal work to be done in getting the regulations implemented, in thinking about litigation under Title IX, applying discrimination principles in this new context, et cetera.

When Title IX was passed, it was a very simple statement. Senator Kennedy, I'm sure, was supportive. He isn't viewed as the "father" of Title IX. Senator [Birch] Bayh has that title, but I have no doubt that Senator Kennedy supported it. I never looked, but I have no doubt that he would have voted in support of it at the time. Why it ended up with Senator Bayh, and exactly what role Senator Kennedy played, I can't say. I could suggest names of possible people who could, if you were interested.

Title IX says you can't discriminate on the basis of sex in education programs or activities receiving federal funds. There were a few legislative exceptions to address issues that had been brought to Congress's attention, to be sure that single-sex institutions could remain—Boys State, Girls State, beauty pageants, for example—but mostly it went through with a very simple explication of a nondiscrimination principle. Athletics, for example, was not particularly on the radar screen when it was passed.

Heininger: Really?

Greenberger: That ended shortly after it was enacted.

Heininger: What *was* on the radar screen at that point, if you look at legislative intent, the impetus?

Greenberger: It was pressed by many women faculty, who saw employment, nepotism issues, tenure-track issues. It came out also of an Equal Rights Amendment push; it was related to it. When you talked to Senator Bayh, he saw it in terms of problems discussed during consideration of the Equal Rights Amendment, where there was so much tracking of girls in public education, such as vocational education. Through the Equal Rights Amendment fight, that those kinds of disparities became very clear.

Title VI of the '64 Civil Rights Act prohibits discrimination of any sort on the basis of race, national origin, et cetera, in programs or activities receiving federal funds. Legislatively, the compromise was to in essence expand Title VI's protections to women and girls, not to limit it to education because education was seen as so key and because there was this background of quite explicit discrimination of all different sorts.

As I said, there were a number of dedicated, mostly women, faculty who pressed the Equal Rights Amendment debate, highlighted some of the problems. People saw education as an area of equality, of opportunity in the future. It was pretty basic in its origins.

Shortly after passage, the football coaches realized that it might have something to do with them, and there became a major, major effort to get Title IX out of the business of sports, in particular, intercollegiate athletics, most especially football and basketball. There is a sizable cadre of people all over the country, from Republican and Democratic administrations, who have had to deal with Title IX, in particular, in the area of intercollegiate athletics, but on some other touchy issues as well.

I won't go into all the things we got involved in. We brought a lawsuit to get the regulations out; they were stymied until 1975 because of a lot of political pressure, including on intercollegiate athletics, Notre Dame, for example. I hear new stories all the time about the people who went and lobbied both the administration officials and on the Hill.

I never had this conversation with Senator Kennedy or any on his staff, but I'm sure he was lobbied in two respects: first, to disapprove the regulations. Secondly, there were a number of amendments introduced, once Title IX was passed, to weaken it, especially in the area of intercollegiate athletics, to take intercollegiate athletics out all together, to take "revenue-producing sports" out altogether, to take football out. None of them passed, but we were on the Hill fighting against them all. There was never an issue about Senator Kennedy's support for Title IX, his support for a strong Title IX.

In those early years, Senator Bayh was the point person on Title IX, but there was never any issue about Senator Kennedy's support. I don't have vivid memories of meeting Senator Kennedy personally around those Title IX issues, because we would never have had to lobby him for his support. It was primarily Senator Bayh who we met with to map the strategy around either defeating the amendments or not disapproving the regulations, which is the way the legislative review was set up.

Because of intercollegiate athletics, very directly, a legal argument was concocted that the focus of the language prohibiting any program or activity receiving federal funds from discriminating excluded specific programs in schools that weren't directly funded by federal funds and, therefore, the scope of Title IX was only as wide as the particular targeted funding program. You'll never guess what intercollegiate athletics doesn't get: specific direct funding. The wording of Title IX was modeled after Title VI of the '64 Civil Rights Act, which of course was a passion of Senator Kennedy's from the very beginning. In the effort to get intercollegiate athletics out of Title IX, this legal argument would affect Title VI, and, subsequently, Section 504 of the Rehabilitation Act, which dealt with disability rights, and the Age Discrimination [in Employment] Act, all of which used the Title VI formulation. They were all going to be narrowed if this legal principle was adopted.

It was advanced in a number of cases, including one against Grove City College, involving financial aid—Pell grants and guaranteed student loans—which were the only forms of financial aid going to Grove City College. Grove City College argued that it was aid to the students and not aid to the school, so they weren't covered by Title IX at all. They didn't have a principled objection to complying with Title VI, but they said they had a principled objection to complying with Title IX, so they wouldn't sign the assurance form that the government requires: that, when you get federal funds, you'll comply with all these civil rights statutes. They wouldn't sign it for Title IX, which is how the legal dispute arose.

Heininger: Was this at the same time that the regulations were being promulgated, that this argument was being advanced?

Greenberger: Yes.

Heininger: That it should be limited to the program?

Greenberger: Yes.

Heininger: So in the process of developing the regulations, the program limitation was being advanced?

Greenberger: Yes.

Heininger: And it was advancing in the courts as well, culminating in *Grove City* [*Grove City College v. Bell, Secretary of Education, et al.*]?

Greenberger: Yes. It was all getting developed pretty much at the same time, but the original, earliest focus was on the administration regs and on Congress. They thought they would probably be able to get some amendments passed.

Heininger: To narrow it?

Greenberger: To narrow Title IX, as they had with Girls State and Boys State, and glee clubs and other things. They thought they'd get that, and it was a big surprise that they were not able to succeed in narrowing it, either with the administration, which was, by then, the [Gerald] Ford administration. Caspar Weinberger was the Secretary of HEW [U.S. Department of Health, Education, and Welfare] when those regs were promulgated and when he came to testify in Congress. He said he had no idea that intercollegiate athletics was the most important issue in the country, and from the volume of mail, the lobbying and everything, it turned out that it was. [*laughter*] They thought they were going to be able to work this thing out, and didn't put a lot into the legal arguments until it turned out that they weren't able to prevail in either place politically.

We were centrally involved in all that litigation and had brought a lawsuit requiring them to issue the regulations to begin with, to pry them loose. It took three years to get Title IX regs; but it took only six months to get Title VI regs after Title VI was passed.

Grove City College ultimately wended its way up to the Supreme Court. We brought the first intercollegiate athletic case under Title IX in 1979. The Title IX regulations, you won't be surprised, had many intercollegiate athletic compromises in them, including that schools had a grace period between '75 and '78 to come into compliance. They didn't have to come into compliance until '78. Schools viewed this as they didn't have to *start* to come into compliance until '78, so they thought they had that time to work this pesky problem out. The government issued '79 clarifications, through litigation that we were involved in, because the schools, in '78, said, "Now that we look at what we have to do under the regs, we can't possibly understand what we're supposed to do. If you don't clarify this, we don't have any idea what these regulations are really requiring; they're entirely too confusing."

At that point, the [Jimmy] Carter administration was not anxious to bite the bullet on the intercollegiate athletic issue. As I said, there are Republican and Democratic officials who bonded over this issue over the years, so our lawsuit pried out that '79 clarification. We handled another intercollegiate athletics case where the school argued that Title IX didn't reach intercollegiate athletics at all because those programs didn't receive direct earmarks of federal funds. But the case that came up to the Supreme Court was *Grove City*. By the time it wended its way to the Supreme Court, it wasn't until the mid-'80s. They couldn't start much of the legal battle until later in the '70s, although they were figuring it out.

Heininger: Seven years, wasn't it?

Greenberger: Right. They were figuring it out, but they weren't litigating. *Grove City* used the argument, which hadn't been developed with a *Grove City* in mind, that the aid they were getting wasn't aid to them, it was aid to the students. The second thing they argued was that if it *is* aid to the school, it's only aid to the financial aid department, not aid to the college as a whole; therefore, the most they have to comply with Title IX is not discriminating in the way they give out scholarships, but they can discriminate anyplace else they want.

By the time it got up to the Supreme Court, administrations changed. It was the [Ronald] Reagan administration and was around the Bob Jones [University] period. The Reagan administration shifted the previous government position and argued Grove City only had to comply with Title IX in its financial aid program. It also applied its interpretation to Title VI, Section 504, and the Age Discrimination Act, too.

