



## EDWARD M. KENNEDY ORAL HISTORY PROJECT

### INTERVIEW WITH EDWARD M. KENNEDY

#### **Interview 17**

February 12, 2007  
Washington, D.C.

#### **Interviewers**

James Sterling Young, chair  
Stephen F. Knott

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To cite an interview, please use the following general format: [name of interviewee] Interview, [date of interview], Edward M. Kennedy Oral History Project, Miller Center, University of Virginia.

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TRANSCRIPT

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**Kennedy:** We talked about the Judicial Selection Commissions before. Do you want to review them quickly?

**Young:** Sure.

**Kennedy:** I felt one of my important responsibilities was to make sure we had the very best judges on the District Court and the second court to the extent that I could have some influence. In 1977, we had the largest expansion of the federal court system in the nation's history, and that opened a number of judgeships for our district. I had established a 10-person panel chaired by Dick Donahue, who had been in the White House and who had also been president of the Bar Association. It also included Bob Coles, Steve Breyer, and Wayne Budd, who had been the U.S. Attorney.

**Young:** You appointed the commission.

**Kennedy:** I appointed the commission that included Father [J. Donald] Monan, who was the Dean of Boston College; a fellow named Sebastian Ruggeri, who was a prominent attorney in the western part of the state; and Jack [Jacob] Spiegel, who was a judge. They made a series of recommendations for me, and from those recommendations—I believe they sent me maybe 10 or 12—I appointed David Nelson, who was the first African American to ever sit on the federal bench in Boston, and also the first woman, Rya Zobel. The judges I appointed subsequently were those who had been recommended.

In 1992, after [William] Clinton had come in, we appointed an additional panel: Wayne Budd and Sandra Lynch, who would eventually be appointed to the circuit court; Margie Marshall, now the chief justice; and Deborah Ramirez. They made several recommendations, and from those we had under President [Jimmy] Carter, Robert Keaton, who had taught over at Harvard Law School; Judge [John J.] McNaught, probably the outstanding superior court judge; David Nelson, a highly regarded and respected black judge; and Rya Zobel. Those were the four who were all confirmed in '79.

Then when President Clinton appointed a second group, we had Reginald Lindsay, a black judge who's disabled. He's a remarkable person and the most popular person on the court now; Patti Saris, who had been the U.S. Attorney, a very bright, smart woman; Richard Stearns, who had

been a Rhodes Scholar—President Clinton had known him; and Nancy Gertner, one of the two or three most active jurists up there for the defense bar, very bright and very smart. She was a visiting professor at Harvard Law School and taught at Boston University Law School. George O'Toole was on the superior court, and was a very highly regarded figure. Michael Ponser was an adjunct professor at Yale Law School and also at Western New England College of Law. Ponser was the controversial one, because [Edward] Boland wanted Dan Keyes appointed in that spot, but I finally made the judgment to appoint Ponser. Boland was upset and didn't talk to me for four or five years. He talked to me just before he died, but Mrs. [Mary] Boland was still upset. We've become good friends again.

**Young:** He wasn't a relative of Boland's?

**Kennedy:** No. Keyes, I think, married someone who was somewhat related.

**Young:** Was Tip [Thomas P.] O'Neill interested in any of these appointments?

**Kennedy:** No. This was the Judiciary Committee, and this was the way it was. All of them were highly, highly regarded and respected. It wasn't a situation where I was appointing one of my political operatives. It didn't mean it was then his turn to get one. I'm sure I let him know. I think he would have been a strong supporter of most of these people. He knew McNaught, and he knew of Keaton, and Nelson he knew very well. Nelson was a very classy individual. He was on the superior court of Massachusetts, and he was universally admired and respected. Tip would have probably known Stearns a bit, but not much—and he would have known George O'Toole. So those who had been on the superior court he probably would have known, but I have no clear recollection that he did very much. Most of them are still on.

**Young:** The reputation of the quality of the judges up there is very high.

**Kennedy:** We had a vacancy in more recent times, which Sandy Lynch got, and she has been just a crackerjack. She's on the circuit. She has an enormously interesting background: she waited on tables, worked her way through every place, and is just a solid jurist.

There was also a fellow named Dave Mazzone, who got on just before these I've mentioned here. He had been a very close friend of my brother Bobby's [Kennedy] but hadn't really emerged at the time. I had not been all that involved—although I was very supportive. He was the person who made the judgment to clean up Boston Harbor, which has made such an enormous difference. He was the one who said that it violated the law, that Boston had to do it, and then he monitored it over a period of years. When it got more and more expensive, he adjusted his rulings so that the place got cleaned up.

He also was indispensable in prohibiting the drilling for oil off Georges Bank. Those were enormously popular decisions, but no one said anything that I ever heard. I couldn't have agreed more, but neither I nor any of my people had anything to do with any of those rulings. They just made a lot of sense. Boston will be eternally grateful to Mazzone for that whole process.

**Young:** You didn't have the reputation, did you, of having your own friends or connections on the—?

**Kennedy:** No. They were not close personal friends. George O'Toole's wife had been active; Vicki [Victoria Reggie Kennedy] had known her. He was the real giant at the Bar. Ponser I never knew. Nancy Gertner I never knew, and she's controversial, because she's rather active. Patti Saris I knew. I knew of Rick Stearns. I knew he had been very close to President Clinton.

**Young:** Did you lay down some criteria or ground rules for these commissions, what you wanted and what they were supposed to do?

**Kennedy:** It was basically excellence in the law and respect from the judge, a demonstrated core commitment to the values guaranteed in the Constitution, and a sensitivity to the needs of people who are relying on the courts for equal justice. I interviewed all the people I made the judgment on—I got that feel myself.

**Young:** Did any other Senators create problems for you on any of these appointments?

**Kennedy:** No. I think some did for some commissions. A few of them did on the circuit. I think for California and New York, even during the Republicans, they had what they call a three-one split. Even with Republican Presidents, they got three judges and the Democrats got one. I think they reversed it for California and New York, because they had so many, and that, I think, is still hanging out there somewhere. I don't know whether it's written in stone, but it's sort of an understanding. That's the only place they had any understanding.

I think [George W.] Bush has appointed one up there now. There are about five or six names on the list now for [Mitt] Romney to consider, and they touched base with us. I called over there. My choices didn't get any consideration, but at least they ran through as a formality. This is all after the [Francis] Morrissey situation we've discussed.

**Young:** It's funny how that stands out in so many people's minds as the way you do things. So it's important to have in the record that that is the exception and certainly not the rule.

**Kennedy:** I think the record shows that. I think we go now to [Robert] Bork.

**Young:** Okay, yes.

**Kennedy:** I'll give you some general thoughts, and then we can get to the basics. We can come back to it.

Probably the Bork stage was set when we had [William] Rehnquist in 1986, because Rehnquist was really a voice, a repeated sole dissenter, trying to roll back the progress that had been made in the courts up to that time. I suppose if you were looking back even further, to 1980, you'd find that when [Ronald] Reagan was elected, [Edwin] Meese had in mind that the administration was going to try to do something with the courts, roll the courts back and get their own people on. He had a long strategy to do it, and he made speeches in the '80s, when he was Attorney General, that he was going to look for people who were what they called the "original intenters."

They had an overall strategy. They looked at it very strategically in terms of judicial nominees—much more, certainly, than we did—and Rehnquist was probably the first one. Once he got on, you could see the repeated number of dissents—more often than not, sole dissents. We talked

briefly about my own opposition, which was based on his activities in Arizona, where he was personally discouraging minorities from voting, showing them the Constitution and having them walk away. We had direct witnesses who saw him doing that. Then there was the memo he allegedly wrote supporting the separate but equal doctrine, which he denied he wrote.

**Young:** That was when he was clerking.

**Kennedy:** Clerking for Justice [Robert] Jackson. Justice Jackson told his secretary—who ended up being his wife—and she always remembered it, but she was too old to testify at the time of the Rehnquist hearing.

So here we come to Robert Bork. He arrives at a time on the Supreme Court with what you could certainly perceive as an extreme point of view, certainly viewed ideologically. He replaced [Lewis] Powell, who had been a very thoughtful judge and who had admirers. He was a very careful, cautious conservative, highly regarded and respected. Although it doesn't necessarily follow, you look at one person and then look at the other: people watch who's being replaced.

**Young:** You mean what the person represented in terms of the rulings of the Court? Was this Reagan's third?

**Kennedy:** I don't know that number. I can't guess the number.

**Knott:** Yes. [Sandra Day] O'Connor was first, [Antonin] Scalia was second, and then Bork was his third.

**Kennedy:** But Scalia was after [G. Harrold] Carswell and [Clement] Haynsworth, wasn't he?

**Knott:** Yes.

**Kennedy:** Everybody was sick and tired of fighting at that time, with Scalia. Governor [Mario] Cuomo was the one who assured the committee that he was going to be okay, that liberals didn't have to worry about him. He gave his personal assurance on it. That was unique. I think Scalia was less than an hour before the whole committee. So those were the circumstances. We had had very hard fights with both Carswell and Haynsworth.

