



EDWARD M. KENNEDY ORAL HISTORY PROJECT

Interviewer's Briefing Materials **Stephen Breyer Interview, 06/17/2008, 09/28/2008**

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Miller Center Documents¹

- Stephen Breyer Timeline.
- Stephen Breyer Fact Sheet.

Secondary Source Materials

- Stephen Breyer bio, <http://www.supremecourt.gov>.
- Stephen Breyer, *Regulations and Its Reform* (Cambridge, MA: Harvard University Press, 1982) pp. 317-340.
- Adam Clymer, *Edward M. Kennedy: A Biography* (New York: William Morrow and Company, Inc., 1999) pp. 227-230, 233-237, 324-325, 526-527, 539-541.
- Adam Clymer interview with Stephen Breyer, John F. Kennedy Presidential Library, 07/06/1993, 07/26/1997.
- Adam Clymer interview with Edward M. Kennedy, John F. Kennedy Presidential Library, 10/09/1995, 06/02/1997, 10/31/1997.
- Adam Clymer interview with Ken Feinberg, John F. Kennedy Presidential Library, 03/13/1995.
- Martha Derthick and Paul J. Quirk, *The Politics of Deregulation* (Washington, D.C.: The Brookings Institute, 1985) pp. 39-45, 51-57.
- "Congress Clears Airline Deregulation Bill," *1978 Congressional Quarterly Almanac* (Washington: Congressional Quarterly Almanac), pp. 496-504.
- John Barnum, "What Prompted Airline Deregulation 20 Years Ago?" Presentation to the Aeronautical Law Committee of the Business Law Section of the International Bar Association at its Annual Meeting in Vancouver, British Columbia, 9/15/1998, pp. 1-3.
- Charles R. Babcock, "Kennedy Touch at Judiciary: Bright, Fractious Staff," *The Washington Post*, 07/20/1979.

¹ These are original documents created by Miller Center researchers for the Edward M. Kennedy Oral History Project. Please acknowledge credit for any use of these materials.

- Judiciary Committee staff, *1980 Congressional Staff Directory* (Mount Vernon, VA: 1981) p. 194.
- “Committee of the Judiciary, Program for the First Session,” Committee on the Judiciary, United States Senate (April 1979) pp. 3-4.
- Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997) pp. 260-261.
- “Law and Law Enforcement, 1977-1980 Legislative Overview,” *CQ Electronic Library*.
- “Law Enforcement/Judiciary,” *1979 Congressional Quarterly Almanac* (Washington, D.C.: Congressional Quarterly, Inc., 1980) pp. 361-362.
- Martin Tolchin, “Judgeship for a Top Kennedy Aide Hits Snag in Senate,” *The New York Times*, 11/26/1980.
- William Clinton, *My Life* (New York: Alfred A. Knopf, 2004) pp. 524-525, 592.
- “Centrist Justice Easily Confirmed,” *1994 Congressional Quarterly Almanac*, pp. 303-305, 308-310.

Oral History Interviews

- Burt Wides interview, Kennedy Oral History Project, Miller Center, University of Virginia, 02/02/2007.
- Orrin Hatch interview, Kennedy Oral History Project, Miller Center, University of Virginia, 05/24/2006.
- David Sutphen interview, Kennedy Oral History Project, Miller Center, University of Virginia, 03/27/2007.
- Jeff Blattner interview, Kennedy Oral History Project, Miller Center, University of Virginia, 03/30/2006.
- John Farrell interview, Kennedy Oral History Project, Miller Center, University of Virginia, 07/13/2006.

Other

- “Stephen Breyer Circuit Court Nomination.”
- “Stephen Breyer Supreme Court Nomination.”