By the time it got to the Supreme Court, it was Grove City versus the federal government. The Supreme Court would not allow a third party supporting the basic coverage provision to argue. A slim majority of the Supreme Court upheld the program-specific interpretation in *Grove City*. That was the end of intercollegiate athletic enforcement around the country until the Civil Rights Restoration Act was passed. By then, Senator Bayh was long out of the Senate, although Senator [Ted] Stevens was still in the Senate and was probably the strongest Republican for Title IX in the early days. He calls himself, to this day, the "Father of Title IX," too.

Heininger: Ted Stevens?

Greenberger: Ted Stevens, the one and the same, views himself as the father of Title IX, along with Birch Bayh.

Heininger: [Indecipherable] credit everywhere else, right?

Greenberger: He became *the* linchpin strategist for overturning the *Grove City* decision with the Civil Rights Restoration Act. It was in that context that I got to work in a far closer way, most directly with Senator Kennedy, than I had in some of the other legislative battles, for example, the Pregnancy Discrimination Act in the late '70s, which he was involved in supporting. But the Civil Rights Restoration Act and Title IX were very central, and he was the person who picked up the mantle; it was his staff that led the fight.

It took four years to pass the Civil Rights Restoration Act. There were a couple of fights over the Civil Rights Restoration Act, but they mostly centered on abortion, secondarily around Title IX

and a religious tenets exception. I remember—quite vividly too—a number of different specific examples of Senator Kennedy's leadership that led ultimately to the passage of the Civil Rights Restoration Act. I guess it was 1987. I think it became effective in '88. I think *Grove City* was decided in '84.

Heininger: How did the fight become a rallying point for abortion?

Greenberger: Every civil rights bill that included prohibitions against sex discrimination—it appeared—ended up having some abortion fight. There was a Fair Housing Act expansion to prohibit sex discrimination in housing. There was an amendment added in the House that in the case of a pregnant woman, the fetus would have the legal status of a person and that the woman who was pregnant could be considered as a family. Her protection would come as a result of family status rather than as a pregnant woman. That was just one example of ways all kinds of amendments were being introduced to give the fetus the legal status of a person. The Pregnancy Discrimination Act involved a mammoth abortion fight as well. The statute prohibited employment discrimination against pregnant women, but the price of passage was an exception allowing employers to deny women employees coverage for abortions in the employer-provided health insurance.

The abortion fight context in the Civil Rights Restoration Act is as follows. Clearly there were many substantive requirements in each of those four civil rights statutes that were controversial. The busing requirements that were being implemented under Title VI are an example. There were bilingual education requirements under Title VI. The Rehabilitation Act disability issues ranged from physical changes that schools had to make to their facilities to educational opportunities schools had to provide to disabled students.

It was clear that to overturn the *Grove City* decision, if the effort turned into a reexamination of the substantive requirements of each of these four major civil rights laws, passage would never happen. So there was a broad coalition agreement, brought together under the Leadership Conference for Civil Rights, that it would not be drawn into substantive fights about the content of each of these statutes. The Restoration Act was just about the coverage. Whatever the statutes required you to do, if you, as an institution, got federal funds for any part, you had to do it for your whole institution and not just this program-specific interpretation.

One of the provisions Secretary Weinberger had promulgated in the 1975 regulations was that it was sex discrimination and therefore prohibited by Title IX, to discriminate against either employees or students on the basis of pregnancy, or termination of pregnancy. That provision meant that a woman who became pregnant, or terminated a pregnancy, couldn't be discriminated against, such as being kicked out of school or an honor society, or in health insurance. If a school covered every condition in health insurance for its employees or students, then it had to cover pregnancy and termination of pregnancy. The government had never investigated any school to see if it did cover termination of pregnancy, let alone ever required a school to do so, but the requirement was clearly there in the regulations.

During the first year of the Civil Rights Restoration Act, the debate was over whether entire institutions should be covered if any part received federal funds, with many questions raised about how coverage would and should work in many settings.

It did not pass the first year. President Reagan, who had shifted positions in the Supreme Court, which got us the *Grove City* case decision to begin with, said he was going to veto a Civil Rights Restoration Act because he didn't think there should be that broad-based coverage. The name of the game for passing the Civil Rights Restoration Act was getting veto-proof margins in both the House and the Senate. It wasn't an issue of passing it; it was an issue of getting two-thirds. I'm pretty sure that if we weren't at two-thirds the first year in the House, we were very close to two-thirds in each house. The real problem was in the Senate, getting the two-thirds in the Senate.

In the second year, opponents of the Civil Rights Restoration Act went to the Catholic Conference of Bishops to bring to their attention, in a way that had not been done the first year, that there was this abortion provision in the Title IX regulations. The Catholic Conference had been part of the broad-based civil rights coalition fighting for the Act, but they became convinced that though there was legislative history that passage of the Civil Rights Restoration Act by Congress was not to be interpreted by the courts as addressing any of the substantive requirements of any of these statutes, and therefore should not be used later as Congressional ratification of any of the substantive interpretations of the regulations, maybe a court later *would* say, "Well, if Congress really thought those were the wrong regulations, it wouldn't have passed the Civil Rights Restoration Act and left them in place." The Catholic Conference then took the position that it was totally supportive of the Civil Rights Restoration Act, as long as the abortion provision was changed in the regulations. They also raised a problem with Title IX regulatory provisions allowing religious institutions to object to specific Title IX requirements as being too narrow.

The focus, pretty much, shifted to these two issues, holding up passage of the Civil Rights Restoration Act. The rest of the Leadership Conference Coalition abided by the principle that everybody had agreed to from the start, so the coalition mostly held that we couldn't get into the business of changing substantive requirements of the four statutes. People also felt that if in fact there was caving on the abortion provision, opponents would then go find some other hot-button issue that might not be in Title IX—it might be somebody else's hot-button issue—to keep from a two-thirds majority. But the abortion issue presented a major impediment to securing the necessary supermajority in each house.

Senator Kennedy was very much on board with the coalition agreement, trying to press to get the two-thirds majority, trying to figure out how to get around this problem, and standing strong throughout. He was a very forceful strategist himself, personally, with the Civil Rights Restoration Act. It epitomized a legislative battle that engaged issues that were near and dear to his heart, the whole range of civil rights issues. Certainly by that point, sex discrimination in education was something he understood, was supportive of, and took a leadership role in protecting.

Ultimately, the Civil Rights Restoration Act passed, but with an abortion amendment in it. His staff helped craft it in the most narrow way possible, and we ultimately knew it was the only way of getting the law passed. The abortion amendment provided that the regs were superseded, but that Title IX did prohibit discrimination against women who did terminate pregnancy, while nothing in Title IX required benefits to be provided to women who terminated pregnancy. The target was to ensure that health insurance coverage provided to either students or faculty need not pay for abortions. That was the compromise that ultimately freed up the passage of the Civil

Rights Restoration Act with two-thirds majorities. The broadening of the religious tenet exception never passed.

The Title IX exception for religiously controlled institutions not having to comply with any Title IX requirement that is contrary to their religious beliefs only applies to religiously controlled institutions, of which there are very few. Georgetown, for example, and Notre Dame, are not religiously controlled institutions. They have lay boards for a variety of reasons, so they do not qualify for a religious tenet exception for Title IX. That is true to this day.

Senator Kennedy's staff, in the Civil Rights Restoration Act, were clearly the people who brought an extraordinary amount of day-to-day leadership, intellectual firepower, and strategic sense. He, too, was involved in the minutia of the issue. I got a chance to work closely with the staff and the Senator in preparation for hearings and debates. For example, I went to his house—which, I'm sure you'll hear from others, was a common practice for the staff and outside experts—to brief him in detail days before any big legislative battles. The Senator wanted to be sure that he was comfortable that he knew the ins and the outs of an issue. That kind of focus and dedication was something I thought was pretty rare in my experience among elected officials.

Seeing his leadership in that close a way, and working with him, I was also struck by how respectful he was of the people that he worked with, both his staff and people like me, to whom he was kind and very substantive and professional in his approach. I had very young children during that period and he was very appreciative of the time I devoted to the legislative battle. He was thoughtful and generous in expressing thanks.

He was unusual in his willingness to thank people after the fact, call people, send notes. He wanted his staff to staff him to do it, and they did.

I remember another instance of the Senator's generosity in another legislative fight, to pass the Civil Rights Act of 1991. A woman who worked in a law firm, and was pregnant in her ninth month, was preparing an important memo on a set of technical issues the Senator could use to support a damages remedy for sex discrimination cases that the Act contained. She finished the memo and literally went into labor the next day, and had her baby. The Senator called her and thanked her for working so hard to the last minute. She's in love with him to this day for that kindness. [*laughter*] It was such a wonderful thing to do. She since has become a high-level official in the Clinton administration and testified many times, but one of the highlights she talks about is getting that call, after she had this new baby, from Senator Kennedy, thanking her for everything she had done. He did that.

