A Symposium Celebrating the Fifteenth Anniversary of the Violence Against Women Act

Panel Two: The VAWA Civil Rights Provision: Shaping It, Saving IT, Litigating IT, Losing It

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Transcript of Remarks by

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JUDGE MARY SCHROEDER: Well all I have to say is, "Oh my gosh." Not only do I have to follow the Vice President but I also have to follow Judith Resnik—Professor Judith Resnik, an old friend. I am Mary Schroeder, and I am a judge of the United States Court of Appeals for the Ninth Circuit, but I am here in my capacity as a member of the National Association of Women Judges (NAWJ). And the NAWJ became involved because I received a phone call from a wonderful woman named Brenda Murray, who happens to be here. She is the Chief Administrative Law Judge of the Securities and Exchange Commission, and in a roomful of heroes and heroines, she is one of them. And she told me that I ought to get involved in the Violence Against Women Act. And it seemed to me as I looked at it, and looked at some of the materials that Judith has so brilliantly put before you, that because women's groups were the principal proponents of the Violence Against Women Act and because judges were the principal opponents of the Violence Against Women Act that the National Association of Women Judges was the only organization that could speak to both groups.

And so we went to the Association and obtained a resolution in support of the Violence Against Women Act. And we had a very lively meeting, I recall, because, as is their wont, judges and law professors tend to try to redraft everything. And there were many efforts to rewrite the legislation right there at our conference, but what was eventually agreed—and I think this is a pretty good gambit for those of you who are law students or who may be working in organizations in the future—what was agreed was that we would support the civil rights provision, which was of course quite controversial, in principle. And then essentially what the group did was delegate to me the authority on behalf of the National Association of Women Judges to negotiate the language of the provision. And so that is really what happened. And those of us who were involved in it wound up in a basement of the Capitol one afternoon, and that is how the actual animus language that was developed got into the Act.

And so in anticipation of this wonderful celebration, I prepared by reading Fred's wonderful book, and then by going through the three entire file cabinet drawers of materials that I had collected fifteen years ago on this project. And I was struck by three things. First, the extraordinary dedication of Senator Biden to the cause—we were really lucky to have him in the Senate Judiciary Committee during that period. Second, the exceptional brilliance of the women who

envisioned the civil rights provision as the centerpiece of the larger act embodying the rights of women to be free from violence toward their sex. And I remain to this day in awe of Victoria Nourse and Sally Goldfarb, who are sitting together right down here, because they were absolutely fabulous. And I don't know where Pat Reuss went but I am also grateful to her because she never let anybody get too carried away with idealism during this whole effort. And the third thing that struck me seemed to me then as the mindboggling hostility of the judiciary to the civil rights provision, because the judiciary thought it would clutter up the federal courts with trivia and impede the state courts in administering the divorce laws. The judges not only didn't get it; they were openly hostile to the Act and oblivious to the extent and pervasiveness of the violence that spawned it. And after fifteen years of more or less open discussion of abuse, domestic violence, establishment of shelters, hotlines, reform of the rape laws, and people like Christy Brzonkala who have come forward, it is difficult for us to imagine the ignorant hostility that existed a couple of decades ago. So let me talk about each of these things very briefly in turn.

Senator Biden was simply relentless in his pursuit of this goal, and it was a determination that at the time baffled me, because my male friends that were in Senator Biden's generation (which is also my generation), and the generation that preceded us—that educated and mentored us—were clueless. And while I intellectually comprehended Senator Biden's desire to use his Judiciary Committee position to enact significant legislation, I never in my heart understood why he was driven so hard to enact this particular legislation, until of course I heard him today and also until I saw him last summer at the Democratic convention with his wife Jill. And I think that we all recognized a man who truly understood and could admire women for their own accomplishments, which of his generation was quite unusual.

As for Sally and Victoria, I never before saw and I never again expect to see a team of such brilliance working together as lobbyist and staffer to accomplish a legislative goal that was to them both personally and professionally so meaningful. And I was sorry to see them both leave Washington and join the ranks of academia. In fact, when I got my computer set up in my own study at home a few years ago, the first thing I did was to look up Victoria Nourse and see if she was still in Madison. I was going [to] look her up and I wish I had. And in looking back at the *Morrison* disaster I tend to think—and I was talking to Fred a little bit about this earlier—if we could have organized a small band of women like Sally and Victoria who could have been out there systematically litigating cases involving the civil rights provision and related issues we might have gotten another vote in *Morrison*, and I think I know where that vote might have come from.