Bork had the most extreme view on the circuit court when he was promoted. I think his nomination crystallized the sense in the country that they didn't want to go back on civil rights; they didn't want to go back and reopen those battles. I think this was obviously an issue. He talked in generalities about the *Brown* case and *Griswold* and other issues, but he set himself up for a fall fairly quickly in the course of those hearings.

**Knott:** Senator, you came out very quickly, right after Bork's name was announced by the White House. You were ready for this one, it seems.

**Kennedy:** Yes. There generally is a fairly good idea about who the four or five possible nominees are going to be. That was true with Clinton, and it was certainly true about Reagan as well. We had had a long association with Bork, going back, obviously, to the firing of Archie Cox at the time of the Saturday Night Massacre, which was notorious. He had been around

writing very provocative articles on a wide range of different issues, antitrust and a lot of other kinds of issues and questions. He was, by far, the most ideological hard-liner of any of the people coming up.

What happens in these Supreme Court battles is people say, “Let’s keep our powder dry”—both the people for and against. But all the time, “keeping the powder dry” works to the advantage of the nominee to move ahead, because they unveil a whole strategy of support for these nominees—and they do it very quickly, before people who have reservations get a chance to do it.

I have to come back to that, how it’s done now, in an immediate time cycle. Haynsworth and Carswell took time, weeks and months of hard work. Bork was a long time, and even [Clarence] Thomas took some time. But with these recent Supreme Court nominees, in the time we take a break while they go to the bathroom, Senators are going out and spinning. When we say we’re going to take our time, it works to their advantage because the other people are so strong in favor of it. That’s why it seemed to me that it was important to say whoa on this judgeship.

**Young:** You got some time. You got [Joseph] Biden to postpone, or to not hold, hearings, I think, until the fall, which gave you the summer, additional time to do the groundwork for the hearings.

**Kennedy:** That’s true, but I spoke right away on Bork—within a half hour of when he was nominated—to hold people in their place. It was a placeholder, so they had to understand that they were going to have a battle. This thing was going to be a fight, and they were going to have accountability on it. Otherwise, the rhythm of these battles flows in favor of the nominees quite strenuously, and it makes it more and more difficult.

I think Bork was honest in his views, but he just lost. They made a decision to go very hard ideologically, and then they tried, to some extent, to mask it. I think when Meese and Reagan made the decision to reverse the courts, one of the spin-offs was that there wasn’t going to be consultation and compromise. If you look back historically at the appointments made by different Presidents at different times in the country, they had that kind of exchange and interchange in the selection of nominees. The Senate was very much involved with it.

**Young:** These were with individuals in the Senate?

**Kennedy:** Individuals, the President, individuals in the Senate, the leaders of the Judiciary Committee. You know the great story about [Benjamin] Cardozo: “You have the right list but the wrong order,” and they appointed Cardozo. History is replete with those kinds of examples. I believe that the significance of these last years is that, starting with Meese and Reagan, there was going to be a very ideological viewpoint. And so the historic interaction and interchange in the selection process was basically by-passed.

They looked for, on the one hand, in the very beginning, someone who was a very strong ideological figure. And once that person lost, the lesson they learned was to get a strong ideological person, but one who doesn’t have a paper trail. That’s the lesson they learned, and they learned it very well.

**Young:** They learned that from Bork.

**Kennedy:** That's the powerful lesson. During this time they also established this infrastructure in the administration. This is the beginning of the Federalist Society. They had the Eagle Forum. I think it would be useful to ask your researchers to find out who those other organizations are. I think there were three other active organizations. To supplement this, find those organizations and what they did and what they were organizing, because people don't have that in their mind.

They had an inside and an outside game, and the outside in the beginning was to change the courts. They weren't going to talk with Congress. They weren't going to compromise. They were going to do it hard on the ideological. They were going to have an infrastructure—the Federalist organization, the Eagle Forum—that was outside. These organizations were campaigning and making their case. They did it very effectively, but it was the politicization of the court judgments and decisions, and it was a dramatic alteration and change in terms of the whole selection process. That really is the whole significance of these nominees during that period.

**Young:** Of course, many people have said that *you* were the one who politicized Bork.

**Kennedy:** I could say something about that.

**Young:** I hope you will.

**Kennedy:** The fact remains, if you look back, even to the ones who were nominated previously, they aren't really the cases. It started with Rehnquist. Haynsworth really wasn't that kind of thing. They were reaching with Carswell, who was conservative. It was going to be a conservative, but at some point they just threw this down. If any person would review the most ideologically conservative judges, Bork would pop up. That isn't me. He would pop up at any time.

**Young:** You've mentioned how the conservatives were getting organized and getting organizations to help support their conservative candidates and Bork. I'd like you to talk a little bit about how you organized the opposition. Looking through these materials in your book and historically, this is a real first, and it's a very impressive effort, mobilizing groups to do the job. I'd like to hear about how you managed to do this in such a short period of time. Did you already have a group or a staff or liberal organizations or coalitions ready and waiting to join the fray, or did that all have to be constructed?

**Kennedy:** It basically all had to be constructed. What we're looking at with regard to Bork is the issue of time. In the early reviews of Bork, there was a caution among the Democrats about moving forward. There was a sense that this person was selected for ideological reasons, to move the clock back. There was a very serious effort to get the individual Senators, which I was very much involved in.

We had new Senators from the South, and most of those had won with the help of strong black constituencies. I talked to all the leaders of all the black organizations personally. We were very active in working with the black preachers, and the black preachers worked with churches and local communities to build grassroots organizations. We worked with editorial boards at newspapers and radio, and we worked with the political wing of the DNC [Democratic National

Committee] to get to the people who were active and would be concerned about these kinds of jurists back in people's states. It was a full-court press across the board.

**Young:** It sure was.

**Kennedy:** We prepared books for all the members of the Senate and had those books tuned to relate to the interests of the various members, looking back over the kinds of things they had talked about in the course of their careers or the things they campaigned on. We delayed the hearings for some time so people had an opportunity to read them.

**Young:** The documents in your briefing book, the papers that Carolyn [Osolinik] and Jeff Blattner were providing you, certainly give good insight into how the effort on Bork was mobilized and proceeded. One of the things I was very interested in was examining Bork's record and establishing a number of different points on which he could be attacked or questioned. Did they do a lot of work on his papers?

**Kennedy:** Once we had made the decision in early July that it wasn't going to be over until the fall, we had an unprecedented campaign, with legal experts who examined his opinions and writings and speeches. We even had commercial television, with Gregory Peck targeting the moderate Senators. By August, we had organized 6,200 black elected officials, and, as I mentioned, I talked to [Joseph] Lowery.

They turned that summer convention into an anti-Bork organizing session. The AFL-CIO [American Federation of Labor-Congress of Industrial Organizations] got involved, and Bill Taylor organized a lot of professors. We had 1,900 law professors in opposition, which was 40% of all the legal academics, and then we had Bill Coleman, Barbara Jordan, and Andy Young speak about it in the beginning, when we started in September. During the course of the summer, I spent a good deal of time phoning Senators and other political people.

**Young:** It sounds like you didn't have a vacation.

**Kennedy:** Well, it was a full-court press. On Bork, we had Chesterfield Smith, who was president of the Bar Association, very highly regarded, and he testified in opposition. He was from the South, from Florida. Bob Meserve, who had been against Frank Morrissey, came down and spoke in opposition. The ABA [American Bar Association] was very powerful; they talked about his temperament and ideology. My statement in the beginning freed the country, and then we were able to mobilize the thoughtful and respected leaders in the Bar and all of these organizations to weigh in, and they made a very powerful case.

**Young:** It looks like no base was left untouched inside the Senate, outside the Senate, the press, the professions, everywhere. It's a really remarkable campaign organization.

**Kennedy:** Yes.

**Young:** Lloyd Cutler.

**Kennedy:** He testified in favor of him and wrote in favor of him. He was the liberal voice for Bork. He just didn't do well before the committee either. There are some people who do very



well before the committee. I think [John] Roberts did very well. But Bork did not do well. I think this cumulative effort was very effective.

**Young:** When did you first meet him?

**Kennedy:** I might have seen him around or testifying, or read his articles, but I don't have a clear recollection of meeting him.

