



EDWARD M. KENNEDY ORAL HISTORY PROJECT

INTERVIEW WITH JUDITH LICHTMAN

February 21, 2007
Washington, D.C.

Interviewers

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TRANSCRIPT

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Heininger: Why don't you tell us when you first met Edward Kennedy?

Lichtman: Oh, that's a good question. I've known him so long that I'm not absolutely *positive* when we first met. I am going to guess, and it's a pretty intelligent guess, that it was sometime in the very early '70s. What year was he elected?

Knott: Sixty-two.

Lichtman: Sixty-two. It would have been sometime in the very late '60s or very early '70s, when I was working for the U.S. Commission on Civil Rights, and testifying, from time to time, on race discrimination and gender, and the intersection of poverty, race, and gender, or about school desegregation. I'm quite confident I met him in that context, but what year—I can place the years I was working at the Commission, between '69 and '72, but exactly in which of those years I met him, I can't say.

Knott: That's fine. This is not a quiz.

Lichtman: This is not a test.

Knott: Is there a point where you particularly began to work fairly closely with him on certain issues?

Lichtman: It probably was after I came to the Women's Legal Defense Fund. You probably know that in 1998 we changed the name of the Women's Legal Defense Fund to the National Partnership for Women and Families. But we are, for your purposes, the same organization; the extent to which we are different is of no moment to you, I don't think. I came to the then Fund in July of '74, as its first executive director, its first paid staff person, and in that context began to play a leadership role on every piece of women's rights legislation, from then until the time I stepped down in 2004. I know it was somewhere in the mid '70s that my profile and the profile of the organization were heightened. I was its chief spokesperson, its chief lobbyist, if you will.

In that context I had *many* ongoing dealings with the Senator: everything from the pre-1976 failure of the [Gerald] Ford administration—which begins to look very good about now [*laughs*— to enforce civil rights laws, and the Senator using his oversight powers and the appropriations powers to try to get better enforcement; to the struggle to get regulations under

Title IX, which had been passed—Marcia [Greenberger] probably talked about this with you—in 1972, but it wasn't until 1975 that we got regulations.

The struggle to get strong regulations necessitated us exhorting the Congress to, in turn, put pressure on the Ford administration to promulgate those regs. I'll just state the obvious, that without regulations, the passage of a law is just a piece of paper you could plaster the wall with. It has no force and effect; it's meaningless, so getting regulations in the first place, and *strong* regulations, was very important. Senator Kennedy played a very important role early on, in ensuring that we eventually did get those regulations.

Heininger: Did you have much interaction with him over the regulation issue for Title IX, or with his staff? At that point, would you characterize your relationship as staff to staff, you to him, testifying, public forums?

Lichtman: It's a combination. Unlike many other members of either body, there's nothing about him that is hands-off when the issues are important. You may meet on an ongoing and continuous basis with staff, no matter what the issue is, but if it rises to the level of something really important, as either defined by him or you, he quickly involves himself in every aspect of it, which includes sitting down and having strategy sessions about how you're going to make something move. Everybody publicly credits him with being a consummate legislator, which of course he is, but he's also a consummate strategist. He is very activist in the role he's willing to play with the civil rights community over these 30-plus years, in ensuring that our strategies as NGOs [nongovernmental organizations] are not only coincidental, but are strategically developed for what the Senate needs and what he needs to be a successful legislator. That's often meeting with him as well as staff.

Heininger: Can you think of other Senators with whom you have seen that kind of pattern? Have there been any others?

Lichtman: There are, but on a continuum, from one to ten, he's ten-plus, and most others are one-minus. That's not to say they don't exist. They exist, but nothing like his personal professional involvement.

This is a more generic statement about him than a Title IX regs statement, because I don't remember enough about that: Unlike *most* other members, no matter how important our issues are, he will—in addition to the strategic leadership he provides to an issue and to the NGOs—do his homework before an important issue comes before him, like no other member I have ever seen. Your question sparks that important difference. If the matter is important, from a judicial nomination—whether in support of or in opposition to, depending on the administration—to civil rights legislation, you will spend an enormous amount of time at his house—whatever house it is, over here just two blocks up, or in earlier years, in McLean—with a briefing book that he has been given that is this high [*motions*], which he has already devoured. By the time you finish those many hours, or more than one session and many hours, he has crammed and moot-courted himself, so that he knows every nuance of that issue.

He gets it. He gets the law; he gets the strategy; the substance; understands the weak points. I don't know another member who has ever devoted that kind of attention to civil rights issues.

I'm not saying they don't do it in banking or they don't do it in finance or they don't do it in bankruptcy or they don't do it in foreign affairs. I don't know about those issues, but I do know about civil rights writ large and civil rights broadly, and whether or not I've been in the room, I know that other people are there. He doesn't go to a hearing on voting rights or in opposition to a judicial nominee without that kind of extraordinary in-depth attention.

Heininger: How does he handle sessions like these? Does he handle them by sitting back and listening as different advisors and different parties talk things out? Is he a questioner? Is he a "brief me"?

Lichtman: My experience is that he's a combination of "brief me" and a questioner, so that by the time you get to those sessions at the house, he knows a fair amount. He's not using you to tell him what's in that briefing book. He's looked at that briefing book. He's using you to be either a foil or a moot court, or for him to ask *you* the tough questions—because he's not persuaded or he sees the holes in the argument and he's not getting it—and he wants you to give him the best arguments you have. There's an extraordinary amount of give-and-take.

Heininger: This tends not to be a process whereby he's using it as "educate me about this issue; I'm starting from close to ground zero"?

Lichtman: Not starting from ground zero, but there is "educate me, because I'm not understanding this" or "you're not making this point clear," or "I don't like saying it this way; I don't think this works; what do you think about saying it that way?" There's a real conversation taking place that assumes some education of him, because he's assuming you know more about the issue than he does, but it isn't from scratch.

Heininger: It's substantially along in the process, so this is where he's filling holes and gaps, and refining his knowledge and honing his own arguments?

Lichtman: And questioning you about what he believes to be weaknesses in your joint arguments. If you can't persuade him. . . . Maybe as I'm talking to you, the best way to describe it is a moot court going both ways. He's moot-courting us to give him the best arguments we can, and at any given moment, that briefing book might not have done it for him. You are moot-courting him so that he can ask the best damn questions in the best way he can. In addition—I've focused on the challenges in a knowledge base—it's him making sure that, even when he's satisfied that those are the best arguments and he's internalized them, he's doing it right. The moot court goes both ways, but it's rigorous. Generalized platitudes don't work in those meetings. There's nothing airy-fairy about it. You're going to be put through your paces, and you had better know what you're talking about, because by then, he does know what he's talking about.

Heininger: Does he have staff lined up with him, so that you—

Lichtman: The people who put together that briefing book and who are his knowledgeable people are there in the room.

Heininger: Is there any give-and-take between the staff and the non-staff people that he's asking?

Lichtman: Yes. And with him. In that, it's informal—

Heininger: It's like a call for a roundtable?

Lichtman: It's free-floating, informal in that case. It's not some rigid, hierarchical thing, and it's not uncomfortable. It's just tough.

Heininger: And staff don't get defensive over their arguments?

Lichtman: No, no, not at all. No. I haven't done one in a while, but I don't remember coming out saying, "Oh, my God." I can't remember a time, *ever*, with him, where I thought he decimated a staff person in my presence, and I have been in the room with members where I thought, *Ooh, I wouldn't work for this person for five seconds; get me out of here*; and, *If this staff person had an ounce of sense, they'd run for the hills; they should never come into this room again. Never*. That's not to say that he hasn't been furious and blown up at people; I'm sure he has, but he'd never do it in front of us, not in a million years. That's just not his style, not the way he deals with people.

Lindskog: Is this true as a general response to civil rights issues? We've talked on so many issues: economic justice, reproductive rights, voting rights, political rights. Have you noticed any subtle differences, either in how he handles them, whether in a level of passion or a willingness to be out in front on certain issues as opposed to other issues?

Lichtman: The obvious issue that you're alluding to is reproductive rights, where he was a work in progress, and his views evolved. If it wasn't that his views evolved, it was his willingness to be a spokesperson that evolved. We used to joke, behind his back, that his involvement and leadership depended upon the extent to which Rose Kennedy was a player. She and some of the sisters were—

Knott: Eunice [Kennedy Shriver] was very active in pro-life.