STEPHEN G. BREYER TIMELINE

Prepared by B.J. Bloom and Rob Martin

Miller Center, University of Virginia, 01/10/2008

- 1959** Stephen G. Breyer graduates from Stanford University with a B.A. in Philosophy.
- 1961** Breyer receives a B.A. from Magdellan College at the University of Oxford as a Marshall Scholar.
- 1964** Breyer graduates from Harvard Law School, magna cum laude. Upon graduation he serves as a law clerk to Honorable Arthur Goldberg, Associate Justice of the Supreme Court of the United States, for the 1964-1965 terms. Breyer helps Goldberg draft his concurring opinion in *Griswold v. Connecticut*, a privacy case that struck down a law banning the use of contraceptions and formed the foundation for *Roe v. Wade*. (1994 *Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly Inc., 1995, p. 305)
- 1965** Breyer serves as the Special Assistant to the Assistant Attorney General for Antitrust in the Department of Justice.
- 1967** Breyer becomes an Assistant Professor, Professor of Law, and Lecturer at Harvard Law School, where he continues to teach until his appointment to the Supreme Court of the United States in 1994. That same year he marries Joanna Freda Hare.
- 1973** Breyer serves as an Assistant Special Prosecutor on the Watergate Special Prosecution Force, led by his former law school professor, Archibald Cox.
- 1974**
- Spring* Senator Edward M. Kennedy (EMK) invites Breyer, who is back at Harvard Law School teaching administrative law, to have dinner at EMK's house in McLean, Virginia. After Breyer suggests that EMK should consider working on regulatory reform of the Civil Aeronautics Board (CAB), EMK offers Breyer a job with the Senate Judiciary Committee's Administrative Practices and Procedures Subcommittee (AdPrac), which EMK chairs. Breyer's other suggestion was for EMK to study procedural changes suggested by Watergate. (Stephen Breyer, *Regulation and its Reform*, Cambridge, MA: Harvard University Press, 1982, pp. 323-324; Adam Clymer, *Edward M. Kennedy: A Biography*, USA: HarperCollins Publishers, 1999, pp. 227-228; Derthick and Quick, *The Politics of Deregulation*, Washington, DC: The Brookings Institute, 1985, p. 40)
- AdPrac begins preparations to hold hearings on CAB reform in a May, 1974 memo, which outlines the issues to be covered in the hearings. (Breyer, p. 324)

- Summer* Breyer takes a one-year sabbatical leave from Harvard Law School to serve as Special Counsel of EMK's AdPrac Subcommittee. His primary responsibilities include organizing a set of hearings on airline deregulation and writing the subcommittee report. Breyer begins by working with the Ford Administration to build support for hearings on airline deregulation, which are to begin in early 1975. (Breyer, p. 325; Clymer, p. 228; Adam Clymer interview with Stephen Breyer, 7/26/1997, John F. Kennedy Presidential Library, p. 1)
- September* Breyer attends a Department of Transportation meeting of transatlantic charter airlines in which the DOT urges the charter airlines to raise their fares. Critics charge the move is meant to prop up the bigger scheduled carriers, particularly PanAm, which is on the verge of bankruptcy. After the meeting, Breyer urges EMK to quickly schedule special two-day hearings on charter fares, in addition to the hearings to begin in early 1975. (Clymer, p. 228)
- October* CAB announces a mandatory hike in charter rates. (Clymer, p. 229)
- November* EMK opens the AdPrac hearings on charter fares after Senator Warren Magnuson, Chairman of the Commerce Committee, and Senator Howard Cannon, Chairman of the Commerce Subcommittee on Aviation, urge EMK to push the hearings back from October to November. In addition to calling several witnesses from CAB, the hearings call Freddy Laker, a self-made British millionaire, to testify on the pricing of cross-Atlantic charter flights. Warning of "PanAmania," Laker charges that the raise in rates was due to government protection of big carriers such as Pan America and TWA. (Derthick and Quick, p. 43; Clymer, pp. 228-230)
- The Justice Department announces that the Ford Administration now opposes CAB's actions to impose minimum rates on charter airlines. (Clymer, p. 229)