Finally, about the judges and indeed, the entire male-dominated legal establishment at the time, who were so opposed to the civil rights provision: these were men of a generation that failed to understand sexual violence and could not

comprehend the concept of violence as an assertion of power against women. The concerns that drove them to oppose this statute, however, were quite mundane. Federal judges, I can tell you, worry a lot about status. And for many judges the federal courts are to be reserved for important statutes and constitutional cases, and important statutes are those that may involve a lot of money. So the state courts, on the other hand, are there to handle—according to the federal courts—are there to handle little people's problems, and there are lots and lots of judges in the state courts who can handle those kinds of things. I remember once at a meeting of the [National Association of] Women Judges in Washington, Chief Justice Burger came out to meet with us. I remember he came out and looked at the room, like this, filled with women, and the only thing he could say in shock was, "Are you all really judges?" I think Gladys[7] remembers that, it was quite a memorable moment.

The combination of ignorance and elitism, that was the thing that led federal judges and some leading constitutional practitioners to oppose the civil rights provision. I think the opposition was caught up in the phrase that I kept hearing over and over again. As I would talk to people and say, "Why are you against this?" they would say, "We don't want purse snatchers in federal court." And on the state side, the concern was to protect their turf and to prevent what seemed to me to be the imaginary threat that the civil rights provision would be used to raise the stake in divorce cases—because the stakes in most of those cases aren't very big anyway.

So the judges were concerned about status and turf, and why should we be surprised at that? And yet it is still surprising to me in a way, and I look back at the judicial impact statement that the Administrative Office of the U.S. Courts prepared for VAWA. In those days the judicial impact statement generally resulted in opposing legislation, because the impact would maximize the number of cases that could be filed in federal court. In the case of VAWA, the estimate for the civil rights provision began with the premise that every rape case prosecuted in state court was a potential federal court case, so the estimates of additional litigation in federal court went into the range of 30,000 to 50,000 cases a year. In short, and this is my point, the greater the magnitude of the problem that Congress wanted to address, *i.e.*, the larger the amount of injustice suffered by people as a result of violation of their rights, then the more motivated the federal judiciary was to oppose the legislation.

Again, I'm speaking just for me. I have always believed, however, that that view was the view that was driving Chief Justice Rehnquist's opinion in *Morrison*. And so therefore, I can't say enough about the work of Judge Stanley

7. Judge Gladys Kessler, Federal District Court for the District of Columbia, formerly Judge of the Superior Court of the District of Columbia and a former President of the National Association of Women Judges.

Marcus of now the Eleventh Circuit[8] in this regard, because he was the person who didn't get it originally, but he was the chair of the State-Federal Jurisdiction Committee at the Judicial Conference of the U.S. And in his view judges just shouldn't be against civil rights legislation, and he was the one who was instrumental in getting the Judicial Conference of the U.S. to pull back its opposition.

So, in the years since *Morrison* was decided I served for seven years as Chief Judge of the Ninth Circuit and I sat on the Judicial Conference of the United States presided over most of that time by Justice Rehnquist. And the Chief Justice has an incredible amount of power, because he is not only the Chief Justice of the United States Supreme Court, he is also the chief administrative officer of all of the federal courts. And he has incredible power. And I now understand what I didn't understand in 2000 when *Morrison* was decided. I think it is very easy for a judge who is charged with administrative power to get the administrative roles and the judicial roles mixed up. And I think Justice Rehnquist saw the administrative role—that is, to keep the courts from being overburdened—as paramount to his judicial role, which was to vindicate the rights of people under the Constitution.

And so I think, in closing, that the only Chief Justice in my time who never got confused on that score and always kept the true function of the federal courts paramount was Earl Warren. And so, while there have been many great men who have served with honor on the Court and who have passed on, I think when *Morrison* was decided not one of them turned over in his grave more often than Earl Warren. So I thank you very much for the honor of asking me to be here and as you can tell VAWA still means a great deal to me. Thank you.