Lichtman: His commitment was—He always voted right, but you wouldn't naturally go to him to be an outspoken spokesperson on those issues. That evolved over time. What I'm about to say is not a specific example, because I can't remember one. But for instance, in judicial nominations, in many of those years, if somebody was a nominee—If we had concerns about their position on *Roe v. Wade*, we would go to a different Senator. We wouldn't ask him to take the lead on questioning that. Today, I would go to him in a minute.

Heininger: Did you see a shift on that issue during the [Ronald] Reagan administration, when the issue of abortion started arising on everything that was coming down the pike, so that it was less easy to avoid it, because it was placed on everything?

Lichtman: That's probably somewhat true, although I don't know. The timeframes are a little bit collapsed. *Roe* was decided in '73. That's not that long ago. From '73 to '76, when Jimmy Carter was elected, even Caspar Weinberger, in wearing the hat—because he had many hats—as secretary of then HEW [U.S. Department of Health, Education, and Welfare], thought that Title IX's regulation had to include nondiscrimination based on termination of pregnancy. That's what

he thought *Roe* had just decided. Gerald Ford wasn't pro-choice, but the law had just—The strength of the right-to-lifers grew.

When Jimmy Carter was elected, he was anti-choice. He was a Democrat, but he was anti-choice, so from '76 to '80, we were having real problems with a Democratic administration, and looking to Congress to help us. There were [Henry] Hyde Amendment votes; there were limitations on appropriations on what the Federal Government would pay for, for poor women, with respect to abortion procedures. My recollection is that there was never a time when Ted Kennedy voted wrong, even before '80. I like to remind people, so I might as well remind you, the first pro-choice president was Bill Clinton, because Jimmy Carter wasn't pro-choice.

We were constantly, from almost the time of *Roe*, going to Congress to either stave off some really bad administrative policy, or to oppose some judgeship, and he was always, always, a consistent vote. Your question is well taken, about the *strength* of the anti-choice forces gaining throughout the '80s, but beyond a very bland recollection, I don't think Senator Kennedy played much of a role until the '90s. It's an impression more than an acute recollection.

Heininger: He did have to deal with it on the 1988 Civil Rights Restoration Acts.

Lichtman: He did, and *we* held it up for four years because of the issue of reproductive rights. Indeed, he was *very* unhappy with us for much of the time, always doing exactly the right thing, but wondering out loud to us on more than one occasion as to what were we holding this important piece of legislation up for, and that the overall principle was so big, were we making a strategic mistake. He always *did* the right thing, but I often had the feeling that he thought we were wrong. Ultimately we gave in, because we couldn't sustain it anymore. It took us four years.

Heininger: When did the Medicaid ban on coverage—Did that come in under Carter or was it not until Reagan?

Lichtman: I know the Carter administration defended the ban in the Supreme Court somewhere between '76 and '80. Whether the ban happened before '76, I'm not going to remember.

Heininger: OK. There was a shift, when you went to Weinberger, assuming that the regulations would cover termination of pregnancy too, the ban, then the defense of the ban—OK.

Lichtman: And then the administration realizing that Weinberger had approved the regs. Tried to get the government out of having to enforce the approved regulation. In part, our *Grove City College* legislative fight was about this.

Heininger: Why don't you talk about the *Grove City College* fight? That obviously was a huge one.

Lichtman: It was. I will say, if Marcia Greenberger said I have a good memory, my paean really goes to her, in this set of recollections. We started out wanting legislation that accomplished nothing more than to overturn *Grove City* and to go back to what we lawyers call the status quo. We just wanted it to go back to the way it was before. We had no bigger aspirations. In fact, we lost ground and it took us four years, the legislation resulted in less coverage than before we lost

the Grove City College case. In '88 we lost ground. However, with Kennedy's leadership, the Congress overturned the Reagan veto of the bill.

Because, however weakened the legislation was, it was a lot stronger than allowing the Grove City College decision to stand. Marcia's role after that time was that she said out loud, and to anybody who would listen, "Never again. Never again are we only going to go back to where we were before. We are always going to push for something more, so that when we come out of here, we have pushed the envelope for women's rights and civil rights forward." That's important because of the predicate of the Civil Rights Acts of '90 and '91, and the damages provision, which I assume you're going to get to at some point. It is born out of her stubbornness and her recognition of the terrible strategic error we made in not trying to get more in the *Grove City* legislation—ending up not only where we were before, but having lost ground.

The Civil Rights Restoration Act fight is a masterful example of the smartness of the correct strategy of the other side to divide and conquer. Because as long as the only outstanding issue outstanding was abortion rights, we were vulnerable. Everybody else in this magnificent coalition needed the legislation fix to the *Grove City College* decision, for a whole host of efficacious reasons, and didn't give two whits about abortion rights. It wasn't their issue. If you were NAACP [National Association for the Advancement of Colored People] or the Mexican American Legal Defense [and Education] Fund or if you were the labor unions, with their civil rights might, abortion rights wasn't your issue. It's a wonderful example of the question you asked me a few minutes ago, of attaching anti-abortion amendments to everything, because as long as you did that, you could divide the coalition and, therefore, weaken us.

I can't remember exactly what year George Meany stepped down as president of the AFL-CIO [American Federation of Labor—Congress of Industrial Organizations], but in that world of labor leadership, the most you could expect from labor on issues of reproductive rights was that they would, literally, leave the Hill, so that they wouldn't undermine your position. And you were damned grateful that they had done you that favor "of leaving." Not that anybody had missed that they had left, but they weren't aggressively out there undermining you. Without labor as the big behemoth driving much of the power behind the civil rights movement's legislative efforts—because that was where the financial resources were—the money went to support the grassroots.

We in the women's rights movement were fighting a very lonely battle. As I suggested, we held up the passage of the Civil Rights Restoration Act for four years, then had no choice but to give in. It was much more a matter of succumbing to the pressures of our best friends and colleagues in the civil rights coalition than it was succumbing to Senate pressures. Even though I knew for sure that Senator Kennedy thought this was a ridiculous strategy we were embarked upon, he wasn't pressuring us to give in. It was much more our coalition partners that were looking for ways to overturn the Supreme Court decision and to do it quickly.

Heininger: Did abortion emerge immediately at the time that efforts to try to overturn *Grove City* began? Did that jump right out immediately, or was it one of those things that grew?

Lichtman: I don't think so. It may have been there from the very beginning. My rose-colored glasses may have allowed me to gloss it over in the beginning, but the opposition, in the

beginning, was focused on whether or not civil rights laws would cover entire institutions, and not just the specific entity within the institution that was receiving the federal funds. That was the very subject of the need for the legislative fix in the first place. Our opponents stuck to that position for a while, and it appeared ludicrous, it was a hard public education stance for them to take with moderate Americans, who, (all four of them) paid attention to this fight. *[laughs]*

My recollection is that the fight over abortion issues became much more central over time. We began to hear much more of “What about the nuns?” and “What about Catholic-run schools?” and whether they were going to have to provide abortions for their students, even though it was a matter of conscience. My recollection is that position grew and crescendoed. I remember having conversations with Senator Kennedy about the nuns. He learned a lot about those nuns, but he wasn’t alone. Many Catholic members, many of whom had gone to Catholic-based schools, were hearing from the nuns all the time, some of the nuns who had taught them.

Knott: What were the nuns saying to them?

Lichtman: That if you allow these regulations to stand that require equality of treatment, if you will, because our entire institutions are going to be covered by Title VI and Title IX—If you don’t have some kind of a religious exemption for moral conscience, we’re going to either have to be providing abortions in our health clinics, or we’re going to have to be making referrals, and we’re not going to do either. We’ll have to forsake the federal money. We won’t be able to take federal money. My recollection is they weren’t all higher-ed institutions. A fair number of them were high schools. I remember having this fight with Barbara Mikulski when she was in the House. She wasn’t in the Senate at the time.

Knott: She was concerned about this?

Lichtman: Oh, God. I heard more about the nuns from her than—And she was hearing from the nuns. We knew she was hearing from them, as was Senator Kennedy. Senator Kennedy may have been hearing from his sisters and his mom. Other people can tell you; *he* can tell you if that was the case. I don’t know. *[laughs]*

Heininger: The sense was that the votes were not going to be there to make the simple fix, to apply to the whole institution, which was simply going back to the status quo. Covering only the program receiving federal financial funds is what the Supreme Court held. The votes weren’t there to apply civil rights legal protections to the whole institution.

Lichtman: Right.

Heininger: And as the fight lasted, other issues got brought into it that made it even more complicated?