1975

- January* In its staff report on the charter fare hearings, AdPrac criticizes CAB for trying to protect the bigger scheduled airlines by forcing the charter airlines to be less competitive by raising its prices. EMK argues, "[S]ince passengers of charter airlines are often poorer than passengers on scheduled airlines, raising charter rates to help Pan American is a classic example of government action that subsidizes the rich by taxing the poor." (Clymer, pp. 229-230)
- February* EMK begins the main AdPrac hearings on airline deregulation, which are intended to cover CAB route, consumer, and rate policies, the unregulated-intrastate vs. regulated-interstate example, questioning the board, and capacity-restricting agreements. (Breyer, p. 326) Scholars Martha Derthick and Paul J. Quirk state, "Kennedy's hearings on the CAB, held early in 1975 after a half year of preparation by Breyer and a very able staff, were an outstanding dramatic success. They set forth anew the academic findings about the adverse effects of airline regulation, uncovered abundant evidence of the agency's anticompetitive

policies, and combined the two in a setting that exposed the CAB's inability to answer its critics." (Derthick and Quick, p. 43) Breyer is also credited for keeping media attention on hearings that reportedly would otherwise receive little attention in the press. In AdPrac's final report issued in early 1976, Breyer states, "Many of the Board's procedures fail to meet commonly accepted standards of fairness and openness" and, furthermore, that the CAB had failed to provide "the low-fare service that is technically feasible and that consumers desire." The report recommends opening up new routes and allowing price competition in fares. Despite the success of the hearings and President Gerald Ford's early indications that he would send up an airline deregulation bill, the Administration delays until the end of the year, only then to propose reportedly weak compromise legislation. (Clymer, pp. 236, 242)

Spring John Robson takes over as CAB chairman. He is a Ford appointee who is sympathetic towards regulatory reform. Robson later helps to turn Cannon in favor of airline deregulation when Robson comes out in favor of deregulation in Cannon's 1976 hearings. (Clymer, p.236)

Summer Breyer returns to teach at Harvard Law School.

1976

April EMK introduces legislation on airline deregulation but no bill comes to the floor in 1976. (Clymer, p. 242)

1977 President Jimmy Carter, who had supported airline deregulation in his campaign, appoints Alfred Kahn as CAB chairman. The Carter Administration does not submit an airline deregulation bill in 1977, but Kahn's support later helps EMK to pass legislation the following year. (Adam Clymer interview with Edward Kennedy, 6/2/1997, p. 9; *1978 Congressional Quarterly Almanac*, pp. 496, 498; (Derthick and Quick, p. 55)

EMK and Cannon introduce airline deregulation legislation but it is not passed in 1977. (*1978 Congressional Quarterly Almanac*, p. 500)

1978

October Congress passes the Airline Deregulation Bill, which gradually increases market competition in the passenger airline industry by phasing out federal controls and the CAB over seven years. In the end, the Carter Administration gets the bill it wanted, which includes an automatic route entry program, a program to grant unused route authority to air carriers willing to serve those routes, price flexibility, and competition seen to be in the public interest. The bill includes an amendment from EMK's and Cannon's 1977 proposal to shift the burden of proof to make it easier for new applicants for air service to enter the market. EMK goes on to

praise the “close executive-congressional cooperation on the bill.” (1978 *Congressional Quarterly Almanac*, pp. 496-504)

Oct./Nov. Faced with an overburdened federal docket, the Omnibus Judgeship Act creates 117 new district court positions and 35 new positions on the circuit court of appeals. One of the new positions on the First Circuit is expected to go to Massachusetts. EMK reportedly supports Cox for the position but is opposed by the Carter Administration. The seat remains vacant for two years and is later filled by Breyer. The act also calls for the president to issue merit-based judicial selection guidelines. EMK had played an important role in the passage of the act and strongly supported the new merit-based reform. As the incoming Judiciary Chairman, EMK works with the White House to draft the executive order providing the new guidelines. (“Committee of the Judiciary, Program for the First Session,” Committee on the Judiciary, United States Senate, April 1979; Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*, New Haven: Yale University Press, 1997, pp. 260-261)