**Young:** Did he pay you a visit?

**Kennedy:** I think he must have, but I don't know whether I have the notes on it. I thought I would have.

**Young:** Paid a courtesy visit or something?

**Kennedy:** Probably. No, I don't see it.

**Knott:** Senator, I believe you tried to enlist Archibald Cox to testify—or at least take a higher-profile position—on the Bork nomination, but he demurred. Any thoughts on why he was reluctant to get involved? At one point, you seemed to think it was pretty important that he—

**Kennedy:** I thought it would have been: the idea of the Saturday Night Massacre and his firing in contempt for the law. I saw in the notes that we invited him, but he turned it down. My sense is that he didn't want this to be a personal thing. He thought it would alter the situation. He thought the record ought to be that he fired him, that was the action, and that ought to stand, rather than being Archibald Cox versus Bork. It was the personal aspect that he wanted to avoid, and I think there was something to that. He had such extraordinary credibility in the country that he probably would have impressed people, but I think Cox wanted to be free from the personalization of it.

**Young:** There's a letter in the book from you to Cox asking him to do this, and it ends by saying that you understand his reluctance, but "even Yankees come down from Olympus some time." And still he said no thanks. There was a lot of evidence, wasn't there, that Bork didn't tell the truth about the special prosecutor and his doing the job on Cox? You needn't go into the details, but that didn't resonate as much as Bork's views, did it?

**Kennedy:** No, I think it probably didn't. We were very much involved in setting up the special prosecutor and had worked very closely with Archie Cox in establishing the rules and regulations, basically writing that special prosecutor. So we had a very clear understanding of that. There wasn't any doubt in my mind about what the precedents were, what the law was, what the requirements were. And he was very comfortable just overriding the understandings and the agreements, and circumventing the commitments that were made on this. That had been troublesome to me.

But he made a lot of other mistakes. He wasn't a good witness, and he was arrogant. He was not enormously appealing, and he made a number of mistakes such as the comment about the Court being a "smorgasbord of ideas," and others.

**Young:** How did he come across as a person?

**Kennedy:** Well, as I mentioned, he was not enormously appealing. He didn't have a lot of personal appeal. He looked and appeared arrogant, and I think people reacted negatively to that. There was enormous public awareness of the hearings. It was incredible. I remember going back to Massachusetts during the fall when the hearings were on, and everybody was watching. I think it was more like a sporting event; people were glued to the television to watch this thing. The country became very involved, which was good. That made a big difference.

**Young:** It looks to me like the campaign for Bork wasn't very well done. Sometimes the White House would say this, sometimes that. When you compare it with the campaign against him, it looks like it was just simply not well organized. Do you know who was in charge of it in the White House?

**Kennedy:** No, I don't know. They always have those handlers, but I'm not sure who it was. Others always come up and tell you they handled the ones who were successful, but I haven't heard—

**Young:** Let me ask it another way. When he was testifying before the committee, did it seem that he really hadn't been prepped for those committee hearings, that he hadn't been before a murder board or anything like that?

**Kennedy:** Well, I think by nature and disposition he is arrogant, intellectually arrogant. The stamp on him was that he's an academic elitist who isn't sensitive to the legal problems of ordinary people. That's what nailed him, I think, finally, as much as anything.

**Young:** So he was himself, but my question was, why didn't people say, "Cool it. Don't do it that way; do it another way"?

**Kennedy:** My take on him is that he wasn't much of a listener. He was a talker, and he was confident about where he was and what he was doing. I don't think he paid much attention to it.

**Knott:** Senator [Orrin] Hatch gave him that softball question—you already alluded to this—why do you want to serve on the Supreme Court? He mentioned that it would be an "intellectual feast." That seemed to solidify that image of somebody who didn't particularly relate to the personal impact that the law has on people's lives.

**Kennedy:** I think that sense came out very well, clearly, and I think it undid him.

**Young:** Do you need a break now?

**Kennedy:** Yes. I might just get a cup of coffee, and let me just look at these things.

**[BREAK]**

**Kennedy:** Just a bit more on Bork. One thing I'd say in conclusion is that Bork did crystallize the sense in the country not to go back on civil rights. They didn't want to go back and fight the old rules on affirmative action and abortion. He did agree that there was a Constitutional right to privacy, and all Supreme Court nominees since Bork have recognized that.

What we've seen, though, is from that period, they've all spoken in generalities, never anything specific. They say *Brown* is okay, like we saw with Roberts, but they won't get into it. *Griswold* is okay—that was on birth control—but they don't get into it. So basically, the sense you get is that the administration is looking for ideologues, but now they're looking for them without the paper trail, and they're moving on. That's the lesson you get with Bork, who had written so much, was so opinionated, was such a poor witness, and the country rejected it.

Now we can go to Thomas. With him we had a number of forces working. One was [John] Danforth himself, who had a very decent record with regard to civil rights generally, and was also, at this time, the key Republican sponsor of the Civil Rights Act, which was coming up just about the same time. That was a dynamic that sometimes has been missed. He had a strong civil rights record, being the prime sponsor of it, and with Thomas being black, there was a basic presumption in favor of Thomas, certainly at the beginning. And Bill Coleman, who was strongly against Bork, now flipped and was supporting Thomas.

**Young:** So you did not have the unity among the black—

**Kennedy:** Well, you certainly didn't have that. I'll come to that. What you had at the White House is that even though he had made some harsh decisions in the EEOC [Equal Employment Opportunity Commission] and had been against some civil rights positions, the administration very cleverly focused the whole battle on his upbringing: he grew up in a house without running water, people who knew him as a small boy and worked with him all admired him and liked him and thought the world of him, and he had to fight his way all the way through. It's a Horatio Alger story, and it set the tone for Thomas, rather than the decisions he was making. This was at a time when Reagan had vetoed the Civil Rights Bill, and we were trying to override it. So it was very much connected. We were trying to pass it again, and this was very much involved in it.

**Young:** This was the [George H.W.] Bush veto, wasn't it? The Court upheld, and then you're coming back, and Danforth wasn't happy about it.

**Kennedy:** You're right. This is against the background of '90, where you had Jesse Helms using his famous ad about racism down in North Carolina. David Duke was up in the gallery for the President. This was a very hot time. In the conversations I had with Lowery and other black leaders, they all, to a person, indicated that they couldn't in good conscience oppose him. These notes here say, "Meeting with the top black officials. Lewis Sullivan—" who is the Secretary of HEW [Health, Education, and Welfare]—"makes it clear if Thomas is not confirmed, another black will not be nominated."

So Ben Hooks and Joe Lowery and John Jacob decided to postpone their decision on Thomas, in order to keep their powder dry for legislation addressing *Wards Cove* [*Wards Cove Packing Co. v. Antonio*] and other civil rights cases, which Bush had vetoed before. That made it extremely difficult to get real life opposition to him. We had plenty of time—we didn't start until

September. In June, Thurgood Marshall announced his retirement, and on July 1 he was nominated. We started the hearings in September. I had quite a long meeting with him personally, I guess, from these notes.

**Young:** There are some notes about him here.

**Kennedy:** He had fairly vague responses to some of the questions I asked him. I asked who best exemplified the Judge Thomas philosophy and approach. He couldn't focus on that one. We talked a little bit about his legal service work at Yale. He had been active in the community; he had worked on a disability panel with Teddy [Kennedy] Jr., and he mentioned he had had to combat all forms of discrimination.

**Young:** But he was against affirmative action.

**Kennedy:** Yes. On *Roe v. Wade*, he indicated he hadn't made up his mind. We indicated to him areas that we were going to talk about at the hearings: individual rights and liberties, remedies. I didn't want him to expect a surprise. I said we'd go into a number of areas we had in the past: the 14th Amendment and the rest.

**Knott:** Would you say he was a more likeable personality than Bork?

**Kennedy:** Yes. We had the sequence of events where we were going to vote on him, and then we heard about Anita Hill. Anita Hill started earlier, before we voted, but it didn't bubble up. It didn't come to the attention of the committee. I was just looking through my notes to get the exact time. It did not bubble up, for some reason.

**Young:** Steve was also trying to figure out what happened when. We were talking about that last night, and he couldn't get a good idea from the briefing book.

**Knott:** The briefing book says that Hill gave a statement to the committee on September 23 detailing her charges, and was interviewed by the FBI [Federal Bureau of Investigation]. She asked that her testimony be kept confidential. Then I note the committee voted four days later.

**Kennedy:** Yes. Her charges were leaked to the media two days before the scheduled Senate vote, but the committee had already voted him out.

**Knott:** You had already voted, yes.

**Kennedy:** What had happened was Danforth was very clever in getting an agreement about when we were going to vote. So we had the final vote set, and then we came back and did the hearing. The hearing was going to be limited to Anita Hill, and they had [Howell] Heflin and [Patrick] Leahy versus Hatch and [Arlen] Specter. And the order in which they appeared worked to Thomas' advantage—I think he went first, and then he came back and rebutted.