Lichtman: Yes, but I wouldn’t fix that as a very long point in time. I don’t think it took very long to transition. Those were also the years—going back to your earlier statement about anti-abortion amendments being put everywhere—I remember a piece of legislation that said fetuses were entitled to public housing, in a fair housing law. It got to be ludicrous. What they cared about was establishing the fact that fetuses had a legal right. They couldn’t care less about whether or not there was public housing for poor women who were pregnant. We were having

that conversation in many different places at the same time, as you suggested. I don't have a recollection of it taking two or three years to get to the abortion problem on the Restoration Act.

Heininger: But as you say, there may have been a strategic reason for the opponents to bring it in.

Lichtman: Oh, there's no doubt about it. There's no doubt in my mind that it was, for them, a very good strategy. They held up the legislation for four years as a result, and when we absolutely saw we couldn't win, we gave up. Then we won on the merits. We did indeed, on the merits, sans abortion rights.

A wonderful little footnote to history is, in '88, I was flying to Palm Beach with my two little children to see my family, immediately after we passed the Civil Rights Restoration Act. Senator Kennedy was flying first-class, and we were sitting back with our family. Senator Kennedy came back to the economy class and handed me a signed—which I have—copy of the veto override, with a beautiful note. Well, it was the buzz of this economy class. People were wondering what was he giving me, and I was certainly floored. Clearly, what he was doing on the plane ride was doing what he's famous for, his notes. One of my jokes about Ted Kennedy, but it's true—If you've lost, he immediately calls you and says, "We're going to win next time. Don't be upset, we're going to win." If we win, he calls to thank you, that he couldn't have done it without you. But you always get the call. Here he was, thanking us.

Heininger: But he never told you, in the end, "You have to take this deal because it's the best we can get"?

Lichtman: No. He did that with the Civil Rights Act of '91, to fast-forward, after he'd made the deal, but I don't think either he or I thought that he was saying I had a choice about whether or not to take the deal. [laughs] It was pretty clear he had made the deal, and it was—on a different set of issues, to be sure. But about this, I don't remember him saying, "You have to take the deal." I remember us knowing that we had no choice and that we'd held it up for as long as we could, but I remember the pressures being much more internal within the coalition than I do with him. It's not to say that I haven't forgotten and that he did, but I don't remember it.

Heininger: Let's talk about *Wards Cove* in '90/'91. Tell us about that fight.

Lichtman: My recollections of '90/'91 are much broader—although they included *Wards Cove*—much broader than merely overturning one Supreme Court decision. We had several decisions that were causing an interpretation of civil rights laws that made it difficult and nearly impossible to bring major class action suits challenging discrimination across the protected classes, because so many of the laws tracked Title VI, Title IX, or VII, or the disability or age statute. In '89, the broad civil rights coalition came together to fashion an omnibus statute that would overturn the most pernicious parts of each of these.

My recollection, again, is of Marcia insisting that we include, for the first time, damages for findings of sex discrimination, which we'd never had. It wasn't an issue for the race or national-origin groups, because the old Civil War-era civil rights statutes afforded them damages, but not for the age-discrimination people, not the disability-discrimination protected classes, and certainly not for remedying gender bias. Harking back to the Restoration Act, Marcia said we're

not spending four years trying to get something and losing ground. At least we're going to end up with some greater protections than we had before.

My recollection of Senator Kennedy's role was that he liked that quite a lot. He thought the strategy was a good strategy, and thought it was unfair that victims of proven intentional sex discrimination were not eligible for damages in the same ways that race and national origin victims were.

Many of the fights in '90 were hydra-headed. They certainly included how broad the language would be to overturn the limitations and provide for class action law suits, and what one had to prove to prove intentional discrimination. And what were the "magic words" one had to use to prove intentional discrimination? I've forgotten the words, but I know it was a big source of merriment and joking in the Kennedy world, about us insisting on some set of magic words. It was mostly the litigators, who knew how hard it was to prove intent, looking for ways to maximize their ability to continue to go into court, and who had a set of magic words. Of course right now I can't remember them, but anybody in the Kennedy office can tell you, because they still make fun of us about it. Importantly we fought for damages.

Damages were an issue from the very beginning, but they weren't the only issue. Even into '91, there were people, like Nancy Kassebaum, who were willing to stick with the women's groups around some damages, but wanted a cap on damages. We wanted damages like those that everybody else had in sections 1983/1984 damages provisions. However other protected classes were provided damages is how we wanted victims of sex discrimination to be awarded damages. Of course, the times had changed since the Civil War, and the fight over caps on damages in medical [medical malpractice] had nothing to do with us, but had *everything* to do with us in '90 and into '91.

What was looming as a political backdrop was healthcare reform, so that in '90, Harris Wofford was elected to the Senate using universal healthcare coverage as an issue. It was huge, and was the stalking horse for a great deal of worry by the employer community about added mandates and therefore, added liability. Our opposition is no stronger today than it was in '90 and '91 to damages. All the arguments you hear today and that you heard play out around the Patients' Bill of Rights in the '90s, we saw on this bill. In '90 it foundered on both the damages and on the *substance* of how broad the fix would be, having nothing to do with damages.

In the fall of '91, the nature of the fight for the Civil Rights Act was changed by the backdrop of the Clarence Thomas nomination. For me that is the nadir of Ted Kennedy's ability to be a strong civil rights leader. He'd probably say it himself, I don't know. He and I never talked about it. I don't know that there's anything about my perspective about that that isn't fully aired in the public. I don't have any great insights into his inability to be a leader, other than what all four of us have read ad nauseam about it. Clarence Thomas's successful appointment provided the immediate—not by a day, and I do not believe by 24 hours, literally—reaffirmation of the need to pass the Civil Rights Act of '91.

Whether—I do not know—Bob Dole went to Ted Kennedy or Ted Kennedy went to Bob Dole, they both, for independent and very different reasons, believed that they needed to pass the '91

act. There were elements in our coalition that were willing to take out the damages provision wholesale. Not Senator Kennedy.

Our coalition saw it. This is fixed in my memory, and I don't think Senator Kennedy knows anything about this. He and I have never talked about it. The day I learned that Nina Totenberg knew about somebody named Anita Hill, I was sitting in the anteroom of Nancy Kassebaum's office—which, by coincidence, was very close to Ted Kennedy's office—waiting to request she vote against the Clarence Thomas nomination.

Apparently someone in our coalition had approached her and asked if she would support the Civil Rights Act if they took out the damages provision entirely. She had called me and said she wanted me to know personally that she didn't favor taking damages out completely. She wanted damages in—she wanted them capped—but that she had been approached. She named the person and asked me to come in and talk to her. I was sitting in the anteroom waiting for her to see me when I got a call from Nina Totenberg, asking me why I'd not ever told her about Anita Hill. I may not remember a lot, but that is seared—and the fact that they were inextricably linked is seared—in my memory: Clarence Thomas was confirmed, and the next day Ted Kennedy said he was going to move the Civil Rights Act.

The other part of my memory is that I had just gotten cable TV, and I didn't even exactly understand what this thing called CNN [Cable News Network] was. I literally had just gotten it, and for reasons that I cannot remember, I know that I was home in my kitchen watching this thing. I saw Ted Kennedy and Bob Dole walking down the hall together, and realized, watching television, that they had made a deal. What I can't remember is why I left the Hill. I don't have a good recollection of why was I watching CNN and not in the Senate anteroom. I don't know.

Later that night, Senator Kennedy called me at home and said he had indeed made the deal, which as I visually watched the two guys walking down the hall I'd figured out, that there would be a cap on damages, and that he personally was committed to blowing the cap off of another piece of legislation at another time. He thought it was wrong. He thought we needed this law, and he would make the cap on the damages provision, fixing this terrible problem that he had just agreed to, S. 1 [Senate bill 1], and he'd keep it as S. 1 until we succeeded.

That was about 11:30, 11:35 at night. I know that because about five minutes later, Congresswoman Barbara Kennelly called, who was still in the House of Representatives, and said she had just gotten a call from Ted, and what did I think. I remember saying to her, "He wasn't asking me what I thought. He was telling me that it was a deal, Barbara. I can not like it and you can not like it in the House, but it's going through. This is the way it is, and he's committed to fix it." You all know that it's never been fixed. We did try, the next year or two, to fix it and there was just no fixing it. That's not to say that he wouldn't be perfectly happy leading an effort again if we thought there was a chance.

With the benefit of great hindsight, and not how upset I was that night at him, I think he was taking us all out of our misery. He was taking himself out of his misery with Clarence Thomas and his palpable lack of leadership and the debacle that ensued—Not that he's wholly responsible; he had plenty of cohorts. He wasn't alone in that, but he bears his share of the

responsibility for the debacle—and passing this good civil rights legislation. As Marcia Greenberger had insisted, we got damages for intentional discrimination. We did.