1979

January EMK becomes Chairman of the Judiciary Committee, replacing Senator James Eastland (D-MS), who had served as Chairman since 1955. EMK names David Boies as Chief Counsel and Staff Director. Breyer also returns to work for EMK on the Judiciary Committee in 1979. One of EMK’s priorities as Chairman is to implement the new merit-based procedures to reform the judicial selection process for lower court judges. This includes EMK’s plan to modify the tradition of senatorial courtesy afforded to the senator from the nominee’s home state, as well as emphasizing the appointment of women and minorities. Some of EMK’s other priorities as Chairman reportedly include trucking deregulation, federal criminal code reform, opposition to the death penalty, rewriting the FBI charter, the Law Enforcement Assistance Administration reform, antitrust reform and giving consumers the right to file antitrust cases, setting new standards for permissible mergers and takeovers, and immigration and refugee law reform. (*The Washington Post*, 01/25/1979; 1979 *Congressional Quarterly Almanac*, p. 361)

Late Summer Breyer replaces David Boies as Chief Counsel of the Judiciary Committee amidst reports of committee staff in-fighting. (*The Washington Post*, 07/29/1979)

September On the 7th, EMK informs Carter at a White House lunch that he will run for president. (Clymer, p. 284; *The New York Times*, 09/12/1979)

November EMK announces he will challenge Carter for the Democratic presidential nomination.

The Senate Judiciary Committee clears a bill to protect the rights of institutionalized individuals by allowing the Justice Department to file suits against states. EMK cosponsors the Senate bill, which clears Congress and is signed by Carter in May 1980. (1980 *Congressional Quarterly Almanac*, p. 383)

December Carter signs compromise legislation to restructure the “embattled” Law Enforcement Assistance Administration (LEAA). Under the restructuring plan, a new office of Justice Assistance, Research and Statistics (OJARS) is established to set broad program policies jointly with LEAA officials. The Attorney General is to resolve any disputes between the two agencies. (*1979 Congressional Quarterly Almanac*, p. 370)

1980

January The Senate Judiciary Committee reports its proposal to re-write and re-codify the federal criminal code to the Senate floor. It is the third major attempt since 1973 to re-write the federal criminal code and represents a compromise between EMK, ranking minority member Strom Thurmond (R-SC) and Senator Orrin G. Hatch (R-UT). Immediately afterwards, the Committee reports a unanimous decision to re-establish the death penalty for federal crimes such as treason, espionage, and kidnapping that result in death. EMK had agreed to consider the issue immediately after the criminal code revision. In the end, however, the revision of the federal crime bill is not considered on the floor. The bill is shepherded through committee by EMK but reportedly loses steam after EMK challenges Carter for the nomination. (*1979 Congressional Quarterly Almanac*, pp. 363-369; *1980 Congressional Quarterly Almanac*, pp. 371, 393)

March On the 4th, after months of staff investigation and three days of hearings regarding alleged ethical misconduct, the Judiciary Committee rejects the nomination of Charles B. Winberry, Jr., a district court judge nominee from North Carolina. This marks the first time in more than 40 years that the Senate votes down a district court nominee, who traditionally have been hand-picked by Senate colleagues. According to *The Washington Post* the event marks a change in the Senate’s “rubber-stamping buddy system” of approving federal judgeships. (*The Washington Post*, 03/09/1980)

Congress clears the Refugee Reform Act of 1980 which, among other provisions, triples the number of refugees allowed into the U.S. on an annual basis. (*1980 Congressional Quarterly Almanac*, p. 372)

August Carter wins the presidential nomination at the Democratic National Convention. EMK reportedly agrees to support Carter provided that Carter appoints Breyer to a vacant seat on the United States Court of Appeals for the First Circuit. (*1980 Congressional Quarterly Almanac*, p. 16-A; *The New York Times*, 11/26/1980; Adam Clymer interview with Edward M. Kennedy, 10/31/1997, John F. Kennedy Presidential Library)