I had an illness relatively recently, and he called to see if I needed any help, if he could share his personal experiences. I am not, by any means a staff member or among his most inner circle, yet it's that kind of concern and kindness that is very much at his core.

Heininger: How had your relationship gotten to the point where you were invited to come to his house and brief him? What had been the nature of your contacts with him up until then, so that you became one of those people he turned to?

Greenberger: Throughout a number of other legislative battles, I was part of the group at meetings. Almost any kind of serious legislative battle involving women's rights was going to

come through his committee, and advocates always wanted to try to meet with him. There was nobody who was a better strategist than he was, and there was nobody who had a better sense of legislative alliances. People wanted to try to get a meeting with Senator Kennedy himself, to get him focusing on the strategic elements, as much as to urge him to be a leader on the issues. Sometimes there *was* a question about whether he was—He was hardly automatically on our side on every issue. I don't mean to say that we didn't have some meetings where there would be an effort to explain what the point was of a particular provision, or why a compromise wouldn't work, when it seemed to him it might be perfectly acceptable, but the strategic judgment that he brought to the table was essential.

I was a part of a number of meetings on a number of issues. Of course, he remembered the '73 hearings, too, which were pretty searing hearings. Because of the role that we played and that I played on Title IX, from the very beginning, and because we had been litigating the *Grove City* issue, we uniquely knew the issue, and knew how the different fixes were going to affect Title IX. We also really knew the abortion fight issue, and Title IX more broadly, because the Title IX fight became so prominent in the Civil Rights Restoration Act fight—I became a natural person to be included in that leadership group of advocates. I don't know, but I suspect his staff recommended my participation, as well as coalition partners. By then, I'd also been in a number of meetings over a fair amount of time.

Heininger: If you look over the years, how would you describe your interactions with him? Does the National Women's Law Center interact principally as your staff with his staff, you with him, you with his staff? Hearings? I want to get to a broader issue of the coalition building, but where is the level of the interaction with him? Has it changed through the years?

Greenberger: Well, it certainly has changed through the years. When I testified in '73, all my interaction, until I testified, was with the staff. To this day, I can't think of an issue where I would have gone or ever did go or would now go directly to Senator Kennedy without going through his staff first. I could end up having a conversation with Senator Kennedy directly, either by phone or in a meeting, but unless it was a personal matter or he was traveling and returning a call, I can't think of a meeting where there wouldn't have been a staff person present. For many of the calls, a staff person might have been present, but not all, depending on where he was, physically, when he was returning the call.

My impression, from the outside, is that he always had a superb staff. There was never any sense of wanting to have a conversation with him on a substantive issue that excluded staff. Also, if we had a problem with a staff person, I never brought it to his attention. I would go up the chain of command in the staff, and there weren't very many of those over, now, 30-plus years of working with his staff, almost 35 years.

My staff works primarily with his staff. It's not a shock that we have had staff here who worked on his staff before they became staff with us. They, of course, have had their own independent relationship with him. One person who recently left our staff had been a law student with us, done a number of different things, went to his staff to work on women's issues—in part because we could vouch for her, although she hadn't worked for us directly since she was a law student—then when she left the Senate, she came to work with us. Other staff we worked with on a particular piece of legislation then came to work with us.

Currently, our vice president for education and employment worked at the EEOC [Equal Employment Opportunity Commission] for many years, was on detail to his office for about a year or so, then came to work with us. There are certainly people on our staff who have their own independent relationships with him and with staff. Most people on our staff would deal with his staff otherwise, and not deal with him directly unless they were in a meeting where he was meeting with coalition members. That would happen, and does happen, with some frequency. I don't think he calls or deals directly with many people on our staff, outside his own past staff members, except with me.

Heininger: So if he wants to consult, or get an opinion on something from the National Women's Law Center—

Greenberger: He would call me.

Heininger: He would call you?

Greenberger: I think so, yes.

Heininger: Or there would be times when he would have his staff call you.

Greenberger: Definitely.

Heininger: But when it comes to testifying, you testify.

Greenberger: Mostly.

Heininger: Have your staff members testified?

Greenberger: Oh, yes, from time to time. I haven't testified on Title IX for a while. Our staff has grown over the years and for a good period, I was the most substantively knowledgeable about the issues, myself. Now, as our staff has grown and our issues have grown and my responsibilities have changed, I'm not always the—as much as I hate to admit it—the most substantively knowledgeable on a particular issue. The staff people are are often the more helpful people to get into the nitty-gritty, to work directly with the staff. I don't work directly with the staff on most issues anymore at all.

Also, I am the copresident of the National Women's Law Center, and there are issues that my copresident works with. They're not as often health issues and they're not judiciary issues at all, so they are usually not as much with Senator Kennedy's staff. There can be some pension issues or some other issues that are not within my bailiwick at all, on which other people at the Center would work with Senator Kennedy. Those issues might come up in the Finance Committee or other kinds of forums. Most of the health issues and most judiciary issues are within my bailiwick at the Center.

Heininger: I was going to go back—and this is a longer issue—to the coalition building that you talked about with the Civil Rights Restoration Act.

Greenberger: I want to tell one other funny story about the Civil Rights Restoration Act, which other people—I was not alone in the meeting—might remember. When Senator [Robert] Dole was majority leader, and there was a big effort to try to work this thing out, he facilitated, with Senator Kennedy's prompting, a negotiation session to try to come up with the final legislative language and solutions, and work until it was done. Senator [Orrin] Hatch had the responsibility for negotiating and representing the administration side, the conservative side. We were there, a few hearty souls from each side, and it was maybe 2:00 in the morning, 3:00 in the morning, and Senator Kennedy was there.

He was not going to leave, because he thought if he left, then Senator Hatch would leave, and if Senator Hatch left, nobody would be authorized to sign off on the language. At 11:00 at night he had Chinese food brought in. I remember his kidding Senator Hatch, who is a Mormon, about how he was getting beer for the crowd, "But for you, Orrin, I'm getting orange juice." That Chinese food was coming any minute, and nobody could leave. He was getting food for everybody. He wasn't sitting in the room where we were hashing out the language every minute, but he was not leaving the building, and didn't, until the discussions went as far as they could go that evening. That was also indicative of his commitment, his savvy, his good humor, and figuring out he was going to bring in food, but not until late. He was going to be there and he was going to josh Senator Hatch, and keep this thing oiled and moving along.

You were starting to ask me about coalition politics.

Heininger: Yes, because you made a specific point, that there were major differences as to how this process could have gone, and that there was a consensus agreement in the coalition that the best way to handle it was to focus only on the issue of not narrowing the provision, and not dealing with the substance.

Greenberger: Right.

Heininger: Talk about that coalition-building process, because, if I understand, there was a similar process used when it got to the Robert Bork nomination: groups putting aside their individual interests.

Greenberger: Yes. In the beginning, it was a very easy commitment to make, because it was in everybody's self-interest not to get into the substance of each of the statutes, because every statute had its hot-button issues and they could be skewered on them. You did not have to be a brain surgeon to know that if the other side had the ability to start reviewing the substance of the way each of these statutes was interpreted and enforced, in every way, we could be diverted for another 70 years in talking about it. We would never keep the focus on what we needed, which was just the coverage of the statutes. I don't mean to minimize the coalition agreement, but my recollection of that piece of it was that it wasn't that hard to agree to it.

Living up to it is a different story, because then, in real life, everybody's fears of what might be their vulnerable issues aren't necessarily being played out, when it turns out that the spotlight is on somebody else's vulnerable issue. Your own vulnerabilities start retreating and receding, then it becomes a much tougher thing. The more savvy organizations recognize that if they jettison the principle and allow the abortion issue to get sold out, which is certainly my perspective on

what would have happened, and to some degree what did happen, that then the opponents were going to go find somebody else's vulnerable issue.

It took a lot of reminding and coalition work to be sure everybody remained on the same page, and over a four-year period, it wasn't always the same actors with each of the organizations, so they needed to be brought up to date if there was a new leader of an organization. Why are we fighting? Why are we in an abortion fight? We don't have a position on abortion, or I don't like the issue of abortion. I thought this was the Restoration Act.

Ralph Neas, who was the head of the Leadership Conference on Civil Rights—I'm sure if you haven't, you will talk to him—understood that political reality, as did Senator Kennedy. Now the Leadership Conference on Civil Rights never had, and does not to this day have, a position on abortion. It was taking this position as a matter of principle, but also as pragmatic—from my recollection and perspective—political reality that this was just the first and easiest way of trying to jettison the Civil Rights Restoration Act, and that if this issue got put to the side there would be other attacks on other issues to follow.