Heininger: I think it was \$300,000?

Lichtman: Yes, that's not nothing. It's not chicken feed. It's not equity. [*laughing*] It wasn't equal, but it was good, and it took Dole off the Clarence Thomas, anti-civil rights, terrible spot that Republicans were in with American women. Of course the "Year of the Woman," in 1992—we didn't know it then, but it was right there. Dole sensed the terrible backlash and came to the table quickly.

Heininger: What was your sense about the fact that in '90 it was Kennedy leading in the bill, then in '91 it shifted to [John] Danforth, and that Danforth was also deeply involved in the Clarence Thomas nomination? What did you see as his relationship with Kennedy?

Lichtman: This might be my myopia at the time, but I thought Kennedy was the linchpin to making the deal. Danforth and Dole couldn't make that deal by themselves. They needed Kennedy to bless it, and he was clear about his power in that situation. If what you're asking me is what do I make of the two of them coming together, I think at the time, with the benefit of hindsight, it was no more remarkable than Kennedy crossing the aisle and working with [Orrin] Hatch on a bunch of different things, all the time. I saw it as Kennedy-Dole. Maybe that's wrong, but that's where I saw the power relationships.

Heininger: But you didn't see, at the time, that when the bill came back in '91 with Danforth in the lead, that it was a signal that you were going to eventually lose, that a deal was going to be cut that was not going to be to your liking?

Lichtman: No, because I still had some naive hope I was going to get Nancy Kassebaum. I was getting her on things. I thought I was going to get her here, too. And I didn't get her on Clarence Thomas, that was how naive I was. I was sure I was going to do that.

Heininger: Let's talk a little bit more about Clarence Thomas. What was your sense about Kennedy's reaction to that nomination, and what were the difficulties that that nomination posed for Democrats in general, both before Anita Hill and after Anita Hill?

Lichtman: Let's talk about before Anita Hill, because I think that's easier for Kennedy. That nomination—before Anita Hill—is a monument to how you can't win a nomination on the merits of a nominee's positions. The conversation, we in the civil rights community continue to want to have, with the American people, through [John] Roberts and [Samuel] Alito confirmation battles, is about why X nominee won't hold up the standards of basic civil rights and civil liberties. The conversation isn't one that the Senators can have with the American people, under the structure of a Judiciary Committee nominations fight, with the exception, of course, of Robert Bork.

Robert Bork's nomination gave us, in the civil rights community, hope about having that conversation with the American people that we couldn't sustain going forward. I say this as the worst offender. I keep thinking I'm going to have this conversation. I don't learn from my mistakes. I keep trying to have this conversation, then the Senators can't have the conversation I

want them to have—they can't lead it—then I get pissed all over again. I don't learn from my mistakes, so I'm not indicting somebody else in the civil rights community.

Heininger: Are you saying that you think nominations can't be fought if the only liability for it to be based on is judicial philosophy? It takes more than judicial philosophy?

Lichtman: On the substance of their record, whether it's philosophical or substantive. For instance, with Clarence Thomas, it wasn't just philosophical; there was a record. His supporters kept saying we didn't know him, but indeed, we knew him very well. He had an exquisite record that laid out where he was on the merits, on the substance, on very many issues and indeed, the Women's Legal Defense Fund opposed him and testified. I testified in opposition on the merits.

It's *having* that merits discussion. I include judicial philosophy, but I don't want to only pin it on judicial philosophy. I want to make it a broader indictment. Senators are miscast as people who can reveal the problems with the nominees' records in a way that the American people can understand and can build some energy or make it a priority for American voters. Both they're miscast and the forum is wrong. It is not geared to get the American people to understand what's going on and why it should matter to them, why should they care.

I don't think Senator Kennedy, pre-Anita Hill, was different from [Howard] Metzenbaum or Howell Heflin or [Joseph] Biden or [Patrick] Leahy. I don't think he was worse, but I don't think he was better. Having recently come off of the Robert Bork nomination, where we did have that conversation on the merits—It wasn't only philosophy, but was what Bork had said and written about constitutional protections, that even Howell Heflin was able to reveal, but—Senator Kennedy did a fabulous job with Bork. It made us heady in a way that has led to future mistakes by the coalition. I don't think it's for lack of Kennedy preparation or lack of him understanding what the nominee has said or stood for that makes him and his other colleagues failures at having that conversation that I so yearn for.

Knott: Is it that the other side had learned more from Bork than you did, perhaps?

Lichtman: They certainly learned more about how to prepare their nominees not to respond anymore, because I can't think of a Supreme Court nominee since—and there haven't been that many—since Bork, who have talked openly about their views on the merits. They just don't do that anymore. They say, "Oh, I'm sorry. I can't discuss that; that could come before me."

Heininger: But there have been some that have been withdrawn. With [Douglas] Ginsburg, it was a toke of marijuana. With [Harriet] Miers, it was a whole other can of worms. What you're saying is that Senators, including Kennedy, are not able to sell deficiency in merit, whether it's judicial philosophy or temperament or something? That Bork was an unusual constellation, and that they're unable to sell it to the American public?

Lichtman: Yes, but I'm saying two things. That is what I mean, but as well I mean they are *unable* to do it, that there is a problem with the forum, even if they were the *best* prosecutors. Some of them once were, not Kennedy, but Leahy and [Richard] Durbin were good prosecutors. It is that they're not able to; there's something wrong with the medium, with the way this is structured, which in a sense goes to your point about them learning faster than I have. I don't know.

Knott: Well, I didn't mean it that way.

Lichtman: No, no. I know you didn't, but *I'm* saying, since I know. I keep yearning for this conversation that's not going to take place. Somebody should hit me over the head and say, "You're a slow learner."

Heininger: But you also got a David Souter, who came along and Kennedy opposed, because of a variety of opinions that Souter had issued when he was in New Hampshire.

Lichtman: But mostly for being an unknown.

Heininger: True, but he did pinpoint certain specific things.

Lichtman: A few things, yes.

Heininger: Then Souter turned out to be quite a surprise.

Lichtman: Right.

Heininger: In a direction that Kennedy, you might say, would approve.

Lichtman: Absolutely. As an organization that opposed Souter—I have the scars to prove my idiocy about that—I think the civil rights groups wanted Kennedy to oppose. I don't remember the give-and-take with Kennedy about Souter. I remember the internal wrangling of opposing, but much of it was based on a belief that they wouldn't make a mistake, that they knew what they were doing. Because there wasn't much of a record—there was a little bit of a record, but there wasn't much—the absence of a record meant that they could be sure about how bad somebody was going to be on all our issues. Our opposition was based more on that.

[BREAK]

Heininger: With Souter, you'd say it was a perception within the coalition, maybe shared by Kennedy, that they wouldn't have nominated David Souter if they hadn't felt that he was in their camp. He being perceived as being a [John] Sununu nominee, when in fact he was really a [Warren] Rudman nominee, which confused the issue, because people perceived him—if he had been more clearly identified as a Rudman nominee, there might have been less confusion about where Souter might end up?

Lichtman: Yes, but the absence of information at that point would have taken some of us to oppose. There was a great deal of internal wrangling within the civil rights coalition, about whether to oppose or not. My recollection is that not everybody did. There was another dynamic going on, and your Sununu/Rudman way of characterizing this is quite apt. There were any number of private blandishments from Rudman New Hampshire Republicans, telling us, "This is really a good guy; back off." This is so far the best you're going to get, just back off, and we

were scared, many of us. There was a lot going on behind the scenes to make us back off, from people who were credible to us, but we were too nervous.

Heininger: And credible to Kennedy, yet he still took him on?

Lichtman: Right.

Heininger: Why don't we back up to Bork for a minute? Talk a little bit about the process by which a coalition came together to oppose Bork, how it interacted with Kennedy and Kennedy's staff, and how it operated internally.

Lichtman: You are testing my memory, except for the broadest generalizations. [*laughs*] The coming together was not difficult, because Bork had such an expansive written and spoken record about issues that crosscut the broad coalition, that it might—I don't remember a great deal of internal dissention in our coming together. Your question is a good question about civil rights issues and nominations, including Bork, but more broadly, Kennedy is almost always our go-to guy, first. Today's Judiciary Committee looks very different from the Judiciary Committee of '87.

Heininger: Democrats had just taken over.

Lichtman: They'd just come back.

Heininger: Or had just come back in '87.