The 1980 fair housing bill is reported by the Senate Judiciary Committee, which would strengthen the enforcement mechanisms of the 1968 Fair Housing Act by making it easier for the federal government to sue. EMK is a cosponsor and

serves as floor manager of the Senate version. (*1980 Congressional Quarterly Almanac*, p. 373)

October Despite the failure of the criminal code bill, Congress clears a bill that overturns a 1978 Supreme Court decision allowing surprise searches of newsrooms. Carter signs the 1980 Privacy Protection Act into law on the 13th. (*1980 Congressional Quarterly Almanac*, p. 372)

Congress ends a 30-year debate by creating procedures for disciplining federal judges short of removing them from the bench through impeachment. (*1980 Congressional Quarterly Almanac*, p. 372)

Congress passes legislation dividing the Fifth Circuit Court of Appeals into two smaller jurisdictions. Whereas such a proposal had met with strong opposition from civil rights groups in 1978 and had not been enacted, this time the bill passes. The legislation removes Alabama, Florida, and Georgia from of the Fifth Circuit and includes them in a new 11th Circuit. Neither the Legal Defense Fund nor the American Civil Liberties Union opposed the legislation this time around. (*1980 Congressional Quarterly Almanac*, p. 390)

December The Senate confirms Breyer's nomination to the First Circuit Court of Appeals on the 9th by a vote of 80-10. In exchange for Republican support, EMK had agreed not to push 17 of 30 other pending judicial nominees until after the election, which Ronald Reagan goes on to win. Breyer's nomination had been briefly held up by Senator Robert Morgan (D-NC), who is reportedly bitter over the rejection of the judicial nomination of his campaign manager, Charles B. Winberry, because of alleged ethical indiscretions. However, Breyer's nomination moves forward when the Senate votes 68-28 to invoke cloture and limit debate. (*1980 Congressional Quarterly Almanac*, p. 16-A; *The New York Times*, 11/26/1980)

The fair housing bill dies in the Senate after an 11th hour compromise fails, falling victim to a filibuster led by Thurmond and Hatch. (*1980 Congressional Quarterly Almanac*, p. 390)

1985 Breyer serves as a member of the United States Sentencing Commission until 1989, where he plays a key role in reforming federal criminal sentencing procedures, producing the Federal Sentencing Guidelines, which are created to increase uniformity in sentences for criminal cases.

1990 Breyer becomes the Chief Judge of the United States Court of Appeals for the First Circuit. He also serves as a member of the Judicial Leadership Conference of the United States.

1993 With the retirement of Justice Byron R. White, the first nomination for a Supreme Court Justice to a Democratic President since 1968 becomes available to President William J. Clinton. EMK promotes Breyer as a nominee candidate, but

in the end Clinton selects Ruth Bader Ginsburg to replace Justice White. The Senate confirms Ginsburg's nomination in August. (Clymer, pp. 526-527)

1994

April On the 6th, Justice Harry Blackmun announces his retirement from the Supreme Court. Clinton has said he would like to place an individual with real-world political experience on the bench, and Senate Majority Leader George Mitchell (D-ME) reportedly becomes the leading contender to replace Blackmun. (Clymer, p. 539; *1994 Congressional Quarterly Almanac*, p. 303)

On the 12th, Mitchell announces that he will not take the post, stating that it would compromise his ability to get health insurance legislation passed. EMK quickly advances Breyer's name to Clinton once more, who is also considering Federal Circuit judge Richard S. Arnold and Secretary of the Interior Bruce Babbitt as potential nominees. (Clymer, p. 539)

May On the 7th, ranking Republican on the Judiciary Committee Hatch tells Clinton and EMK that he will oppose Babbitt, urging EMK to make the case for Breyer.