**Young:** Danforth worked out that deal.

**Kennedy:** The vote got locked in, no matter what was going to happen, because Danforth and the civil rights people wondered if there was going to be a question about when that Civil Rights

Bill was going to come up. They gave the assurance that it would be quicker if we got the vote locked in, and so Danforth played that card, and he did it very effectively. That was a major factor in rushing it through. Lowery told me personally that he wanted to be able to look at the Supreme Court and see a black face up there. Civil rights groups wanted to get this Civil Rights Bill passed, and they thought they couldn't get the support from their community as they had with Bork. That just wasn't going to happen, and as a result, we found out that a number of the southern Senators who had been with us earlier were not with us on this one.

**Young:** Was he elected with a large black vote?

**Kennedy:** Yes. They had some emotional moments in those hearings.

**Knott:** The "high-tech lynching" line.

**Kennedy:** Yes. Every black man needs to think for himself.

**Knott:** He seemed to be able to shift it away from the question of sexual harassment and make it a racial issue.

**Kennedy:** He did that very well. There was a very ambitious attack on Anita Hill, her background, in a very harsh way. That was pretty devastating.

**Young:** You get two very different pictures of Clarence Thomas, it seems to me.

**Kennedy:** As for the idea of the order of going ahead, and then the attack on Hill, I was just looking over this note saying that the Harris poll showed that at the end of the hearings, 56% believed Thomas and only 33% believed Hill. That was a direct result, I think, of the order and the time it was laid out, and the very strong attack on Hill. That's the real result of the strategy in the nomination process.

This is about the time, too, of the Florida trial of Willie Smith, and so I didn't ask questions in the second round. I got heavily criticized for that, people saying that I was just sitting there not asking questions, although it had been agreed earlier that we were going to have just two questioners. And I thought Leahy—since he had been a prosecutor—and Heflin—because he was a Southerner—would be the best, as they had just two on the other side. There was a lot of speculation about it, but that was agreed on, and I didn't object because I thought they were probably the ones to do it, with Leahy being not tied to the Democratic liberal wing, certainly as much at that time as perhaps he is now. Nonetheless, that was a secondary factor.

**Young:** In other words, you weren't designated.

**Kennedy:** I wasn't designated. They were going to have only two, and it looked like Howell, who had been on the Supreme Court, and Leahy, who had been an Attorney General. It seemed that it probably made the most sense for them to do the questioning. But there were always questions about why I didn't ask questions, and that sort of thing. We had that limited time and schedule, and the schedule was dictating this, so they could do it through three days or two days, whichever was going to happen, and go over their material.

**Knott:** Danforth admitted later that they really did a number on Anita Hill. There's a great footnote on the bottom of page 11, where he admits that they basically drummed up these nasty stories about Hill and released them to the media. In a sense, they went over the top. Was that your impression?

**Kennedy:** I think that was the general sense, but we didn't have the material on the other side.

**Young:** There wasn't anybody in the Senate on Bork like Danforth was on Thomas—somebody really pushing the fight?

**Kennedy:** No, I don't believe so. It was the circumstances, as I mentioned: the Civil Rights Bill and the fact that he was black. And he had a very dramatic life story. There were some very dramatic differences and changes and circumstances—particularly with regard to the legislation on the floor—that led into it.

**Young:** Ken Duberstein was running the White House part of it while Danforth was running the rest. Is that your memory?

**Kennedy:** Yes.

**Knott:** Danforth and Fred McClure.

**Kennedy:** Bush's guy.

**Young:** Was this a case of an effort to pack the Court with another conservative?

**Kennedy:** I think so, and they're continuing this march on the judiciary. We can talk a little bit about what was happening in the circuit courts, too. There was certainly a desire to try to move ahead on this.

I thought I might talk for a few minutes thematically about what we saw at this time, because I think that's the significance of it: the '80s period with Meese and what they were headed for, and their organizations. There was the decision that it was going to be ideological, a closing down of any cooperation or consultation with the Congress. They developed a very effective infrastructure. We have to fill in those particular pieces. They announced that Meese himself was going to put everybody on notice that this is where it was going, and this is what they were going to do.

From this period on, I would say from the '80s on up to where we are now, we're finding that as the press has failed on Iraq, they're failing with regard to the Supreme Court as well, in a very similar way—just the fact that they haven't gotten into the details of these cases. They haven't gotten into reading the reports. They haven't talked about the importance of these courts and court decisions, and their impact on rights and liberties.

They gave attention to Bork because the issues were big and flashy, but they were not paying attention to these others who are less flashy, less big. They're rather dismissive. If it's not there in the very beginning, if something doesn't stick out about an individual, if he hasn't made some

judgment decision, then he ought to move ahead, no matter what the implications are going to be with regard to American rights and liberties.

And that has complicated the role of the Senate. The “Gotcha!” attitude of the press applies not only in politics, where they’re looking for mistakes politicians have made, but it’s also in the judicial system, and it applies all the way through here. We’ve seen it in the most dramatic way, in the collapse of leading newspapers, the *New York Times* and the *Washington Post*, on Iraq.

That’s different from where it was even when we were back with Carswell and Haynsworth. This thing has been continuing. If it isn’t big and flashy, it’s not a big deal; we don’t have to report it. It’s clear that the television is worried about ratings. The press is collapsing. The *Boston Globe* was valued at \$1.2 billion six years ago, and now it’s \$600 million. All the written press is going down like this. People are getting their information from other places, and all of that applies to the Supreme Court. I think it’s influenced other Senators. They’re not as worked up about these smaller issues; they don’t have to be.

So to see a shift in all of this, the media attention, you have to get back to consideration of the nominees, obviously, to involvement of people in a more dramatic and significant way, if we’re really going to meet the Constitutional requirement.

Then, as I mentioned, there’s the strategy to “keep your powder dry.” But by keeping your powder dry and finding nothing dramatic about a candidate in the beginning—a mistake they’ve made either in a judgment or personally—the people who are keeping their powder dry permit the other side to lock in the nominees. The leaders are saying, “Keep your powder dry” so they don’t get locked in favor of it or against it, but there’s a sense that it works to the advantage of getting these people approved. I don’t know how you’re going to change that, but it’s certainly something that has happened, everybody waiting to find out.

Meanwhile, the other side is moving and being managed. The press is being organized, groups are being lined up—you just keep your powder dry before we get a chance to get these things organized, get up to speed. I don’t know what the alternative is, but I’m not sure that that kind of slogan—although I certainly have suggested it to some of these people—works very well.

There’s been a loss of the moderate Republicans who had influence and progressive Democrats in the South. Heflin obviously is one; he’s very thoughtful and understood the laws, and is respected because of that. He’s been a Supreme Court judge. He did very well in terms of the questions people can ask. You may differ with him, but he’s a very thoughtful person. I’m not sure that we now have moderate Republicans or progressive Democrats in the South who would vote no on some nominees. We don’t have that. Even if the ideology conflicts with their own, they’re not prepared to deal with it. And that leads right into Roberts and [Samuel] Alito, because we had nothing big against either one of them, and we couldn’t really focus on their records. They were very smooth in terms of their appearance—Roberts more so probably than Alito—but we couldn’t focus on it.

It’s another era now, and other forces regarding these Supreme Court nominees are the issues—much more now—of religion, race, and ethnicity. Religion now is being used as a weapon to promote and justify some people. Some of the nominees who were being put forward were

Catholic, and I and several others on our Judiciary were called anti-Catholic because we asked them questions. Rather than getting into a discussion about their legal views, it got to be religion, and this became a popular mix in the press. You had it with regard to [Miguel] Estrada, who was Hispanic. We were accused of being anti-Hispanic.

**Young:** This is the spin.

**Kennedy:** This is the spin going along with all of this now. It's moving away from decisions that people made and their philosophy, which is where you start in the Senate, their judicial philosophy and judicial temperament, knowledge of the law, character. They ought to understand the nature of the country and society. Now, these are the kinds of elements that are influencing decisions, and it's a transition that has taken place over the last 25 years. That's the message of this whole period, and that's what's really startling about what has happened.

We have ideas about how to deal with it, some were in that talk I was supposed to give a week or so ago, which was put off because of Father [Robert] Drinan's funeral. We are now seeing the religious aspect—and race and also ethnicity—with regard to the circuit courts and the district courts. They're doing this to paralyze the questioning of nominees on these different issues, which is so in conflict with what the Founding Fathers intended.