Lichtman: But it was, as I remember, Metzenbaum, Leahy, Howell Heflin.

Knott: Biden.

Lichtman: Biden as the chair?

Knott: Yes.

Lichtman: It wasn't [Charles E.] Schumer and Durbin, let alone [Herb] Kohl and Dianne Feinstein. In *that* Judiciary Committee, that is where we would go—to Kennedy first on civil rights, because if he wasn't with you, there was no point in going to Metzenbaum, who would be your next person, or Leahy, God love him, who is a wonderful and decent guy, but not a fighter. If there were controversy, he didn't like it much. He'd do the right thing, but he wasn't going to lead a controversial fight, and Kennedy would. If you didn't have Kennedy, then not much was going on in that Judiciary Committee.

Even in today's Judiciary Committee, you'd go to Kennedy first. If you didn't, the Chief Counsel for the Judiciary would be calling you to come in right quick to hear what do you know, what do you think, what are you hearing; this is what we're hearing. If you didn't make the first call, you'd get a very early call from Kennedy. I'm begging your question slightly, but it isn't because I can't remember who called who, that's for sure, but it would have been very early on that we went to him; that is what we would do. If we wanted to do the Civil Rights Restoration Act in 1984, we'd go to Kennedy first and see what he thought. His staff would help us navigate both

the legislative language and the Congressional Research Service or whatever, or the people who would be helping us draft.

Lindskog: Just to be clear, you're making two points, I think. You go to him because he's the most logical source. Then you seem to be making another point, that if you didn't go to him first, there would be questions asked?

Lichtman: Well, no. I'm saying something much more fundamentally strategic, which is, if you didn't have him, there would be no point in mounting the fight. If you couldn't convince him that this was something worth doing, it wasn't worth it, so he would be your first leader. Marcia may have said this to you, because she loves saying it. I repeat it and always try to attribute it to her—and it's directly to my point—she can conceive of doing her job with anybody in the White House. She cannot conceive of doing her job without Ted Kennedy in the Senate. She may not have said that today.

Knott: She did not.

Lichtman: But she should have. They're her words. Call her up and get her to say—

Knott: We're not supposed to be telling other interviewees what they said. [*laughter*]

Lichtman: All right, but she left out a very important thing that she always says.

Knott: That's a great line.

Lichtman: Because it's true, which is why I repeated it.

Heininger: He had better not age.

Lichtman: That's right, and that's why we want him to stay thinner, although at the moment he seems to be in better shape. He's doing better, that's my sense. I can see from his face; it's a little better.

Heininger: How did abortion not emerge as the key argument against Bork?

Lichtman: There were so many outrageous things, including abortion. Everything from restrictive covenants—Did you know too many people in 1987 who thought that the Supreme Court case that said restrictive covenants on real estate were unconstitutional was wrongly decided? He said it and he was proud of it. You had so many things that you could turn to that exposed the extremism of him. I called Hillary Clinton to see if we could get the then Governor to testify against Bork. He said he'd do it, and came to town and testified because he could say, "I'm a child of the South; I remember segregation, and this guy wants to turn back the clock." He could say it with passion and verve—he was a fabulous witness—because there was *so* much out there. Bork really was an extremist. The wisdom is that Bork sunk himself because he needed to smoke and whatever. That's probably true. Who knows? But I get that he is not a hail fellow well met. I imagine he wasn't. He insulted Howell Heflin; that's pretty stupid.

Knott: Well, he was asked that softball question about why he wanted to be on the Supreme Court, and said, “It would be a great intellectual feast.” That reinforced that image of somebody who was cold and detached.

Lichtman: Yes.

Heininger: Although of course it would be.

Lichtman: Right, especially for him. So . . . we had abortion out there. There probably were fights within the coalition to get us to lead on other issues, rather than to go out big-time on reproductive rights, but those were fights around keeping the coalition together, around groups that had no position on choice, rather than, as I remember it, a strategy of losing members on choice. There were fights that we should try to stick with, things for which the coalition could stick together, and for which there would be a broad public consensus.

What I can’t remember, in keeping with your question and going to my recollection about Bill Clinton, is whether or not he included reproductive health in his statement, or if he stuck to race and national origin. I can’t remember, but that would be very telling. I didn’t write it, but I know I had a hand in it. It’s probably in his papers; it’s probably at the [William J. Clinton Presidential] Library. It would be interesting to know if he even had an aside to it; my guess is he did, about overturning *Roe v. Wade*.

The Bork nomination revealed that the American people had come much further than what was probably a rather cynical view of Bork’s record. He clearly had more than the intellectual heft that you would need, so people cared less about what one might call judicial philosophy or his positions on the merits, because they just thought he was so well qualified they were going to get him through.

One of the interesting things for me, and it never ceases to interest me—and it goes to your question about whether they learned faster than we did—is that the conservatives take that victory by us as the “great divide,” and for us it’s much less important, not because we didn’t see it as a great victory; we did. We understood what we had won, but it was just another in the line of conservatives trying to roll back civil rights. What was so shocking to the conservatives is that we won. For us, our joy in that was significantly tempered by the fights that quickly came after. I’ve never noticed an awful lot of reveling in the victory, as much as they think it was such a momentous thing. I don’t think we all think it was such a momentous thing.

Heininger: Why do you think the civil rights supporters won on Bork? Did you win from going to the public, or did you win through persuading individual Senators of the extremism of his views?

Lichtman: They’re inextricably linked. There was a very sophisticated grassroots effort, the first time I can think of where the civil rights community put real resources into a grassroots strategy on judicial nominations; Senator Kennedy and Senator Metzenbaum were very involved in that strategy. When I talked before about meeting with him, we met about strategy; we met about what we were doing in what states, and who needed to be heard from and what were the black groups doing in Alabama. That was a question I know Ted Kennedy asked.

Heininger: So they felt that that was an important component—

Lichtman: Definitely.

Heininger: —that would solidify their efforts within the Senate, that they needed that? Did Kennedy not see that, with Roberts or Alito? Had that become less important?

Lichtman: No. Everybody saw it with both those nominations, and it was much, much harder to pull off, but not because Kennedy, at least, didn't see it. He did see it, for sure.

Is it useful to you for me to go back to post-Anita Hill? To do that speaks directly to your general question about defeating a nominee on what I call the merits.

I knew about Anita Hill before it became public, but after I testified on Clarence Thomas' record. I testified on day one. It wasn't day one of the hearings, but whatever day that was, I heard about her for the first time late the next night. What I was asked that night, by a lawyer who was holding herself out to represent her—and in some ways she was, somebody I knew—was whether her testimony and those terrible allegations could be taken in executive session, so that she would not have to come forward publicly. There was not yet an FBI [Federal Bureau of Investigations] memorandum, and there was not yet an interview by the FBI. It was before that, and I assured this lawyer that that was impossible.

Knott: Impossible?

Lichtman: Impossible. If she were going to come forward, she would have to come forward in a public way, and she would have to take into consideration that it would be in public. There was no way the Senate Judiciary Committee was either going to take an anonymous allegation or do it in executive session. For a good long time, probably what seemed like an eternity but wasn't quite so long, she vacillated between being willing to come forward and unwilling to do that, until she was eventually outed by [Timothy] Phelps and Nina the next day.

For Kennedy and the Democrats, the problem was acute. They didn't know who this woman was; they had no idea about her credibility; and they were not quick to embrace somebody they didn't know, who came with no portfolio that they could think of that vouchsafed her allegations. They were just scared to do anything. The Republicans only had one mission—it was simple—and that was to discredit her. It was *easy* for them.

The allegations against Senator Kennedy's nephew, which implicated Senator Kennedy, as this was going on, in my personal view, were acute in making it difficult for him to take on the kind of leadership you would have to take on for a white Senator to take on a black man, even Ted Kennedy, or for him to embrace this woman, who was alleging the most graphic—Now it sort of seems amusing, but it wasn't in '91—the most graphic of sexual harassment allegations. Now they don't seem to me to be so horrible, but seemed horrible at the time. There was nobody else on the committee who would do it, or who had his power with the American people on race who could do it. He wasn't there for us, and there wasn't another soul who wanted to be there or who thought they could be there.

Eventually, there was a memorandum in the FBI's signed affidavit, and Senator Biden, as chair, received it. When I exhorted other members—not Kennedy, Metzenbaum—to get it and to get it circulated to other members, Metzenbaum refused. Biden was sitting on this memo and wouldn't circulate it. He eventually showed it to a few people. She had nobody there who was going to even ask him really tough questions. [Arlen] Specter, who was willing to play a maverick role on Bork, was unwilling to do it on Clarence Thomas, and Kennedy wasn't up to the task.