Heininger: Were you getting any cues from Kennedy, or from Kennedy's staff, that they wanted this to be the approach?

Greenberger: Originally yes, but obviously, by four years into it, when a one-for-all approach was no longer going to be the winning strategy, and the negotiations were getting down to the nitty-gritty of the actual wording of the language—It did appear that this was *the* issue that was stopping two-thirds in the House and the Senate. We had the House but not the Senate—that if we worked out the language, because of the signal from Dole, we were going to get two-thirds. That is ultimately what happened, so it passed over a veto. It was a compromise.

Part of the strategy that Senator Kennedy was behind was not to compromise too early, because if you compromise too early, that compromise doesn't count anymore, then you have to go to the next compromise. But when everything else had been worked out, this was the last compromise that, in his judgment, was standing in the way of the deal after four years of trying. He figured—and he was a legislative compromiser ultimately—to get what, in his view, was the greater good. It was time to move and figure out how we were going to resolve this issue and come up with the best language we could, but come up with language. That is where he and his staff were, and that was a part of the pressure we felt. Of course, we wanted the rest of the Civil Rights Restoration Act for Title IX, so it wasn't that we were not going to benefit our own constituency of women and girls, but it was obviously an extremely painful compromise.

Heininger: Well, there's a synergy between outside groups and their effect on Congress and Congress's effect on outside groups.

Greenberger: Right.

Heininger: Were there detailed discussions about this, where you were told or you and the coalition were told, "Look, this is what you have to do. You're going to have to accept this, because this is the only thing we can get through"?

Greenberger: Not every group did accept the compromise.

Heininger: Did you help in terms of writing the compromise language?

Greenberger: We certainly gave input. The language secured an explicit protection now, in the statute, for women who terminated pregnancies not to be discriminated against, which we didn't have in the statute itself before, but we lost on the benefits issue. We also prevailed on the religious tenets issue, which we were more nervous about than we wanted to let on. That was part of what we were holding everybody's feet to the fire on, so that when the religious universities, who weren't controlled, came in to lobby, or other religious entities came in to lobby, we demanded that couldn't be compromised. We felt as if we didn't lose entirely, but we were not happy at all.

We were absolutely not happy. Although I don't remember his delivering the message personally, the Senator could well have told us personally that the time had come. We had a very close working relationship with his staff, among others who helped us figure out the language. We were working together on both the coverage language—to craft language that was going to get interpreted properly by the courts later, which was tricky—and all the back-and-forth and compromises, where we were all doing it, including with his staff, in a very collaborative way. That was true with Senator Dole's staff, too. I remember a woman named Sheila Bair—at the moment, she is the head of the FDIC [Federal Deposit Insurance Corporation] and is a prominent Republican—had been on Dole's staff, had worked on his committee, and was also, through Senator Dole, in there crafting much of the language.

Senator Kennedy's maneuvering and strategizing and working with Senator Dole and getting Republicans on board positioned Senator Hatch and ultimately produced the two-thirds, which included the Republicans, and positioned us, also, so we couldn't stop it anymore.

I don't have a specific memory of Senator Kennedy saying directly to me that the time had come, but it wouldn't surprise me if he did, because he has in other contexts. In later legislative fights, he has delivered that message, that very unwelcome message, to me personally. His style would not be to deliver it in front of a coalition. His style would be, and has been sometimes, to have his staff, with whom I have very close working relationships, say, "The time has come and this is the best we can do." But he would not shirk from calling or having a meeting and saying, "Marcia, the time has come. I think it's the best you can do. Carolyn Osolinik," one of his superb staff, "has been working on this. I understand this is the best language. I could try to get you X, but if I can't get X, I think you have to take Y." That has happened, but he would not deliver that message in front of a broad coalition.

Knott: Have you ever felt that he was a little too quick to settle?

Greenberger: I've been unhappy, but I had confidence in his judgment and good faith. I was probably less unhappy on the Civil Rights Restoration Act, with four years of holding my breath about the rest of the coalition, outside of the Catholic Conference, sticking with us, and seeing the handwriting on the wall. We had a next fight around the Civil Rights Act of '91.

The Civil Rights Restoration Act was a very searing lesson for me. We were involved in a four-year battle to get back what we had lost, and we lost something substantive on top of it. If I had anything to do with it, I vowed I was never going into another major battle where the best we

could come up with was staying in place. I also never wanted to be in a situation where it was going to be women's rights issues that were the most vulnerable issues and got compromised.

Then the Civil Rights Act of '91 came along, to overturn a whole series of Supreme Court decisions that had narrowed any number of civil rights protections, which were of great importance to the civil rights coalition, just as had been the case with the Civil Rights Restoration Act. Oh, and by the way, the great irony of the Civil Rights Restoration Act was that one of the biggest political plusses for passing it was to restore Title IX coverage of intercollegiate athletics.

We had athletes such as Martina Navratilova and Billy Jean King holding press conferences, and having one of the most visible roles in the fight, because, for four years, until the Civil Rights Restoration Act, OCR [Office for Civil Rights] took the official position that it was not going to be investigating any intercollegiate athletic discrimination complaints, because there was no direct funding. It was one of the great ironies that that was one of the most publicly positive arguments to pass the Act. Senator Kennedy was 100 percent behind using the sports issue and the strength of Title IX in general, during the fight to pass the Civil Rights Restoration Act, and holding hearings that highlighted all of the reasons why Title IX needed to be strengthened, along with the other civil rights laws. The Title IX issues played a very positive, prominent role in that fight, thanks to the Senator.

Turning to the Civil Rights Act, when the coalition got together to pull the different pieces of bad Supreme Court decisions that needed to be overturned, we—and I have to say I, in a coalition meeting—raised an inequity to be included. Under Sections 1983 and 1981, which are post–Civil War statutes that deal with race discrimination, if there is intentional discrimination in private contracting, in 1981, the party who has been discriminated against can get damages. In employment, for example, if somebody has been intentionally discriminated against on the basis of race, they can get damages. That does not cover sex discrimination. Under Title VII, the employment discrimination statute that was being amended because of some weakening Supreme Court decisions, those discriminated against even purposely cannot get damages for intentional discrimination on the basis of sex.

By then, sexual harassment cases were being decided by the courts. The courts had already determined that sexual harassment is a form of intentional sex discrimination. In most instances, when somebody is being sexually harassed, their pay might be affected and they might get some back pay, because if they wouldn't have the relationship, they were going to have lower pay. But often pay was not affected. Their lives were being made miserable, but they didn't lose pay, so there weren't money injuries in the form of back pay due. We had cases, including a case where a woman proved that she was sexually harassed and won in court, but because she had no lost pay, and there were no monetary damages under Title VII to cover pain and suffering the harassment caused her, the Court said it could not order a remedy for her. As a result, she had to pay the court costs of the other side, the employer. So we said, "This is an anomaly. We're fixing 1981; we're fixing Title VII. It's just an omission that there are no damages for intentional sex discrimination in employment, so while we are fixing them, we should put that in."

By the way, not only would women be able to get damages for sex discrimination in employment but they could also get jury trials, because unless you have damages available, you don't have a

right to a jury trial. If you have damages involved, either side can ask for one, so if you have a bad judge, but you might have a sympathetic jury, that could make a big, big difference. We broached that with the coalition and the coalition said, "Well, we're not sure. We love this idea, but this is supposed to be another restoration bill, and adding damages would be new. See what Senator Kennedy's office thinks about this. If they say it's politically doable, we'll do it; we'll go along with it." Some members of the coalition thought that Senator Kennedy's office was never going to say this would fly, but they did. He stood behind it, so we had the Civil Rights Act of 1991 that had this anomaly fixed in it, along with the other fixes, and altogether it was a very controversial bill.

You won't be surprised to learn that the damages provision was *highly* controversial. Ultimately, of course, President [George H. W.] Bush vetoed the Civil Rights Act of '91. There were two big sets of issues. One, which affected all of the groups and organizations and bases of discrimination, dealt with the Title VII disparate impact standard, which if you want to know what it is, I could tell you. It's up to you.

Knott: Sure, go ahead.