To make this final point with regard to the press: before, we had weeks and weeks of preparation, weeks of questions for the nominees, and give-and-take between the Republican side and the Democratic side. I'd be for the effects test, and Orrin Hatch would be for the intent test, and what judicial holdings. Would a nominee support one and not the other, and what's his view about these kinds of things? Now, the Republicans are attacking the Democrats for their questions, and when there's a coffee break where the nominee goes out, they're all out there at the television spinning it. With this mindset of the people and the press, there's 24 hours, 36 hours, and if you haven't hit on this then, in terms of the vulnerability of this nominee, they're going to go on through. It doesn't really make any difference what's going to happen—

**Young:** You become the obstructionists.

**Kennedy:** You become the obstructionists.

**Young:** The questioners become the obstructionists.

**Kennedy:** You have that factor. Then there's the preparation factor—they all learn how to answer these questions so as not to get themselves in trouble in going through their reviews. You saw that with Roberts and Alito escaping their past by saying they were just attorneys in the Justice Department, just doing the will of the Justice Department. Now you're going to see in their holdings on the Supreme Court that they're right back where they were prior to the confirmation hearings, making a sham of the whole confirmation process. It's basically an undermining and a destruction of the confirmation process for a key branch of government. And how and when this happened is the important historical issue in question, and why people ought to be interested in it and follow it. It's an essential aspect in terms of our Constitutional democracy.



That has happened now, and there's very little interest. Maybe there is in law schools and in *Law Review* articles, but we're not thinking about it. Of course, we're thinking about Iraq. Many of us are. A lot of people wish we weren't thinking about Iraq, but it's an overriding issue. We're not thinking now about how we're going to do this, and we're going to get a President, not unlike Clinton, who, rather than risk a battle for the Supreme Court, took the most moderate nominee with Ruth Bader Ginsberg. She had the most conservative record on the circuit court.

It took Steve Breyer, who I'm very grateful to and for, but he was acceptable because he was for deregulation. I happened to be for economic deregulation, not for health and safety deregulation, but he was a purist in deregulation, and wanted to deregulate oil and gas. We never got to it; we didn't have to. I knew what his view was, and he knew mine. But it was fine with Republicans to put him on the Court because it may very well be an issue that will come up, and it's right up their alley. He's cautious on it, although I think he's had an outstanding record.

That's where Democrats have been on this issue, playing it safe rather than taking the chance on someone who has unlimited capability and awareness of the Constitution and commitment to the Constitution, and considering what they could add in the future.

Those are some of the themes that are reflective of this whole movement now, where we are on it. A couple of other points: one is about the blue slip. That's the process by which if people are personally offensive to members of the Senate, one can file a blue slip, which means that they will not be considered by the Judiciary Committee. That was the age-old tradition, and it was used in the United States Senate to keep blacks and women off the courts.

**Young:** This is the district or circuit courts?

**Kennedy:** The district court. It's a good question, whether you could have had it for the Supreme Court. For the most part, I think people called people in the state where the nominees were from to ask if they had any objection to the nomination. It's difficult for me to believe—I didn't know that the blue slips would even apply to the Supreme Court, but they applied to the district and circuit courts; they were used to keep women and blacks off.

When I became chairman of the Judiciary Committee, I changed the blue slip to say that if you had personal objections to an individual, you had to come down to the Judiciary Committee in a closed session and indicate what those objections were and let the members consider them. We'd consider them seriously, but you had to come down and testify. We found out they weren't coming through. Then they reinstated some of these blue slips during the Clinton time. There were 167 judges who were not considered during the Clinton time, 167. Either there were no hearings, or they were blue-slipped. It's amazing how the Republicans got away with that.

**Young:** So they're stopping the Democrats from putting their people on.

**Kennedy:** They're stopping the Democrats from putting their people on, and holding out. We had the famous Helms blue slip to Roger Gregory for the Fourth Circuit. He was a very distinguished black attorney. Finally, that was lifted when Helms left.

Now, in more recent times, the themes I mentioned are relevant today. When we had control of the Senate but a Republican President, and we were going to face these judges on the circuit

courts and the real possibility of the Supreme Court, we held a retreat in Maryland in 2003. I got Tom Daschle to organize a very effective panel on what had happened between the Senate and the Executive Branch through history, and the role of the Senate in considering Supreme Court nominees. It was very interesting and very effective. The Senators loved it.

**Young:** This is all the Democratic Senators, no Republicans?

**Kennedy:** All the Democrats, no Republicans. Columnist Bob Novak wrote articles following that in May 2003 about how we were trying to hijack the whole judicial system. [reading] “The launching of a second simultaneous Senate Democratic ... of federal appellate judicial nominees, followed a strategy laid down weeks ago by Senator Kennedy.” And then it talks about the filibustering of Estrada. “The Democrats made clear they would not permit a vote on the nomination of Priscilla Owen that fits the tactics propounded during a secret meeting of Democrat Senators, where Kennedy stressed to block it. ‘Estrada must begin, not end, the stopping of President Bush’s conservative judicial nominees’.”

There were a series of these nominees to the district court and the circuit court.

**Young:** What went on at this meeting?

**Kennedy:** Well, it was a real seminar by these scholars: Larry Tribe from Harvard and Cass Sunstein at Chicago, who was more moderate, and Marsha Greenberger. The subject was the Senate’s crucial, historic role in the Supreme Court confirmation process, the issues at stake when we confirm another justice, and the roles of the Senate and the President, and what their implications would be when civil rights, First Amendment rights, reproductive rights, and Congressional powers are at stake.

We had a good deal of preparation material on it. That took place in April of 2001. I have the relevant questions. You can have all this. This is a litmus test. Nominees should be judged overall—these are my talking points—on the Constitution. “I’ve supported nominees whose views on certain issues differ from my own, but if Senators have substantial doubts about a nominee’s dedication to core Constitutional values, our Constitutional responsibility will require us to oppose the nomination.” That was 2001, and was the real reason I opposed [David] Souter, because I didn’t believe that he represented to the committee positive Constitutional values. That’s been my test, and it is my test.

**Young:** It’s really become paramount in your own thinking.

**Kennedy:** Absolutely, given the history of what we’ve seen here, the games that have been played, the lack of good faith in following our Constitution, the implications I just mentioned, particularly in areas I’m interested in.

Maine held that probation officers could not sue state employers in federal or state court for overtime under the Fair Labor Standard Act. I’m interested in overtime and minimum wage. In [J. Daniel, Jr.] *Kimel v. Florida Board of Regents*, the court held the Congress had the authority to abrogate state sovereign immunity in suits under the Age Discrimination Act. That’s out of my committee. In [Patricia] *Garrett v. University of Alabama*, the Court applied *Kimel* to invalidate

individual suits against state employees using the Americans with Disabilities Act. That's out of my committee.

What the district court has done on regulatory agencies—clean air, clean water, workers rights—is extraordinary. It undermined the work of a generation in our committee, real implications. So what am I going to do? That's the more practical thing, let alone the 14th Amendment, civil rights, reproductive rights, all of which I'm interested in.

You have that Tennessee case with a woman in a wheelchair who trained as a court reporter [*State of Tennessee v. George Lane and Beverly Jones*]. She had two children. She got herself trained as a court reporter, but in Tennessee, all of the courtrooms are on the second floor. She used to have to be carried up by judges and clients. She brought a case for reasonable accommodation under the ADA. It was decided five to four. Four justices voted against it. I brought that up to Roberts. I said, "Can you imagine my voting for four of those judges who can't read English, who don't know what we've tried to do in this country for disabled people? Can you understand this?"

**Young:** What did he say?

**Kennedy:** He said yes, of course he can. Oh, yes, sure he can. You had *Grove City* [*Grove City College v. Bell*], with all the same battles and issues. That's a very prominent case. Make a note on it, and I'll get you that case, because it's a very special one.

The basic point here is that these decisions have real consequences for real people. This is not just theory. Now after that meeting, the Democrats didn't have a majority; we had a Republican administration. We had a series of different judges who came down. We had one fellow, [Charles] Pickering, from Mississippi; he's [Trent] Lott's friend. He looked like he was going to go right through, but for one reason or another he had to come back because we had a rushed hearing over in the Capitol because of the Senate's schedule. People thought we could just do a quick one and he'd come up.

But it didn't work that way, and we were able to get him back up. And when he came back up, he was extremely arrogant. He thought he was entitled to the nomination, but he was the one who got caught by cross burning. He called the Justice Department to get a reduction in a sentence for people who burn crosses on people's lawns, which wasn't a good idea. John Edwards is the one who did the questioning, and he did a very effective job.

**Young:** Is John with you on most of these?

**Kennedy:** Yes.

**Young:** He's not there any more.

**Kennedy:** No, he's not, but I'll tell you, he was always at the end of the table questioning, and he was by far the best.

**Young:** Really?

**Kennedy:** Yes, by far the best. He was able to draw people out. He has a real knack for doing it. You'd think that people would have muddled topics so badly, and the guy would have answered some things over time, but read back through those records of his questioning.

Then we had Priscilla Owen, who was a hot figure from Texas. In 2003, we lost control of the Senate, and we had Estrada—we had to push back on that. [Terrence W.] Boyle and [Janice] Rogers Brown got stalled. There was a series.