My recollection is that viscerally and visually, he was getting smaller and smaller in his chair, that he was just sinking into this chair and getting smaller, and he's not a little man.

Heininger: What was the newspaper description? That he was sitting out like a potted plant?

Lichtman: Yes. There was that awful *Saturday Night Live* thing, which, if it didn't hurt so much, you could laugh at, but he was becoming a little shriveled man in his seat; a "potted plant" was generous. If you felt kindly toward him, which I did, you could say, "Well, he just couldn't do it," but in a less-nice moment, you're pissed beyond belief.

Heininger: Did you have a sense that Jack Danforth's role as sponsor of Clarence Thomas was a factor in this?

Lichtman: He was a consummate politician within the Senate. He was very good at his job. He wore his very conservative positions on the merits with the façade of great moderation, and was, therefore, very effective at either moving forward his agenda, whether it was the Civil Rights Restoration Act or whatever it was, or Clarence Thomas. He was a really good pol[itician] and was well liked in the club, so I think it did. He lent his credibility and his mantle to a guy who didn't deserve it, and the guy inherited it and wore it. Danforth is a very smart man. The notion that he thought this guy was qualified for this job—forget Anita Hill, just that he was *qualified*—is ludicrous. It's just that he knows the guy is not up to the task, but he had mentored him and he had worked for him in the State AG's [Attorney General's] office. He may have even worked for Ralston Purina. I can't remember, but he may have had a corporate job or something.

Heininger: [Indecipherable]

Lichtman: Monsanto. It was one of those corporate—And he *liked* him. On Danforth's part, he believed what he was saying, and I'm sure he believed that he was incapable, once Anita Hill became public, of these dastardly allegations. I'm sure he believed that, which made him even more effective, because he wasn't just marketing this guy; he believed in him. All of that further undermined the ability of the Democrats to be strong.

I don't think for a second that we should underestimate the race card; not only the one *he* played, but the whole pinpoint strategy. Getting black groups to come out was very difficult. They eventually did, but the internal wrangling over whether or not to oppose a black man was quite painful and acute. Splits within the black community also slowed down the ability of the coalition to be effective in mounting a grassroots effort. It was a very complicated grassroots effort, as compared to Bork, where we were together.

Heininger: Were there splits within the coalition?

Lichtman: There weren't ones that surfaced publicly. There was inaction and inability to move, as opposed to saying, "We support him," but as pernicious—or almost as pernicious.

Heininger: It was a tough time.

Lichtman: It was a tough time. The Pollyanna in me sees the '91 act and the '92 Year of the Woman as direct results of those bad times. Something good came from those very bad times. There isn't going to be a Judiciary Committee again, ever, that doesn't have a woman on it. The potted plants and *Saturday Night Live*—that's never going to happen again, ever.

Heininger: We have a couple of other big issues we'd like to go over with you. One of them is the Family and Medical Leave Act, and the HIPAA Act [Health Insurance Portability and Accountability Act] that you worked on with both Kennedy and Kassebaum. Do you want to start with Family and Medical Leave or HIPAA?

Lichtman: Well, Family and Medical Leave probably comes first.

Heininger: It does, chronologically. On my list it does.

Lichtman: My lousy memory, at least I do remember that. I also remember more about Family and Medical Leave than I do about HIPAA, so I was self-indulgent.

The Family and Medical Leave Act took much too long to pass—nine years from drafting to signing, which is pretty terrible. For many of those years, Kennedy, who was a very good friend of Chris Dodd's, had allowed, for lack of a better word, Chris Dodd to take the lead. He was our champion, as Dodd is on a lot of childcare legislation. Kennedy was always ready to do the right thing and help Chris and hold the right hearings, and do whatever it was Chris wanted, but most of the negotiations around us trying to change the substance of the law enough to get enough Republicans to pass it, to get more bipartisan support, happened with Chris rather than Senator Kennedy—with him knowing it and being behind it, but not necessarily with his leadership.

Heininger: Because Dodd was more passionate about it or because Kennedy often will allow other people to take credit or take the lead on things? Why was it Dodd's bill?

Lichtman: What you're really asking me is why did we go to Dodd and not Kennedy, on day one? I think Dodd had whatever was the right subcommittee. I think that's what made us go there, or because of his leadership on childcare. I don't remember, and I would think I would always go to Kennedy first. What I can't remember is why did I go to Dodd? There must have been some substantive reason for doing that, because in '84, we didn't control the Senate. I can't remember whether Kennedy was ranking on what is now HELP [Health, Education, Labor, & Pensions], or was he ranking on Judiciary in '84?

Knott: It should have been HELP.

Heininger: It was HELP, at that point. He had just had two years on Judiciary, but I think he had just gone back to ranking on HELP.

Lichtman: He'd gone back to HELP?

Heininger: I think so, yes.

Lichtman: That's not the answer, that he wasn't ranking. I know we were in the minority when we went to Dodd.

Heininger: Well, it may have been Dodd's subcommittee, too.

Lichtman: Yes. My recollection is that it was Dodd's subcommittee.

Heininger: I can't remember the composition of subcommittees, whether there was specifically a children one.

Lichtman: I want to say children, youth, and family, but it wasn't called exactly that. But clearly, he was the go-to guy on childcare and Kennedy wasn't. Not that he didn't care, but everybody had different issues, and Kennedy would, more often than not, do the labor issues. This was sometimes labor, sometimes family, and it was pretty revolutionary. I could ask some of my dear friends and colleagues why we went to Dodd and they might remember, but I honestly don't, except I'm sure we did.

It wasn't that Kennedy gave it to him, as much as we went to Dodd. That I know. As we were wending our various ways in and out of Congresses, and compromising on the bill, all in the service of trying to get Republicans and bipartisan support, we were doing it in both Houses. We made some major compromises. We started out—This was a Kennedy conversation, I remember. He wanted us to start out with covering 15 or more employees, because he thought we were going to have to compromise at some point, and didn't want us to begin too high.

Heininger: Like 50.

Lichtman: Like 50, right. We went to 25 over the years, then we went to 50. We had some ludicrous number of weeks. It was like 24 weeks in a year.

I remember Kennedy saying that 15 was a good number because it was the Title VII number, 15 or more employees for Title VII. That was a good way to begin. We went to 25, we went to 50, we went down to 12 weeks. We narrowed the definition of "serious health condition" so it couldn't be a common cold; it had to be a serious health condition. It wasn't sick leave.

Dodd did most of those negotiations, and brought on [Christopher S.] Kit Bond, not Kennedy. As we got closer to 1990—and my harking back to the Harris Wofford race—it became clear that on a political agenda soon, there was going to be a mandated health benefit. Our Family and Medical Leave legislation was, in a sense, a hostage to those times, because the last thing the employer community—many of whom were providing much better leave than our law required—could take was a mandate. They could not take the idea of required family and medical leave because they saw it as a stalking horse to health benefits, and they were quite explicit about it.

The closer we got to '90 and the mandate battle, the more active Senator Kennedy got in that discussion. I'm not sure I remember why exactly, but I remember a more active participation by him. As we began to pass it—We passed it twice out of both Houses, and both times, George [H.

W.] Bush, the father, vetoed it, the second time on the eve of the '92 election—Kennedy began to play, again, a more aggressive role in trying to negotiate a compromise with the White House. That is such a quintessential Kennedy role. He didn't cut out Dodd, but he was more of a team player, a *leadership* team player, in trying to get the White House to get George Bush to sign this, trying to get corporations to give the White House the go-ahead. He, I believe, became convinced, as we got into '90/'91, and certainly into '92, that they were never going to give George Bush a pass on this to sign it.

For many of those '80s years, we couldn't get—[Walter] Mondale was a candidate in '84, although I can't remember trying very hard, but I know that we didn't. For sure I tried hard with [Michael] Dukakis to use it as an issue. We were just beginning to be a little bit sophisticated about gender gaps, just beginning—I don't want to oversell my case—and family issues being a good women's vote issue, and Dukakis would have none of that.

Heininger: Even with Susan Estrich there?

Lichtman: None of it. Susan Estrich and I have been good friends. We fought over this: This was communism; it was ludicrous; it was the kiss of death. She didn't use those words, though, that's not true, but—

Heininger: Did she believe that?

Lichtman: She thought it was the kiss of death. She thought it was a killer, and it was a mandate, and mandates were bad things, and her guy wasn't going to come out—It was too anti-business and it was going to hurt the economy. But Kennedy saw it more and more as a winning political issue. He embraced it more and more.