Greenberger: You want to know? OK. There is intentional discrimination, where they say, "You're black, I'm paying you less." Or "I'm harassing you and I want to have sex with you, you're a woman." That's it; it's mostly individual. You can have a class—"No black is ever getting to be a vice president of finance in my bank"—but usually they're individual cases. The more conservative view is when you're dealing with *intentional* discrimination, throw the book at them; that's the kind of discrimination our civil rights laws are after. But in most instances, it's not that blatant; practices can have a disparate impact, and not be intentional. They can be neutral on their face. They weren't picked and selected because people meant to discriminate, but they end up having a discriminatory effect.

Title VII has prohibited, with the Supreme Court explicitly approving Title VII interpretations, disparate impact discrimination, which can change wholesale employment practices affecting thousands and thousands of employees. There could be training programs where an employer says they're open to people who come from these particular departments. Well, only whites may be in those departments and black employees might be in other departments because of historic discrimination or because of lack of education or whatever. That kind of rule would have a disparate impact on the basis of race. Unless an employer could show a business necessity for why they were running a training program just for those particular divisions, they'd have to change them, and they'd have to change the rule, if there weren't a business necessity for it, to reduce the disparate impact. There was a Supreme Court decision that narrowed that disparate impact standard, and it would be devastating to all kinds of very broad-based policies and practices that have been challenged over the years.

Heininger: This was *Wards Cove* [*Wards Cove Packing Co. v. Atonio*]?

Greenberger: Right. The disparate impact standard was something that conservatives, in particular, were very upset about, because it was very affirmative action sounding to them. Even though it was in the nature of discrimination and not affirmative action, it wasn't like an individual with intentional discrimination and dealt with broad classes of people. Big employers,

the Business Roundtable, had worked out many sophisticated practices over the years to comply with the disparate impact standard. They had all kinds of employment discrimination lawyers and HR [human resources] people, so they didn't love it, but they could live with disparate impact discrimination prohibitions that had been in the law for many years. However, small employers were saying, "Any regulations I can get out of, I'm there and I want to get out of them." Conservatives: "This is terrible; we never meant this kind of discrimination." That was one big fight around the Civil Rights Act where the civil rights groups had as an ally the Fortune 500 companies.

The other big issue of contention was damages, because big employers with harassment claims, and otherwise, did not want to have to pay damages and did not want to have jury trials. The big employers, including the Fortune 500, hated the damages provision. There was a more mixed view among conservatives, because if you were an "evildoer," to use more modern phraseology, and you had intent to discriminate against somebody, why shouldn't you pay damages. It was a bit of mixed political context between the two sets of issues, but they were both constituencies of the Bush administration, both the conservatives and the business community, so the Bush administration did not want to support the Civil Rights Act of '91.

Led very much by Senator Kennedy's staff, and by Senator Kennedy personally, there was a broad effort to get the Civil Rights Act of '91 passed. He was on board about the damages provision. He got why it was a hole in the law. He got why it ought to be fixed. And he got why all the other provisions were necessary.

We had very compelling cases. There were explicit cases where the employer would use, as a defense, that it discriminated against a woman of color on the basis of her sex and not her race, because if they owned only up to sex discrimination, they didn't have to pay damages, and didn't have to have a jury trial. If it was race discrimination, they were going to have those extra vulnerabilities. Well, the idea that you could have an employer say, as a defense, "Oh, it was only sex discrimination that I was doing," doesn't sound just, so we had some very good, compelling, and concrete examples of why this little anomaly needed to be fixed.

The fight went on and went on. We were very much central players in that fight, because we had already been central players over all this time on most of the issues in the bill. We knew Title VII. That had also been one of our areas of focus over the years. We'd had the experience of the Civil Rights Restoration Act fight. We had worked with many of the same players. They were very interrelated. Many of the same groups and the same leaders were involved in both fights, so when you ask why we'd be at the table there, it was a continuum from the Civil Rights Restoration Act days.

Jeff Blattner—who I assume you're going to be interviewing—if he doesn't remember his role as a hero, *I* remember his role as a staff hero on the damages provision. You can remind him that he was. He strongly supported its inclusion and fought for it. We ended up with a damages compromise. It was very painful because stringent caps on damages got introduced as the compromise.

At the time, Bob Allen, the CEO [chief executive officer] of AT&T, was chairing the Business Roundtable portfolio that dealt with this issue. He presented Bush with a compromise that big

business and the civil rights groups had signed off on, on the non-damages part of the bill. As it turned out, political forces in the Bush administration did not want something presented that Bush could sign.

Heininger: Was this the ’90 bill or the ’91 bill? First go-round or the second?

Greenberger: I don’t remember. There was an article in the *Wall Street Journal*, with an illustration of Bob Allen, savaging him for making this effort of trying to work out a compromise that would get business—big business at least—allied officially with the civil rights community to pass the Civil Rights Act of ’91. We understood that was an article orchestrated by elements in the White House to make Bob Allen back off. It personally savaged him about his belonging to a club that had discriminatory membership. This wasn’t the number-one lobbying issue for big business. If it were going to anger the Bush administration to present this compromise—because it turned out they didn’t really want a compromise—then big business wasn’t so sure that it wanted to burn bridges when it had many other fish it was trying to fry, to mix a few metaphors.

Turning back to the issue of damages in the bill, the context at the time was that there was also a big effort to cap damages generally in Congress that the business community and Republicans were pressing for, and still are to this day. Of course, we just had a Supreme Court decision on tobacco and damages, but that has been a very consistent theme for decades now, so the idea of adding a damages provision in that context was quite politically controversial among Republicans. Nancy Kassebaum, who was a Republican Senator at the time, was somebody with whom we worked very closely on a range of issues. But she was not with us on the damages provision because she—and she told us explicitly—thought that damages ought to be capped in general, and had a real problem with damages. That we could not get her support reflected the many political problems with this damages issue, so the concept of caps became inevitable. We were very unhappy about it, given that there were no caps for race discrimination cases under Section 1981.

The concept came with two different approaches: one, by number of employees. We were arguing, certainly, that big business had to face the prospect of serious damages, or else there wouldn’t be a deterrent in any way. The second was the amount of money. The biggest objectors were the small-business people, who wanted to have very small caps if there were a relatively small number of employees. The idea was to take away that argument of putting a mom-and-pop employer out of business because of some big damages award, and allow more money for big employers’ liability.

We wanted women to be able to recover, but we also wanted to be sure that we had access to jury trials. We were torn, too, about needing the Civil Rights Act for all of its provisions, and wanting some damages provision, even if the number was smaller. And we were already not happy at having taken a hit on the Civil Rights Restoration Act. By the end of this negotiation process, it went into what I view to this day as a freefall. Whatever the original dollar amounts were, they started to be cut, going lower and lower and lower, until they were very low. Also, the numbers of employees in these categories were being raised. It was like a new deal with lower numbers, and yet another deal two hours later with lower numbers than the last deal that we hated, which had numbers that we thought were too low.

I took the position, in conversations with the Senator's staff, that we were walking from the bill, that we were going to publicly complain about this outrage. We were being screwed; it was outrageous; this was on women's backs; this bill should not pass; and, unlike the Civil Rights Restoration Act, we were not going along.

The Senator's staff, at a conversation at 1:00 in the morning, called me at home and said, "You're not being rational; you're being emotional. This doesn't make any sense. You're getting damages. The numbers are terrible, it is true, but you're getting jury trials; you're getting damages; and you're getting the Civil Rights Act. We're going to be able to pass it and we're now at this magic hour where it's now or never. It's a legislative judgment that we can move, and we're going to have to deal. Yes, it's terrible that it's been in freefall, but it will be in worse freefall if you wait any longer. We have to move, and the Senator's view is that we have to move."

I said, "I don't care. I am opposed. I think it's wrong. We're opposed. I'm going to organize all the other women's groups. You're going to be talking to Judith Lichtman very soon, with whom I've worked with very closely on all these battles, so she will tell you her side of the story." I was not alone in this, but I said that I and the colleagues most centrally involved in this thing would get the women's groups to be enraged over this, and to be enraged publicly.

Senator Kennedy called to talk to me and said, "This has to happen. I'm sorry. I didn't want them capped and I didn't want them capped at this level, and I didn't like it, but this is better than not having a bill. You have to have it." Senator [George] Mitchell was the majority leader at the time. Kennedy said, "We will commit that the first bill introduced in the new Senate will be the Equal Remedies Act. I promise you that we will press, as a highest priority, to pass the Equal Remedies Act, which will take the caps off and will equalize remedies for sexual harassment and discrimination victims on the basis of sex and race."

Disability, although that wasn't an issue that they had focused on, was subject to the caps too, because it wasn't covered under the post–Civil War statutes either. We did not want to accept that, and I told Senator Kennedy I thought it was wrong. I was happy about an Equal Remedies Act commitment, but not happy enough not to oppose passing the bill, and they went ahead. So when you ask if there were times where he delivered very bad news that I wasn't happy with, most certainly yes.