The other theme during this period is how the American Bar Association was intimidated by the right wing, absolutely intimidated. If you look through these controversial nominations, they gave them all almost a blank check. It's so dramatic, all the way up to Mike Greco, who's the recent Chairman. He's actually from Massachusetts, and he's just superb.

**Young:** Was that the conservative movement?

**Kennedy:** The movement got into it, and if you go back to the ABA 20, 25 years ago, they were enormously criticized by the Republicans for the job they were doing. Then the Bar Associations got after these people, got people on the ABA, and they really, for 15 to 20 years, have just been a real disgrace on judicial nominees. I'd have them in and ask them about the people who were really very marginal. I don't think they did their homework well. They didn't really reach out, and they were intimidated by the other people in the Bar Association.

Now they're back, actually, after Greco, who has just retired. He did very interesting work on torture and also on wire-tapping. Greco appointed a panel of national security and Defense Department lawyers, half Republican and half Democrat, and they came in and panned what this President was doing. It was a very interesting unanimous report. That's using that spot over there at the ABA in a very constructive way, to educate lawyers. That's been the other force we've had.

**Young:** So the organized Bar, ABA, went along with the trend?

**Kennedy:** They went along with the trend. Those are the themes and the differences and the changes in the whole confirmation process.

With Roberts and Alito, they're already—I ought to reference that Outlook article here. It's the fall of '06, in the *Washington Post* Outlook section, about the confirmation process. I'm going to give a talk soon about the confirmation process, and it's superb. I have an article already written anticipating how Roberts and Alito are going to come down on the state of Washington civil rights issue.

**Young:** What is the issue?

**Kennedy:** The issue deals with whether parents can voluntarily have their children bused to other places to be able to have an integrated educational experience. The School Board said no, they could not do that. So the question is do they have a right, under the educational interpretations of the Supreme Court, feeling, as parents, that there is value in integrated education, to do it in a positive way. They're going to deny them the opportunity and stop the buses. It's the people who want to do it, and the integrated schools have been very effective out

there. They've had very good results, and the parents want to be able to have busing. Otherwise, they're going to all-white schools. They wanted to be able to do it: it was all voluntary.

It's going to be an interesting decision, because they'll say that *Brown* did not deal with race; it dealt with prejudice, and since this isn't a race issue, we don't have to make these adjustments. I think that's probably where they're going. They had a lot of different kinds of testimony.

I don't know whether you want to talk about Roberts or Alito for a little bit.

**Knott:** Senator, could I ask you a question? You mentioned David Souter in passing a few minutes ago. You opposed the Souter nomination. Was that one that you might have gotten wrong, do you think?

**Kennedy:** Yes.

**Knott:** What was it about him at the time that led you to oppose his nomination?

**Kennedy:** The fact that, as I've just mentioned, I'm going to vote only for people for the Supreme Court if they are going to make affirmative commitments to Constitutional values. If they're going to leave this to be an open issue, or if there's a question about it, then I don't feel that I have a responsibility to support them. This is a life-long job, it's extremely important, and there is too much at risk.

And I don't think he did. If you look through the hearings, you'll see that he gave very good answers in the very beginning of the process, but then as he began to feel that he had more and more of the committee working in his direction, they became vaguer and vaguer. There were nine people in the end who voted in opposition to him, but he's certainly been a very impressive member of the Supreme Court.

**Young:** There was a saying years ago when I was studying politics and Constitutional law. I don't know who said it, but the saying was, "The Supreme Court follows the election returns." Is that what one should take of this recent trend, a well-organized conservative movement, a President after prerogative powers, and the Supreme Court moving to go along with it? Is that the result of all this?

**Kennedy:** I think clearly that's what President Reagan and Meese were intending to accomplish. But another view of the Court would be that we've seen the most extraordinary march for progress in any democracy in the world, at a time when countries are violent about women's rights and they are constantly threatened and intimidated. We've seen, in recent times, the Chinese killing people who are born disabled. You still get these echoes from the Shia and Sunni, problems based on ethnicity, and the results are tragedy, violence, and all the rest. The United States has made progress in all those areas, and not to recognize that progress has been made—and continue it—would be a reflection that somebody doesn't understand history or what this country's about.

Now people will differ with me on that as a political viewpoint, but that's my view. So the idea that we want to go back and re-fight these battles—getting a minimum wage or helping disabled people—is a failure to understand what this country is about. You could say that America is a

living force more than a land. It's an idea, a continuum, and you either understand that or you don't.

Not that everybody's going to accept every particular judgment and decision, but I think that's the mistake. They've clearly tried to move us in a different direction. Anyone who writes Constitutional history understands the failure of the Executive and the Legislative Branch on the issue of race. It was the Fifth Circuit—it was the court system—that moved this country in ways that our Founding Fathers could never imagine. And to discount that, or to move back on it, is a retreat. It's not a victory for the party. They can look at it that way, but it's certainly a philosophical view.

I think the point is have they done it during this period of time, and the answer would be yes. I'm asking whether it's right. Obviously, the answer would be no, because I think no one wants to re-fight these battles. The Republicans don't want to re-fight these battles on the floor of the United States Senate, so why the hell should they give us justices who put us back in there? What the hell is that all about? They don't want to go. No one's for repealing the Voting Rights Act or the Fair Housing Act or the Employment Discrimination Act. So why are we striking those things down in the courts, so we're going to have to do this again in Congress? That's a political debate and discussion.

**Young:** It was back in the '50s that the Supreme Court became the vanguard of the force in the center of a Republican administration.

**Kennedy:** That's it.

**Young:** *Brown vs. Board* and so on. The President wasn't leading on this.

**Kennedy:** No.

**Young:** [Dwight] Eisenhower wasn't. The Congress certainly wasn't.

**Kennedy:** No.

**Young:** And so the Congress came to it at about exactly the time you went to the Senate.

**Kennedy:** But that was an entirely different Republican leadership than the Republican leadership now. That's the party of [Abraham] Lincoln, and we had moderates. We had Republicans who were the party of Lincoln. [Charles] Mathias was, Cliff Case, maybe [Charles] Percy, probably [Jacob] Javits, probably [Mark] Hatfield, maybe [William S.] Cohen.

We had a series of people rooted in that kind of tradition, but that's not what the Republican Party is now. They were reflective because the people they selected to serve on the Fifth Circuit—[John Minor] Wisdom, [Elbert P.] Tuttle—were people who were philosophically tuned in to the Lincoln aspect of Republicanism. But that has long since been abandoned.

**Young:** I remember, back then in the South, everywhere you went, billboards, bumper stickers—everything—said, "Impeach Earl Warren." That was regarded as such a fringe then, but now the sentiment behind it seems to have gotten into high places.

**Kennedy:** One point on Alito and Roberts. There's been a tremendous turnover in the Senate since we had some of these battles. If we had had people who were in the Senate and had gone through the Bork and Thomas battles, I'm not sure that Alito and Roberts would have gotten quite the free ride they got. I think members of the Senate who went through that period of time spent a lot of time thinking about the Supreme Court, and a lot of time thinking about who should serve and what their responsibilities were. We are some distance beyond it, and the Senate has changed very much. And with the very significant turnover, we don't have people in the Senate who have witnessed these kinds of battles. I'm not sure how our Founding Fathers would have thought about that. They're coming at it fresh, and coming at it fresh is not always advantageous. As a matter of fact, it's quite deceptive.

**Young:** Our generation is dying out. We're not.

**Knott:** That's a cheery thought.

**Kennedy:** I've just gone to three funerals in the last week, too. Thanks.

**Young:** There are lots of people now—it's not only the turnover in the Senate. There are a lot more people each time who haven't been witness to, haven't experienced where this all started. They're not aware of what happened and how this movement toward progress got started and the situation then. I think it's hard for many people to get a sense. Alito and Roberts are children of a different generation. They didn't know about any of that. They've come up as conservatives from the Reagan era.

**Kennedy:** Yes, although I think Roberts probably had more insight into that. The basic point is if the public are going to decide on the basis of three or four hours of hearings whether this person is going to make it, and they're going to make judgments and decisions that are going to affect them for a lifetime, it's a matter of very great significance and importance.

And we're not there in terms of doing it. We're not there both in giving focus and attention and dealing with these things institutionally. We have some ideas on how to do that, and I can talk about that at another time.

My sense about Roberts is that he was an indispensable figure in Republican administrations going back to the very early '80s, when we had President Reagan and the Voting Rights Act and the Civil Rights Restoration Act, the solicitor general bringing cases, and all the way through. He had a very cramped view, I think, of civil rights, voting rights, and the role of the solicitor general. He was able to portray that view as being that of the administration and not really his own. And in the course of the hearings I don't think we were able to break that out at all. He just sailed right through. He's a very pleasant person. He's very smart, and he had a lot of allies here, and at Hogan & Hartson, among the Federalists, and otherwise, and he was able to go right on through.