Heininger: Wasn't public opinion shifting in this period, too, in favor of it?

Lichtman: We were beginning to be sophisticated enough to mount a good public education campaign, so the public began to be aware of it. In those mid-'80s years, nobody had ever heard of it.

Senator Kennedy once said to me—I take it back. I will tell the story, but it wasn't about this; I'm mistaken. It was about the Civil Rights Restoration Act. He said, "How come I go home to Massachusetts every weekend and nobody has once said to me, 'I need you to pass the Civil Rights Restoration Act'?" Of course that was true, and that was his way of saying that we had built no support for this thing, that he was killing himself, doing nothing else but that. He repeated a variant of that around what kind of intentional discrimination had to be proven before you can prove your case on the '90/'91 act. He didn't say it around the Family and Medical Leave Act, but the truth is, it was a closely held secret. We did it, for many of those years, as an inside strategy, because we didn't know better, and we didn't have the resources. We were doing it out of this little C3, with labor support and AARP support.

My second point is, if people knew about it at all, they thought it was some labor mandate. But if you think about it, it is a family issue and a women's issue, and it took us a long time to get it out there as that, if ever, until it was passed. I sound a little bit—wearing this pin, listening to myself—

Knott: Your Hillary [Clinton] pin.

Lichtman: My Hillary pin. I sound, more than I care to, in what I'm going to say now, like a Clinton partisan, but it took Bill Clinton embracing it in the '92 campaign to *really* make it a women's issue, because until we could join issue politically—what I'm for and they're against—it was hard to get much public traction. We were helped by George Bush having vetoed it in the fall of '92, and we were also helped by Al Gore's son being hurt, and his being willing to go to the well of the Senate and talk about those experiences. We were helped in the House—and this was a strategy we developed, and Senator Kennedy used it as well in the Senate—by people using the Gore type of line, telling their own personal health stories, mostly family, and why they needed family leave. That made it a kitchen table, water cooler type of issue. People began to get what this thing was about, and that it could make a difference to their family.

Heininger: It wasn't just pregnancy/childbirth leave?

Lichtman: That's right.

Heininger: Were there comparisons being made to the benefits that were being offered most of the rest of the world, particularly Western Europe?

Lichtman: There were.

Heininger: Was that an argument that was sold?

Lichtman: It was an argument that we used, and it was not an argument that worked with members. They viewed it—

Heininger: Did it work with the public?

Lichtman: Not so much. People thought either that they were going through their own private hells, it was their business to fix their problems, no sense in collective action, in coming together and getting this protection, or they didn't think employers were going to provide it. They were pretty pessimistic about whether or not it was possible. What motivated people the most was the energy by the labor unions organizing people and telling stories, and using some of *their* resources to allow us to do grassroots organizing around not only taking leave for childbirth and newly adopted kids, but for your own serious health condition and for the care of your spouse and your parents. The strength of the broad coalition that included the disability groups and the AARP [American Association of Retired Persons], the lobbyist for the senior community, was it kept our coalition honest, so that we were not, as a coalition, going to compromise and do a mummies-only pregnancy bill, because to do that, we would have had to sacrifice our coalition partners.

Heininger: Was the fact that this timeframe overlapped with ADA [Americans with Disabilities Act] beneficial, in terms of strategy?

Lichtman: No, it was painful, because it got introduced, George Bush supported it, and in what—a year, 18 months—they had a bill and we were still toiling in the vineyards. I have a grown-up daughter now, who's 35, but she was in high school, working first for Tony Coelho in

the House on ADA, then she went to work for Senator Kennedy as a college intern. What does she know? She passes a bill! Not literally. She thought that's the way you do it, while her mother is. . . . [laughs] Two summers, and she's at the White House for the signing of the ADA. Two summers of work, and there's her mom . . . so it didn't help.

It didn't help with George Bush because he'd done ADA, so he'd done it. Many employers were not happy about reasonable accommodations and what he had just signed. They were not happy, so he wasn't going to do another one.

Heininger: You had a President not disposed because he's done enough. You had members who said, "We've done that." You had business, which said, "Yes, but you're making us do all this stuff for the disabled; now you want us to let people who have sick parents or spouses or childbirth go, too?"

Lichtman: And, "If you do this, the next thing you're going to tell me is I have to provide healthcare for everybody."

Heininger: That was the big bugaboo looming in the closet?

Lichtman: That's right. When I spoke a few minutes ago about the compromises we made, what we learned was that it didn't matter what we compromised, because you could go up to 100 employees; you could go down to three weeks; and it wasn't going to bring over the President or enough Republicans to override a Presidential veto. The reason was the mandate. They could not abide the *requirement* of family leave, and that was the one thing we couldn't compromise on. All that stuff that we did to get Republicans, in the end, didn't make a difference.

Heininger: Did you have Kennedy, at any point, telling you to prioritize, or that the time was not right?

Lichtman: Never. He liked it, and I think he liked it for political reasons. He thought it was a good labor/women's/families issue. There was an apple-pie-and-motherhood quality to it that he rather enjoyed. The proof is in '96, in the Dole/Clinton campaign. For reasons that I cannot fathom, Dole, more than once, many times, said he wanted to repeal Family and Medical Leave. Ann Lewis, who was then the communications director of the Clinton campaign, said, "A day without Family Leave was a day without sunshine," because every day that Dole would say he wanted to repeal it, Clinton's numbers would go up. [laughs] She loved it. What was he thinking? I don't know. It became popular very quickly, from '93 to '96.

Heininger: Whereas Dole, then, continues to take credit for ADA?

Lichtman: Right.

Heininger: Which is also a mandate.

Lichtman: Right. It was his mandate. It was something that he cared about, but not *this* mandate. I don't think I can overstate the fact that this mandate, unlike ADA—but I don't know why that's the case—was seen as the stalking horse for healthcare.

Heininger: Because childbirth is paid for by health insurance; disabilities often aren't.

Lichtman: It may have also been sort of gilding the lily. They had already done that mandate, and how many are you going to do? It will get to be too easy to do all these mandates. You do two in this many years, well why not?

Heininger: We'll skip over the healthcare reform effort in '93/'94—

Lichtman: That's good.

Heininger: There's a lot there, but—to talk about HIPAA, which in fact was enacted. Why don't you talk to us a little bit about that, because that was a slightly different—

Knott: Just for the transcriber, we should say what HIPAA stands for.

Heininger: Health Insurance Portability and Accountability Act.

Lichtman: That's good. I forgot the accountability part.

Heininger: It's the accountability part that counts.

Lichtman: Right. We, at the partnership, had a very narrow and clearly defined piece of HIPAA. Maybe there were two pieces. One was the privacy part of it; the second, related to the privacy, was the prohibition against discrimination based on genetic information in the group health market, which was a sleeper; nobody was paying any attention. Indeed, when my then staff person came to me and said she was going to get this little sentence inserted that said you couldn't discriminate against anybody in the group market based on their genetic information, I said, "That's ridiculous. The insurance companies are never going to let you do it. I wouldn't spend five seconds on that, but go ahead." They were fighting so many bigger battles. They saw it; it wasn't that they missed it. They just decided not to fight it and it got slid in there, so if you're in group health insurance, you can't be turned down for genetic information. It's a good thing. Of course, it doesn't say employers can't hire or fire you based on genetic information, which is the next thing that needs to be done, and if you're in the individual market, which fewer of us are, sadly, it doesn't protect you. That was a little narrow thing, but a sweet victory nonetheless.

The privacy stuff—I don't have a very clear recollection, unless you have some specific question that might bring something to mind. I remember there were Kassebaum battles. I can't remember what they were. Were they on damages?

Heininger: That I don't remember. The big issue was portability, being in the wake of passing COBRA [Consolidated Omnibus Budget Reconciliation Act] in '85.

Lichtman: Right. We were not big players on the portability questions. We took that little genetics piece, and there was a privacy piece around reproductive rights that we wanted to safeguard, and I can't remember what that was. I don't think we interacted an awful lot with Senator Kennedy on that. Others took the lead.

Heininger: Did you deal with Kassebaum at all on that bill?

Lichtman: Yes, around the reproductive rights piece, and she liked our little genetics discrimination prohibition piece. We did deal with her a lot on that, and we always had a very good working relationship with her.

Heininger: What can you tell us about the relationship between Kennedy and Kassebaum?

Lichtman: I probably don't have any firsthand knowledge about that, except to say that it struck me that she was another person with whom he always thought he could do business; she was a straight shooter. If the two of them dealt fairly on the table, they could do business, as he did with any number of other Senators.