The Equal Remedies Act has never passed. It was introduced as the number-one piece of legislation. It was never going to be able to pass on its own, when it was pure caps on damages, when the Senate was into capping damages like crazy generally. To this day, it remains a provision in broad-based civil rights legislation, including legislation that people are talking about, introducing the Fairness Act, right now, where Senator Kennedy is playing the central role yet again. Now that he is back in a leadership position, while that has been a major catchall piece of legislation, now we have to get down to the nitty-gritty of what could potentially move in a legislative fight. The Equal Remedies Act, among other sex discrimination needs, is in yet another piece of legislation, where he will play a major leadership role.

Knott: Did you ever talk to him again about this issue, reminding him perhaps should they ever come up again—

Greenberger: The commitment?

Knott: Yes.

Greenberger: Yes, but! First of all, of course, during the years of Republican control, it was a moot point. We certainly, in the beginning, did get hearings and we did discuss how it had to get passed, and we did have meetings with the Senator about it, but he's not a miracle worker. We knew that we didn't have the numbers to pass it as a freestanding bill; he said he's not going to be able to get the votes as a freestanding bill; and we said we were so unhappy about it. That's that, and in the meantime, you have many other legislative battles, or judicial battles, to fight.

Heininger: Were you dealing with Senator Danforth at all during the Civil Rights Act of 1991?

Greenberger: I can't remember. Maybe there were some direct conversations with his staff and there might have even been a conversation with him directly. Not much. Mostly, these were conversations through Senator Kennedy's staff, and Senator Kennedy's staff being the go-between with us, because we were not going to be in a position of negotiating directly over getting into the substance of changing the Title IX substantive requirements and moving off of that basic principle. When we had to get into the actual language, we were mostly doing it through the Senator's staff.

[BREAK]

Knott: We have a few judicial nominations we'd like to talk about. Go ahead, Jan.

Heininger: Do you want to start with [Robert] Bork?

Greenberger: The National Women's Law Center had never taken positions on any nominations at all, either judicial or for any other governmental positions, until Bork. His writings and record were so problematic that we felt as if we, as a women's legal organization, could not simply step aside and not address the issue. To address the issue, we felt we had to take a position as well, so we did. None of us had a background of having testified or spoken to judicial nominations in the past.

We did a very substantial analysis of Bork's record, and of how it affected women's legal rights. We were the women's organization that I think did the most extensive report, and issued it that August, at a time when the coalition of groups that was working on the Bork nomination came out with a series of reports, taking his record from different perspectives and exploring what the effect would be on different types of people. Our report was the analysis on women's legal rights. We got a lot of press attention to it and were very knowledgeable about his record, because we had worked on a number of different legal issues, both statutory and constitutional, and had been on the Hill. We would be a natural organization to turn to. We became a central part of the coalition working on the Bork nomination, working with the Leadership Conference

on Civil Rights—and with other women's organizations, along with the Leadership Conference on Civil Rights—on the Bork nomination.

By way of background, a couple of other very quick points. Number one, as we discussed before, there were many Democrats—not Senator Kennedy, but many Democrats at the time—who were not pro-choice, and were not supportive of *Roe v. Wade*. While that was a critically important issue, and Judge Bork was clearly opposed to *Roe v. Wade*, as a tactical matter it wasn't necessarily the issue to focus on solely. From a Leadership Conference perspective, it would not be an issue to address, because the Leadership Conference had no position on *Roe v. Wade*, did not, and does not now. The underlying premise that *Roe v. Wade* relied on—right to privacy, the core right—Judge Bork had opposed. That was a far broader principle that affected *Roe v. Wade*, for sure, but also contraceptives, and an array of privacy protections in many, many facets of life.

In our women's legal analysis, we did not shy away from *Roe v. Wade*. We included it, certainly, in our analysis, but we also included the broader privacy principles that we talked about. That was pretty well known, though; analyzing it and bringing it up was important but hardly groundbreaking or terribly newsworthy. What wasn't known at the time were his judicial writings and his approach on basic equal protection principles as they affected women. He had denigrated a key Supreme Court decision where a majority, for the first time, articulated that women are entitled to what's called heightened scrutiny, heightened protection, under the equal protection clause.

In a not-very-well-known, but landmark, case, *Craig v. Boren*, he criticized the decision, criticized heightened scrutiny; he trivialized the principle. He was very clever and humorous and biting in his words. The underlying facts dealt with buying beer, and the age differentials for young women and men, so the facts were easy to trivialize, and he used them to trivialize the legal principle. We explained that he was opposed to sex discrimination protections under the equal protection clause. That was of great concern, in particular, to [Dennis] DeConcini, who was on the Judiciary Committee at the time. He was not supportive of *Roe v. Wade*, but he was a big Equal Rights Amendment supporter—which of course had not passed—and his wife was a big Equal Rights Amendment proponent. And he had three daughters.

Senator Kennedy, regarding the Bork nomination, was as he always has been and continues to be in a major fight like that: the key strategist that I remember our coalition going to. I remember being in his office, meeting with his staff and with him on repeated occasions, about the substance, how the hearings were going, the strategy, the issues to address, how best to address them. He was very key, and the central source of advice. That's not to say that he was the only Senator on the Judiciary Committee that we worked with, but he was the core person we went back to again and again.

First, there was a judgment made—after some ads were run, in particular in the Bork nomination, by People For the American Way, and a big public dispute over the appropriateness of the ads and the role of the groups, as they were called by the Republican supporters of Bork—that it would be better not to have organizations testify in the Bork nomination. No organizations testified, so it never became an issue about whether we were going to testify or not.

We were involved in working with people who did testify and in making sure that they got our report and our research and briefing about where the different Senators were coming from. We worked on questions and, as part of the coalition, we worked with the Senators' staffs, and certainly with Senator Kennedy, on who was trying to divide up areas of questioning. My recollection was that we focused particularly on Senator DeConcini, who was seen as a swing Democratic vote, and was particularly concerned by the sex discrimination issues involving equal protection that our report identified. He was concerned about the right to privacy most explicitly, not about *Roe v. Wade*, but he was also very concerned about equal protection, and took it upon himself to ask those questions. We felt, and I think Senator Kennedy's office felt also, that having him play the lead in those questions was both respectful of his concerns and strategically a good thing to do.

I can't remember exactly what the questions were that Senator Kennedy focused on, and how wide-ranging he was in his questions with respect to Judge Bork, but I don't think his primary focus was the specific sex discrimination issues. A big reason why that question would never have to have been called was because of Senator DeConcini's particular importance on those issues. Senator Kennedy was entirely behind having that happen, and was for and supportive of DeConcini's role. Since that time, every nominee has been asked about his or her position on heightened scrutiny for sex discrimination, and every nominee post-Bork has said he or she is supportive. It has become like some other questions, something you must answer; you can't say you won't—It's not an appropriate question to answer until you're on the Court. You must answer it and you must say you're for heightened scrutiny.

Knott: There was some criticism of Senator Kennedy at the time, even somewhat to this day, that he came out within an hour of the announcement of Bork's nomination, and basically said that in Robert Bork's America, police would be kicking doors in and blacks would be forced to go back to segregated lunch counters. The public campaign that you alluded to earlier, conducted by People For the American Way—The criticism is that the whole nature of the judicial nomination process changed, and not necessarily for the better.

Greenberger: I'm familiar with that criticism, of course.

Knott: Could you comment on that, what your view of this is?

Greenberger: I disagree with the critics. You could point to many earlier nomination battles that changed the process. You could say that the battle over Abe Fortas changed the nature of nomination battles. If Senator Kennedy had not stepped out and laid a marker and described what was at stake, and had not done it in vivid terms—and the terms were very focused on people's individual rights—we could have a Justice Bork on the Court today. History has shown what a dramatic difference it would make to have had a Justice Bork instead of Justice [Anthony] Kennedy, for all the swing votes with Justice Kennedy, five to four, would have been the other way, I'm quite certain. Judge Bork has spoken out, criticizing those votes. I don't think there's much debate about the stakes or a misjudgment about Judge Bork.