**Knott:** A number of your fellow Democrats supported him. Pat Leahy and Senator Biden, Senator [Hillary] Clinton, Senator [Birch] Bayh. Was it simply the fact that he appeared to be such a reasonable and affable person? What was the key to winning some of the Democratic support he garnered?

**Kennedy:** Well, even [Charles] Schumer and [Richard] Durbin were sympathetic to him. And then they went to Norman Lear's house in California. There were 400 activists out there, and they made a speech that they were going to vote for him, and they ran into a real buzz saw. It was only in the last few days that we were able to get what support we could.

There was a sense that he was replacing Rehnquist. Rehnquist died, he was replacing Rehnquist, Rehnquist was a very hard conservative. Even if he was hard, it didn't appear that he was going to change the mix of the Court, and we should wait until the next one comes down the line. This person is probably going to go on through. There's no sense in getting everybody worked up. The next one will be the key, so let's wait. We're not looking at a replacement for [John Paul] Stevens; we're looking for a replacement for Rehnquist. In people's minds, that was an added factor. They can explain themselves on it.

**Young:** What about Harriet Miers? What does that tell you?

**Kennedy:** That was a sad nomination, a sad circumstance. She was a pleasant enough person, evidently. I never had anything to do with it. She seemed to be a very pleasant person who was way over her head and was thrown into the breach. She was never going to make it, and she was pulled.

**Young:** What about putting her up; were they just very confident?

**Kennedy:** They could push, and they thought they could probably make it with her, I suppose. They had to have thought that, but their miscalculation was part of the arrogance of all the authority and power. She just didn't ever rise to the point of real seriousness, and they got tattooed from all their own people and from others as well. So it never really resonated through there, never really got off the ground at all. It wasn't taken very seriously.

**Young:** Alito was a somewhat different story.

**Kennedy:** [reading] "Bush withdraws Miers, Roberts will succeed O'Connor and submits to being the Chief." That's on the Rehnquist end. This we can see is the case against Roberts' chances. He seemed to be pretty strong, so he wouldn't upset the balance." That, I think, probably tells it.

**Knott:** On page 19 it says that, according to Jim Flug, you considered Roberts to be the worst-case scenario.

**Kennedy:** In what sense? Roberts to replace O'Connor. Well, he's going to be tough to beat: a short paper trail, and he's smart. And he has Democratic allies. That's where we've gone. We've gone from Bork, who had the paper trail, to Roberts who has none, and that's smart. That's the trend line we talked about earlier. That's the danger. I think the most significant observations are those we talked about, the transition with these nominees.

**Young:** There was a little more of a paper trail, wasn't there, on Alito?

**Kennedy:** Yes. There certainly seemed to me to be a fairly incriminating trail on him, but we didn't really get to it. I listened the other day to a good friend of ours, John Douglas, who is Paul



Douglas' son, who was head of the civil division in the Justice Department, a Rhodes Scholar. His wife died, and at the funeral service we heard that she had been the first woman appointed to the governing board of Princeton, and it was during this period of time of CAP [Concerned Alumni of Princeton].

The person who spoke at her funeral was another person on the board, and he talked briefly about how distressing their whole life was because of this organization, CAP. And I said, "If we had ever had this fellow come down here—" because, as you remember, in the course of the hearings, this was all developed because Alito said he joined CAP to persuade Princeton to restore ROTC [Reserve Officers' Training Corps] to the campus. They made the point that CAP was anti-woman, anti-black, anti-disability, and this fellow, Alito, was up to his ears on that part. We never could demonstrate it, couldn't show it. Those books were sanitized; the record was sanitized.

**Young:** I would have testified as an alumnus. I saw that whole thing.

**Kennedy:** From the '70s.

**Young:** Oh, yes, the counter-propaganda, the way they did it. I knew some of the founders of that. It wasn't entirely as represented.

**Knott:** CAP stood for what? Concerned Alumni or—?

**Young:** Concerned Alumni of Princeton. They mounted a campaign, among other things, to stop annual giving to the—

**Kennedy:** "Let's keep Princeton the way Princeton was." That means white male.

**Young:** That's right, and some of the organizers were people whose kids didn't make it to Princeton. They were all for legacy appointments, no more women, none of this. They got up a dummy replica of the *Princeton Alumni Weekly*. It looked just like it, so you'd get it in the mail, and you'd think, what is this? And then you'd see.

**Kennedy:** They were very good. They had this public relations group that handled the swift boats. They had ads. We'll run them and listen to Ted Kennedy or the people of Nebraska.

They went after me for this club called the Owl Club—saying that I was a member, and it didn't let women in. Of course, when I was a member of it they didn't let women in because Harvard was all male until the '70s, and I was long out of there. Then, at the time of my 25th reunion at Harvard, I sent them \$250. I went one other time, after a football game, and I sent them \$100. It's \$450 a year, or you're not a member of it, and that was \$350. I haven't set foot in that place in 20 years. They had me living in that place every day, keeping women out. The Boston press got hold of it and just wouldn't let it go. I admitted I was in it—I sent my letter of resignation in. This is the swift boating, and they got the press to play into it.

My own sense is that there was a trail on Alito that was of great concern. But as I mentioned earlier, what's happened now is the Republicans on that committee all use the time to attack the Democrats. Every two hours there was a line of Republicans outside at the television, just

spinning this thing. After the first two or three days, it was tough; they were going to win it. I spoke strongly about it in the Democratic caucus and mentioned there that I was going to filibuster it.

[John] Kerry spoke there at the same time he joined the filibuster. I dictated someplace—I don't know where the notes are—all of the people who were supporting Alito and who was against it. Kerry came down after the lunch. He went to see [Harry] Reid and said he didn't know whether he was going to filibuster. And then he came down to see me around 4:30 and said, "Is this really the best?" I said they complain all the time about it, but we're going to go ahead, and he said, "I'll keep in touch." The next thing, he went over to Geneva and announced over there that he was going to lead a filibuster. I went in to see Reid the next day, which I think was the end of the week. I've dictated this carefully, so we ought to try to find out where the notes are.

**Young:** There's nothing in the book about Reid?

**Kennedy:** I went and talked to Reid. This was on a Friday, and then I went over a couple of times. Then Reid called me over around 5:00 and said, "We have the agreement now. We'll file the cloture, and you can have all day Monday. We'll vote on cloture, and then if you don't get cloture, we'll vote on him Tuesday, up or down." We had 24 hours, so it didn't look like they were going to run us into the ground.

That gave us the weekend to try to build the case, with the cloture vote on Monday and the vote on Tuesday. I know I've dictated on Alito. This will be important, because this isn't all that long ago and far away. I mentioned who spoke in favor and who spoke against, and then also the conversation with Kerry. I went back to my office at about 5:00, and as I walked in, I saw on CNN Kerry leading the filibuster from Davos. I didn't even know he had gone.

We called people over the weekend. I have the people I thought were going to be with us. I thought [Daniel] Inouye probably would, and then I think we ended up with 24, almost half the caucus. Reid was very worried that we were going to get more than half, and because he hadn't done it, this would reflect on him. So he, quite frankly, was not all that helpful at the very end, which is the interesting part of the discussion. I had Inouye, but I think he turned back, and I lost [Daniel] Akaka with that. We ought to make a note and ask Beth [Hoagland] about that.

**Young:** I read something about the conversation you were having with Reid, telling him it was snatching defeat from the jaws of victory.

**Kennedy:** I spoke to him about it, and I spoke to Inouye about that, too.

**Knott:** It mentions in the briefing materials, Senator, that in certain strategy sessions and preparing for the Alito hearings, Democrats decided not to make a big issue out of Alito's views on abortion, for fear of scaring away moderate Democrats.

**Kennedy:** I don't remember that being really an issue during this. The hot one was the strip-searching of the girl. He was all for police power. He never could find an excuse when the police didn't have it. There were about four or five major cases on this, guaranteeing the police power and authority for strip-searching.

**Young:** There was also a question about recusing himself from a case.

**Kennedy:** He had stock in Vanguard. He had the most cockamamie explanations: the fact that he didn't understand he had a notice. If you go back to what Haynsworth had, Haynsworth had less controversy than this one had: Vanguard and the police.

I have a note in here that on the 16th at the end of the hearings, I went up to Boston and spoke to a big audience at Faneuil Hall. Some of them had been fighting for us all week. We got a standing ovation when we decided to try to block it with a filibuster. What impressed me at that time was the grassroots aspect of it. I had difficulty understanding whether people were really involved in this battle. If we get those notes on Alito, they could be useful.