Knott: Have you ever had the sense, or any of the folks that you know within the broader civil rights community, that he's a little too quick to cut a deal with people on the other side of the aisle?

Lichtman: I have heard those allegations, and I reject them. He's very tough, and very pragmatic, and that takes me to believe, over many issues over a very long time, that by the time he's making a deal, he honestly has assessed that it's the best deal he can get, and that he is a consummate legislator. He always believes that legislating moves the ball forward. My example is the cap on damages in the Civil Rights Act of 1991, and your fair reminder that it included damages for the first time. That's what he'd say, and he's not wrong. It wasn't everything I wanted, but I don't think I've ever seen him be too quick. I was pretty pissed at him that night, but I didn't think that it was too quick. I just didn't like—I didn't want to make a deal; I wanted to hold out.

I was less involved in the fights around No Child Left Behind, and watched that more as an interested bystander and more than a casual reader of the newspapers, but I always had the feeling that that was in keeping exquisitely with who he is. He thought he was dealing with somebody with whom you could make a deal. It never occurred to him that the person on the other side of the table wasn't a trustworthy negotiator, so he was moving the ball forward. There's nothing naive about him. I say what I've just said with no condescension. I don't hold a candle to his sophistication politically, but I think he was had by this guy.

Ted Kennedy is a quintessential little "d" democrat. He's a Civics 101 believer in the system, and he's made the system work by dealing with, if not his enemies, his political adversaries, in what I would describe as making civil society a better place. That's what he thinks he's doing in legislating. I don't think he's ever not lived up to his part of a bargain, and it didn't occur to him that somebody else wasn't going to in public life. I really don't think he thought so. I didn't think then, nor do I think now, that he did it precipitously. He did it believing there was a good deal to be had, and he was wrong. I don't know how he feels about it. I've never discussed it with him.

Knott: Any reflections on why you think he has this, what you appear to consider genuine commitment to civil rights? Where that comes from? I know I'm asking you to take a leap here.

Lichtman: Although I was young, I'm old enough to remember the dubious regard in which many people in what was then a very young civil rights movement held his brother, the

President. I also remember the stories were legion about Clarence Mitchell and the NAACP reminding the then President [John F.] Kennedy that he said in the campaign that it would only take a stroke of the pen and an Executive order to do fair housing, then never did it. Compared to people's views, ultimately, about Robert Kennedy—not initially, in the anti-civil libertarian, labor stuff, but the later stuff; not too much later, but later—with the [Rev.] Martin Luther King [Jr.] Birmingham jail negotiations, this was a mantle that Ted Kennedy wore early and long.

I don't know where it came from. I haven't read an awful lot about his dad and his mother. I know about all those biographies, but I've never read them. What the popular press tells me about them was it probably didn't come from one of them. Wherever it comes from, it sure is deep and ingrained and very honest. It's almost simple. It's not complicated for him.

Knott: Simple justice.

Lichtman: Yes. It doesn't present many challenges for him. His intuitive and knee-jerk reactions are where you want him to be.

If I can go back to post-Anita Hill for a second, and my response. My response at the time was that he was in pain, and that he couldn't do more. It wasn't that he didn't want to do more. It never occurred to me that he wouldn't want to do more. It doesn't occur to me now; it didn't occur to me then. That's how confident I am in his intuitive sense about equality and justice.

Knott: He was in pain, is that what you said?

Lichtman: Yes. I think he was suffering about not being able to be the leader that I would expect him to be on that set of issues, that he would expect of himself, which is telling. I don't think it's giving a friend a pass, although it may be, but it speaks to what I believe to be his intuitive moral compass about inequality and economic and social justice in this country. He has an unfailing sense about that, so if he failed, it must have been very painful. That's my explanation, but I don't really know the answer to your question, about where it comes from. I know you're not supposed to say what happens at these interviews, but I hope sometime to be able to read where he thinks it comes from. That would be fascinating.

Heininger: At some point when he leaves the Senate, who will civil rights supporters go to?

Lichtman: I don't know. That's a tough question. It goes to the Marcia Greenberger quip, which isn't funny. I don't know.

Heininger: There's been no one who's stepped up to take the mantle, although no one's needed to.

Lichtman: No, because there isn't anybody, because Ted Kennedy is there when it does nothing for him, nothing for him except heartache, except—"noisome" isn't the right word. It's nothing but grief and he's there. I know other people who are there for you, but it's always part of a political equation. I never think that about Ted Kennedy. I never think that he's there for me because there's some political equation. I can't even imagine what the political equation would be for him. I don't know who that is, which is why it would be hard for the civil rights community to do their jobs. He just turned 75, or he's about to turn 75. That's sobering.

Knott: Tomorrow, I think.

Lichtman: Tomorrow. I know it's any minute, because I know there's a series of parties.

Knott: [George] Washington's Birthday.

Lichtman: Oh, is that Washington's Birthday? How fitting. I know we don't all live forever, but I have a very healthy 93-year-old mom who could outdo many of us, so maybe he'll—Every once in a while, somebody near and dear to him will warn me that he's not going to stay forever, and I stick my head in the sand and pretend I don't hear that person very well. [*laughs*]

Lindskog: Do you think that's one of the reasons he's continued to—in 2006 and other reelections—that he's decided not to retire? This idea, not only that he cares about the issues as much as he does, but that he might be the only one?

Lichtman: I don't know what animates him enough to be able to answer that question. This is what I *think* I know about him. I think he loves his job. I think he loves what he does every day, even when he's mixing it up and making trouble; I think he loves that. Maybe he doesn't love it that he asks questions of Justice Roberts, and then gets slammed in the press for the way he does it. What's to love about that? But I'll bet he didn't think that it was wrong to try to get at the heart of John Roberts. He didn't think that. He didn't think he did the wrong thing. Maybe he thinks he went about it in the wrong way or something, but I think he loves what he does. I think he knows he's good at it. This says definitely more about me than him, because I don't know what the answer to your question is, but what would he do? What would he do every day to make a difference?

Heininger: Go sailing?

Lichtman: I think he loves sailing or he loves painting or whatever it is he does, but I don't know. I really don't know.

Heininger: Why hasn't there been a Patients' Bill of Rights? That's the last question I have, and I just wanted to get that one in.

Lichtman: Because the economic and political power of the insurance industry at the time was so overbearing that even the joining of the labor, the trial lawyers and the AMA [American Medical Association] couldn't trump it, and that is saying something. They clearly hate each other, but they hate the insurance companies more, and that brought them all to the table, which was a fascinating legislative effort to be a part of. You haven't asked me about this, but the Patients' Bill of Rights is a wonderful Kennedy monument to stepping aside and letting somebody else take the lead when you think they'll be more successful than you, legislatively. He stepped aside for [John] Edwards. Edwards was a rising star and Edwards brought on [John] McCain, not Kennedy. Kennedy was there as a leader all the way, but he allowed Edwards to flourish as a leader, externally and internally. It's a very important part of Kennedy.

Heininger: We've heard a lot about him mentoring younger, newer members that you don't get from many other members.

Lichtman: That's a good example. He believed in Edwards. He thought Edwards could do it, and Edwards also had the political—It was fortuitous that Edwards came out of the trial lawyers, and it was not lost on Kennedy that Edwards could play hardball with the trial lawyers—and did—in a way that Kennedy couldn't and wouldn't. He saw that and just loved it. He reveled in it. You could see him smiling in the room; he just couldn't control himself. He saw what was happening and thought it was terrific. He very early on recognized that Edwards was a star and invested in him. Not all, but much of what we fought for in the Patients' Bill of Rights the insurance industry didn't compromise. They voluntarily changed themselves. It is important to remember that while that particular piece of legislation never became law, many of the important provisions were voluntarily adopted by the health insurance industry. So consensus definitely benefited in the long run.

Heininger: They incorporated some—

Lichtman: —a lot, except for the damages part.

Heininger: That's money.

Lichtman: Damages again, but the gatekeeper function that used to be—I don't know if any of you were in HMOs [health maintenance organizations]. To go to a gynecologist, you'd have to go get a piece of paper that said you were going to—or to go to an eye doctor or anybody. That's gone. Much of the more noisome, stupid stuff that drove people crazy, the insurance industry fixed themselves, but not the damages part, which was the sticking point, lest you think some of these issues have been settled.

Heininger: That's Congress.

Lichtman: Right.

Knott: Well, thank you very much.

Lichtman: Thank you.

Knott: It was a great interview. You have a very good memory.