In terms of the political judgment, it was a Herculean effort for Judge Bork not to have been confirmed. The public rarely pays attention to judicial nominations, which has shaped both the Senate's expectation of its responsibility and role, those who are making nominations and trying

to figure out how they're going to maneuver those nominations through, what they're going to have to do, and how they're going to have to do it. In some respects, it was a very seminal fight that has had a long-range effect. What Senator Kennedy did and the role he played was essential for Judge Bork not to become a Justice; if he had not played that role, we would have lost major constitutional protections that are hanging by a thread right now. We'll have to see whether he staved off those losses for 30 years or permanently, for as far as the eye can see, but certainly a couple of generations have more rights because of what he did than would have otherwise.

Heininger: Could you talk a little bit about the coalition's efforts on the Bork nomination? How did groups work together? What influence do you think they had on votes on Capitol Hill? Were there lobbying efforts? Were there grassroots efforts? Was there a strategy within the coalition?

Greenberger: There were lobbying efforts. Yes, the coalition most definitely tried to coordinate its efforts as best it could. When we did our report, we were familiar with when other organizations were going to issue theirs, so we tried not to do it on the same day as somebody else. We knew, so we were all thinking, OK, we're going to be within a certain window. Some of that window was practical in terms of from when the nomination was made to when they knew the hearings were going to be held, and you needed to do it pretty fast. There wasn't much flexibility about when you could analyze the record and get it out, but there was some coordination on that front. There was certainly a lot of coordinated lobbying, depending on what the issues were and what the organizations were, what would be of most concern to particular Senators. You would not send somebody from the National Women's Law Center to some Senators, because they either could care less what we had to say, or if we were unhappy, then they figured they'd be happy.

With somebody like Senator DeConcini, it turned out that we were a very important force for him, so we were a more important organization to go meet with Senator DeConcini's staff and ultimately to have conversations with Senator DeConcini himself, than some other organizations might be. There was most definitely that coordination and people reporting back, as is traditional with legislation, too, on the nature of their conversations, the sense of what they were hearing, talking to the Senator's staff about it.

Heininger: Was there much coordination with Senator Kennedy's staff?

Greenberger: Yes, because the staff was so substantively excellent, really understood the issues, and played a leadership role with other staff, in informing other staff of what was going on. We wanted to be sure that Senator Kennedy's staff knew what we knew, because they were very central and very well respected, and because we wanted to hear what they thought.

Knott: The Bork effort turned out to be a success. I imagine there was opposition to Clarence Thomas by groups such as your group.

Greenberger: Right. We did oppose Clarence Thomas. We did a report on Clarence Thomas, and we testified. I testified.

Knott: Oh, you did?

Greenberger: Yes, pre–Anita Hill. There was early opposition based on his record, including the short period of time that he was on the D.C. Circuit Court of Appeals. I was part of a panel testifying with Judy Lichtman and with Patricia King, Pat King, who is on the law faculty at Georgetown, a member of the Harvard Corporation, and served on Harvard's search committee for a new president, among many, many other things that this quite extraordinary woman has done. We testified about his record, all before Anita Hill surfaced as an issue, and opposed his confirmation, and did another analysis of his record.

The coalition was a lot more fractured in its initial consideration of Thomas, because having an African American nominated to the Supreme Court was of monumental importance. While he had a very problematic record, there was an instinctive feeling on the part of a number of organizations to be supportive. Unlike Bork, who had been very out there on many different issues, in a very purposely provocative way, Thomas was pretty well known, but much of his legal philosophy was a little less well known, even though he was at the EEOC [U.S. Equal Employment Opportunity Commission] and at the Department of Education dealing with Title VI and Title IX, et cetera.

There was also a feeling among some people that his roots, which obviously became a major part of his story once he was on the Supreme Court, would come out and that he would be more in the tradition of Thurgood Marshall than you would have expected by his record to date. There was a lot more ambivalence among a number of the organizations and there was certainly that on the part of the Senators. Certainly, the Republican Senators were strongly disposed toward wanting to support him. There was a very high burden, understandably, for them not to, and the Democrats were wary.

Knott: There was some criticism of Kennedy at the time for not being particularly aggressive or taking a high profile during the Thomas hearings. The conventional wisdom was that—and I'm not sure it's accurate—because he was embroiled in that Palm Beach situation with his nephew, he remained silent.

Greenberger: There were two sets of hearings. One was the set pre–Anita Hill, and the second set, of course, was with Anita Hill. I should say that Anita Hill is on the board of the National Women's Law Center. When the problems first began she was special assistant—I think that was her position—to Clarence Thomas, when he was the head of the Office for Civil Rights, and I guess what was the Department of Education, not HEW anymore. They had a Title IX set of responsibilities, and we had dealt with Clarence Thomas on them then. I can't remember ever having met Anita Hill. Certainly, if we ever had, it would have been at some big meeting, where she was sitting around the table, but we didn't know her at all until after she came forward. I didn't know anything about Anita Hill until it all came out, so that wasn't a factor in the first hearings at all.

Senator Kennedy was clearly opposed to Clarence Thomas, based on the issues. I remember very clearly his being quite engaged in that first round of hearings, and asking questions along with the other panel members who were dealing specifically with women's issues, not Anita Hill. There was nobody on the Democratic side in the Anita Hill hearings who acted appropriately, as far as I'm concerned, in the way I would have wished they would have acted. Now, when I say

acted appropriately, it is because the Republicans acted so highly inappropriately. The Republicans required a shift in what the Democratic response should have been.

The Republicans were prosecutors, to a person, of Anita Hill. The Democrats were neutral fact finders in that proceeding. It's not a fair process when there is a team of prosecutors and neutral fact finders, and no defense counsel to balance out the prosecutor's sharp, narrow focus. Not one of those Democratic Senators stood up to become the defense counsel that they should have. You can speculate about why not one of them did it, but not one of them did it. Of course, none of them had a Chappaquiddick issue, but not one of them did it, nonetheless.

[BREAK]

Greenberger: Since not a soul stepped up to the plate the way I think they should have, and nobody else had the Chappaquiddick problem, it's hard to say what all those different factors were at work. A lot was making people reluctant, on the Democratic side, to become defense counsel. In normal circumstances, one would think you're not supposed to be defense counsel to Anita Hill if you are a Senator. You are supposed to be a neutral fact finder, but those weren't the circumstances.

Knott: Yes. Since we're on this point, could I ask you a somewhat delicate question? That is, Kennedy's reputation, his personal conduct over the years, has that ever been a problem for either your organization or for some of the groups that you affiliate with?

Greenberger: That's a very fair question, and it depends on what you mean by a problem. What has struck me, over the years, are the strong, capable, extraordinary women that he has had on his staff, that he has been respectful and loyal to, are extraordinarily loyal to him, have played major, major roles in the Senate because of him, have moved on to positions of responsibility because of him, and have retained strong ties to him over the years, which one wouldn't necessarily assume to be the case. From my personal experience, he always, always was respectful, interested in substantive issues, wanting excellence in the most professional of ways. I never knew or saw any inappropriate behavior of any type with any woman lobbyist or any woman expert or any woman who came to testify, or anybody who dealt in a professional way with him, over all these years. It caused no problem, from that perspective, that I'm aware of at all, and certainly not to anybody on my staff or to me.

Does it and has it caused a problem with respect to his effectiveness on our issues, and have we been criticized sometimes for being very supportive of him because of that reputation are two separate questions. We have an annual fundraising dinner. We honored Senator Kennedy a number of years ago. I don't remember anybody of the more than 1,000 people who came to our dinner or many thousands more who got the invitation, who chose not to come, or criticizing that we honored him for his work. But I have had calls over the years, especially when there have been unfortunate incidents. Not Chappaquiddick. I was not in a position to get those calls. I got married the night of Chappaquiddick, so my mind was entirely elsewhere.

Knott: The night of the moon landing, too, right?

Greenberger: The moon landing was the very next day. But reporters have asked, "How could a women's rights organization be supportive of Senator Kennedy?" Clearly sometimes he's been criticized or his positions have been second-guessed because of that. To the extent that you want your champion to always be beyond reproach in every way, shape, or form, then . . . I wish that that were the case for every single person that we are ever involved with, let alone myself. I wish that he were beyond reproach, along with all the other Senators, but in no personal, direct way. Ultimately, given his effectiveness on the issues that we care about, it's pretty hard to say that any of that has affected his ultimate effectiveness at all.

Heininger: Have you seen a shift in him through the years, in terms of personal conduct?

Greenberger: No, because I never—I could read gossip pages, but I never saw any of it. I saw him staying until 2:00 and 3:00 in the morning working on legislation during those periods. I saw him before he married Vicki Kennedy, being briefed at night. I never saw his professional work life compromised in the least by any diversions of attention or anything like that, to say there was a change. Since he got married, I've definitely seen Vicki Kennedy, had conversations with her. She's very much a presence on the issues, is knowledgeable, cares about them. She even had a stint at that same tax law firm where I was very briefly. She is a woman of great substance herself, so in that sense, I see a change, that there is a person who is as committed as he is to the issues he's working on now, but not like all of a sudden now he's gotten more serious. He was as serious as he could ever have been during the period that I was witnessing, before he got married.