**Young:** Do you have any personal impressions of Alito, your measure of the man?

**Kennedy:** No. You always think about some of the things that impress you. He hired that person who was in a wheelchair, who worked for him and had difficulty getting in and out. And I remember that person talking to him, and talking to that person. That person made a very compelling point about his genuine concern and compassion and decency. That sort of stuff makes an impact. You're taking straws around here about this kind of thing.

On the one-man, one-vote, he talked about going to bed and hearing his father, who was working on redistricting, ticking, tick, tick, tick, he was trying to work out an even distribution of the population to each district. Of course he wasn't. He was ducking when we asked him about the one-man, one-vote, but he told a story. "At nighttime," he said, "I'd be falling asleep in our little house over there in New Jersey, and I'd hear tick, tick, tick. My father used to work 18 hours a day."

**Knott:** The ticking of the calculator.

**Kennedy:** The calculator. "—and I knew he was trying to work out a fair allocation." But it just didn't—

**Young:** Here again is a self-made man from a modest background, an Italian, who made it into Princeton.

**Kennedy:** That's right, and that always has a ring to it.

**Young:** A couple of days ago, he was at the University of Virginia.

**Kennedy:** He was down there?

**Knott:** His son goes there.

**Young:** He was at Larry Sabato's class. Nobody could enter the class except Larry's people, but it was written up the next day. He talked a little bit about his nomination. It was very bland, but it was pointed. He did say he was exhausted afterwards. He said, "It's all these questions. I had questions from 82 Senators," or something like that. "It was just exhausting. Of course, I was

glad I made it,” he said. “It’s really like murder boards and all that. It’s just like an election.” I wish I had heard the rest of what he was telling the kids. *[laughter]*

Who’s next? What’s the next appointment that’s going to come?

**Kennedy:** One little part that was written up in the newspapers was about Mrs. Alito [Martha Ann Bomgardner] crying during the hearing—that I forced her to cry, which was all just malarkey. I believe I had just left or I had just arrived at the time this was about to happen. I think the writers believe it was Lindsey Graham who asked Alito if he was a bigot, and that did it. But somehow we got painted as asking the question that made her cry. The idea of family members being in there when they’re asking questions is something we ought to give some thought to.

It’s one thing when they arrive down there and you introduce these people. That’s a very proud day. They come in, they make their opening statement, and then it seems to me they ought to excuse the family. These people and the children are down there, and they’re sitting in there for ten hours, squirming. You get a little dolly out there who’s looking up at her daddy, and you’re calling him a son of a gun. It’s unseemly, it’s just unseemly. It shouldn’t happen. That’s just not what that place ought to be about. I suppose the wife wants to sit in, and the rest is fine, but I would really discourage it. This process is very sober, significant, and valued, and this exploitation of it, for whatever side, for whatever purpose, compromises what the Founders wanted us to do. It just doesn’t make sense.

**Young:** Is there any place you sense a growing concern with the kinds of problems you talked about at the Democratic retreat in 2001? The text of the speech you’re going to give, or were going to give, mentions some ideas about how you could get beyond the current situation.

**Kennedy:** Yes.

**Young:** Do you sense there’s any kind of constituency for that, in the legal profession or elsewhere?

**Kennedy:** Probably, if you’re going to do those things I’ve outlined. It’s basically getting more information and getting it earlier. We ought to get all the information on people who have been solicitor general. We’ve gotten it in the past for different nominees. We ought to have that information made available.

And then the issue is about questioning. Shouldn’t we have people in there who can ask these questions, go over these on behalf of the committee? We do that in other committees. The Finance Committee does that, for example. They’ll have three or four experts down there on technical kinds of things, and then they’ll have one of their staff who’s highly competent spending a lot of time on these things. Basically as members of the Senate, we’re generalists. I spend a lot of time on student loan programs and stem cell research. I’m a generalist. In Iraq, we’re spending all the time on a lot of different kinds of issues.

These issues are nuanced, and as we see how nuanced they are by their handling, their answers, which are so nuanced, we have to get into the real meaning of their answers. I remember, we had one on employment discrimination, Title VII of the Civil Rights Act—I think it was ’91, ’92,

*Wards Cove*. We went from substantial to significant to manifest, and when we got to the difference between significant and manifest, half the civil rights groups left, walked out, because we were using that word.

“What the hell was that word?” they said. Well, in these cases, it’s defined this way. Others could find manifest could go that way. How am I supposed to know this? You have to have staff who understand whether those cases are the compelling cases and the overarching issues that are carrying forward. You have to research all those cases. You need professional guidance, and they need professional guidance, and that has to be done in ways that are understandable for people, that the American people understand, not so technical.

So much of the definition of a genius is taking complicated things and simplifying them. I remember going through law school, I couldn’t understand a springing future interest. I asked Steve Breyer one day as we were waiting for the hearing to start. He got a pencil out and a pad, and he drew boxes and used simple words, and hell, I understood the thing. Taking a complex issue and simplifying it is what very gifted minds can do. We need gifted minds that can question and get the nuance.

These nominees have to be prepared. Every one of these current nine talks about every one of these issues. They’re talking about it every time they’re ruling on civil rights, they vote on voting rights, they vote on First Amendment rights. People know what their views are. Why the hell shouldn’t we know the views of the person we’re putting on there? Why is this a “hide the hat” trick? With the Supreme Court, every one of them has voted, and we know where they are now. So why should it be hidden from the American people where Johnny’s going to go and fit in there? Why should that be hidden from them? It shouldn’t be.

**Young:** But they can always say, “I may be on a case on that; I don’t want to talk about it.”

**Kennedy:** But you can’t take that. The other people know how they’re going to vote. They all know how they’re going to vote. They’ve all voted on this.

**Young:** Or at least they know where they’re coming from.

**Kennedy:** The American people are entitled to that, and it seems to me we’re not getting it. You know, if you’re chairman of the Judiciary Committee, that you probably ought to be doing hearings now in preparation for this. Most people think now we probably won’t have it. It won’t get through before the Presidential election.

**Young:** Is Specter any good on this issue?

**Kennedy:** Not really. I think most people feel that if they made a Supreme Court nomination, it probably wouldn’t get through before the next election. It would take into the fall. You’d probably get the hearings out, and that’s what? Several months away? He’s going to make a decision about the Supreme Court? I don’t think the Democrats would approve. We’ve gone, as you know, for long periods of time without nine justices.

**Young:** And even with interim appointees.

**Kennedy:** So they're not doing this, but it sure ought to be on an agenda, just in terms of the Supreme Court.

**Knott:** Thank you.

[BREAK]

**Kennedy:** I have not gone through. He had me be the bad boy in here for a lot. Here's the next day, April 20. *[reading]* "Senate Republicans are tired of the battle to confirm contested judges, indicating that Senator Kennedy ... is set to prevent ... from shaping, is succeeding. Kennedy's unprecedented plan to block" and all that stuff. I don't know if any of this stuff is worth considering.

**Young:** Well, it's testimony—

**Kennedy:** *[reading]* "Considering these politicized views, what Kennedy said when he took the floor five days ago, sounds *disingenuous*."

**Young:** Are they saying you're succeeding in your secret plot?

**Kennedy:** Secret plot. "They also distrust his close, personal relationships with Senator Kennedy." Who's that? Hatch.

**Young:** But at least it shows they have your number and are trying to undo the changes you're trying to get. Do you think it would make an appreciable difference if the next President is a Democrat?

**Kennedy:** Yes.

**Young:** In the restoration of the confirmation process?

**Kennedy:** Well, you certainly hope. I think it would, yes, sure. If you talk to someone like Steve Breyer, he says, "Look, you can't expect that these guys are going to go back to bite the hand that fed them. But if you take Roberts, he's so confident of his own intellectual ability. He thinks he's smart, and he probably is as smart as the other guys. He always thinks he can talk him into—" I think that's what he said.

No question that Breyer's had an influence on [Anthony] Kennedy. I mean big time. The question is, if Bush is gone, then where do these people go? I think you have to expect that they're probably marching in lockstep while he's around. Then where do they go? Most of these other people have all matured over time, for the most part pretty well.

You know, Stevens. They came up to Stevens. I was at the [Gerald] Ford funeral, and the press came up, "Do you consider yourself a conservative?"

“Absolutely,” he said, “absolutely I am.” He didn’t talk about what we’re conserving. But he’s gone. Maybe he was there for Ford, but I don’t think for the last 20 years he’s really thought he’s Ford’s guy. He’s on that Court to make a judgment about things, and he’s made a lot of good decisions and made a big difference.

I’m planning on you all for a little soup, if that’s good for you.

**Knott:** Sure, we’d love some soup.

**Kennedy:** Good. Do you want to take a look and see if there’s any other stuff you want? You can take a look at this stuff here.