Heininger: Why don't we finish with the most recent round of Supreme Court nominations, both [Samuel] Alito and [John] Roberts?

Greenberger: There was a real hesitancy on the part of the Democrats about what to do with Roberts. Everybody's attention was on the [Sandra Day] O'Connor seat as the swing seat. Roberts's taking of that swing seat was no doubt going to shift the Court dramatically to the right, so there was great concern about that. On the other hand, there was also belief in giving some deference to the administration to fill the position with somebody who would be to its liking. That meant that if there were going to be an O'Connor seat, by definition it was going to be with somebody who was going to swing the Court somewhat to the right, or else a person would never be confirmed, and that just was not going to be in the cards. There was nobody among the Democrats who felt that they didn't care; they were just not going to confirm anyone. There was this question, from the beginning: Yes, there's going to be a swing to the right, but at what point is it beyond being acceptable?

With respect to Roberts, he was very well known in the Washington legal community, somewhat in the elite legal community more broadly, but especially in the Washington community, very well liked, very well respected. There were many people that these Senators knew who spoke very highly of him, who called and told them how highly they thought of him, and that he was one of those people who, yes, he was going to be more conservative, and yes, he *is* conservative, but he's within the bounds of reasonable and acceptable for a Bush nomination and shouldn't be opposed.

Senator Kennedy was a leader, as he was in the Bork nomination, in staking out, early on, that he was too extreme; the shift in the Court would be too dramatic; he was not a worthy person to replace Justice O'Connor, in terms of the judicial philosophy that's at issue. There also had been building up, over the last number of years, with the lower-court nominations, a shift in the Senators about what the proper role of judicial philosophy is in a confirmation context, as opposed to other kinds of qualifications: judicial temperament, intelligence, legal scholarship, and all of that.

From everything that anyone expected or knew, Justice Roberts was not going to have any of those judicial temperament or other kinds of ethical or qualification problems. This was going to be a judicial philosophy issue, pure and simple. Bork, of course, ended up being judicial philosophy, but there were many judicial temperament and other kinds of things that you could rely on, but that wasn't going to be the case with Roberts. Kennedy's staking out and articulating, in a Supreme Court context, that position was critically, critically important, although ultimately he then was switched over to Chief Justice, and that changed the dynamic because it was the [William] Rehnquist seat, et cetera.

Had he not done that, it would have been a great, great detriment to the whole issue of judicial nominations, number one. Number two, he's always been a leader on these issues, so if he doesn't speak out, then people immediately wonder, where's Kennedy? If he's not talking about something, then there's nothing to talk about. His mantle of leadership now requires him to be a leader, or else his silence can be misinterpreted. Some people could just wait, and they may be just as forceful, ultimately, about the way they view something, but people will expect him to be there leading the fight. If he isn't and says, OK, somebody else, you can take this one on, then it makes people nervous. They may want to have their day in the sun and take the issue on, but to the world at large, and I think to many Senators, the political climate is, God, if this isn't a Kennedy fight, and he's not in the middle of it, then what's wrong with the fight? There is that part of the dynamic, certainly with Roberts.

The second part of the dynamic, leaving even the merits of Roberts to the side, is that shockingly few Senators had been around for any Supreme Court fights. There was a Senate retreat right after the 2000 elections where there was a panel added. This, I think, was done by Senator [Patrick] Leahy, who was chairing the Judiciary Committee at that point, and his staff, to brief people on the Supreme Court, the role of the Senate in confirmation battles. I was a part of that briefing panel, with Professors Larry Tribe and Cass Sunstein. The three of us were going through judicial nominations and the role of the Senate in this setting, which was primarily not very many staff, but for Senators and their families. During the Clinton administration, when there weren't major fights over either [Stephen] Breyer or [Ruth Bader] Ginsburg, of course, Clinton had cleared those nominations with Hatch before he made them. Both of them were well known by Republicans, had Republican support, and were viewed as moderates on the bench, and not among the more liberal jurists that Clinton could have picked.

To the extent that many of these Senators hadn't been in the Senate, they didn't have experience with fights. To the extent they remembered Clarence Thomas or any hearings, all they remembered was Anita Hill. Many of them were surprised there ever were any hearings on the substantive positions that he took and his judicial philosophy. Even some of the ones who were in the Senate, by the time they were considering it and it was on the Floor, Anita Hill had

overshadowed all those other considerations anyway. If they weren't on the Judiciary Committee, these weren't the issues they were dealing with, so they were generally unaware of the Supreme Court battles over judicial philosophy.

For that reason, too, Kennedy's leadership around the Supreme Court battle—Bork was ancient history. Maybe they knew there was a Bork fight, but they didn't know what the Bork fight was about; they didn't know what many of these Supreme Court decisions had done to their own powers. A lot of the leadership that Kennedy provided on Roberts was different from Bork, although he was a big leader with Bork in setting the tone, too.

By the time we got to Alito, that then had become the O'Connor seat. There was a lot more Democratic unity in opposition to Alito than there was to Roberts, although the majority of Democrats did oppose Roberts. But by then there was the filibuster threat, the nuclear option, a lot of dynamics at work. However, Supreme Court nominations are generally very hard to turn into public political causes without some special element. The most human element for Alito that captured the public's attention was Mrs. [Martha Ann] Alito crying. That was the closest to any kind of human connection, which Anita Hill had provided with Thomas and probably Bork's personality and extreme statements had provided then.

Heininger: Where did Harriet Miers fit into the process?

Greenberger: Well, it was a very interesting thing. At the end, she defused the press for a woman to replace O'Connor, to my great dismay, although some of the women who were being named as possible nominees would have been terrible, and just as terrible, from my perspective, as Alito. Much of what we were doing at the time was making statements that we did want a woman, but that not any woman would do. That's not so different from what Ruth Bader Ginsburg said publicly. In any event, it became, "Well, I tried; I came up with one. She didn't work out. It was the best I could do, so now we have to move on. We tried a woman." There was that element to her nomination.

The second element, of course, and the reason she didn't work out, as far as I'm concerned, is that the right wing wasn't sure she would be conservative enough. While she didn't have Roberts's fancy credentials, she was perfectly credentialed compared to other people, certainly compared to Thomas, but other people too. She was a perfectly respectable nominee. She may also not have comported herself as well as she needed to, which I don't understand to this day, in the responses she gave to the Senate, which were very cursory, and in the way she was dealing with the Senators. At the end, what most people saw was that she was not right wing enough, reliably right wing enough, to be nominated.

There was no question that the only way Alito could be stopped was through a filibuster. There was also very little question that the votes weren't there for a filibuster, so no matter what Kennedy did, in contrast to what he did and could have done with Bork or Thomas, this was not going to be able to be, by the time of the vote, a vote that was going to stop Alito from being on the bench. It was going to have to be a vote to get people on record, understanding where they stood, what the stakes were for the next fight, and positioning for the next fight. It will have major lasting consequences. I think Kennedy knew that, and had some ambivalence on the filibuster issue, and about calling the question on the filibuster issue, knowing that this was a

positioning decision and not a decision about what was going to happen ultimately on this nomination.

To say something that I know you have heard and will hear repeatedly: he's an extraordinarily pragmatic person, who is in the business of legislating and being in the Senate for results. He wants to get results at the end of the day. The best position for losing, he's into figuring that out, but he's more into figuring out how to position to win.

Heininger: One could argue that shifting Roberts from the O'Connor position to the Rehnquist position solidified his ability to become confirmed.

Greenberger: Right.

Heininger: Could Kennedy have stopped him if he had remained there for the O'Connor position and not Rehnquist's? Do you think he could have garnered the votes?

Greenberger: I don't know, because there still was a major uphill battle, given the numbers in the Senate, for a filibuster, with an extraordinary reluctance, great nervousness about the '06 elections at the time, and much worry on the part of the Democrats, and some of his Democratic colleagues. It was always going to be a filibuster strategy at that stage; that was going to have to do it. It would have been much easier if the argument that this is a young Rehnquist and it's not shifting the balance, if that argument had been removed, whether it would have happened, more likely, but likely, I can't say.

Knott: We need to let you go, it's 12:00.

Heininger: Yes.

Knott: Thank you so much. This was very helpful.

Greenberger: I hope so.