On the 10th, EMK and Clinton speak about national health insurance at a meeting of the American Federation of Teachers. Speaking privately with Clinton in a corridor of the Hyatt Regency Hotel, EMK argues for Breyer's selection. As Breyer's other allies, such as White House counsel Lloyd Cutler, push the nomination in the coming days, EMK continues to call Clinton, reportedly convinced that his 1993 failure was due to the fact that Moynihan spoke to Clinton last. (Clymer, pp. 539-540)

On the 13th, Clinton announces his selection of Breyer as Associate Justice after Judge Richard Stearns tells him that Babbitt would write fine dissents, but that Breyer would be a leader. Arnold's recent diagnosis with cancer has eliminated him from the pool, and Breyer's clear bipartisan support is appealing to Clinton, who is pursuing a loaded legislative agenda. (Clymer, p. 540; *The New York Times*, 05/14/1994)

July Confirmation hearings for Breyer are held from the 12th to the 15th. EMK is Breyer's chief sponsor. During the hearings, Breyer reportedly tries to avoid speaking too much on topical issues such as voting rights and abortion, and comments most extensively on the importance of the separation between church and state. Breyer is generally very well-received; his most vocal critic is Metzenbaum, who questions Breyer on a potential conflict of interest between Breyer's investments with Lloyd's of London and several pollution cases over which he presided. (*1994 Congressional Quarterly Almanac*, pp. 308-309)

On the 19th, Breyer is approved 18-0 in the Judiciary Committee. On the 29th, Breyer is confirmed 87-9 by the full Senate. Senator Richard Lugar (R-IN) leads the opposition. (*1994 Congressional Quarterly Almanac*, p. 310, 42-S)

STEPHEN BREYER FACT SHEET

Prepared by Rob Martin

Miller Center, University of Virginia, 08/27/2007

Breyer's Early Experience

- Clerk to Supreme Court Justice Arthur Goldberg, 1964-65
- Special Asst. to Asst. Attorney General for Antitrust, DOJ, 1965-1967
- Asst. Special Prosecutor, Watergate Special Prosecution Force, 1973

Breyer's Work with EMK

- Special Counsel, Senate Judiciary's AdPrac subcommittee, 1974-1975
- Chief Counsel, Senate Judiciary Committee, 1979-1980

EMK had asked Breyer to work for him on AdPrac in 1974 over dinner at EMK's house in McLean. Breyer did not want to work for EMK full-time but agreed to take a one-year sabbatical leave from Harvard to work specifically on airline deregulation. Breyer's work in 1974 and 1975 helped put the issue on the map, leading later to the 1978 law.

Breyer returns to work for EMK on the Judiciary Committee when EMK takes over as chairman in 1979. *The Washington Post* reports that Breyer replaced David Boies as chief counsel amidst staff in-fighting in the summer of 1979; a single reference in a 3/26/79 *Washington Post* article suggests that, prior to the move, Breyer had been working under Boies on the Judiciary Committee since at least March. Richard Burke loosely suggests in his book (which is tabloidy and unreliable) that Breyer was hired in part to serve as a legal consultant to the 1980 campaign.

In 1980, Breyer was nominated by Carter to become a judge on the U.S. Court of Appeals for the First Circuit. EMK had made Breyer's nomination (for the seat that Cox had been denied) a condition for supporting Carter in the presidential campaign. Breyer's nomination survived a filibuster from Morgan in December and became the last judgeship approved by the Senate in the Carter Administration. Breyer served as Chief Judge from 1990 until 1994, when he was nominated by Clinton to the Supreme Court. Breyer had also been a candidate in 1993 but lost out to Ruth Bader Ginsburg. Breyer also served on the Judicial Conference of the U.S. from 1990-1994 and the U.S. Sentencing Commission from 1985-1989. Breyer has also taught at Harvard Law, starting in 1967, and at the Kennedy School.

Issues Breyer Worked on with EMK:

- 1978 Airline Deregulation Act (which closed the Civil Aeronautics Board); the Judiciary Committee began hearings in 1975; Breyer's report was released in early 1976 and EMK began introducing legislation soon after.

Issues that came up during his time w/ EMK:

- 1979 EMK takes chairmanship of the Judiciary Committee
- Merit-based judicial selection reform, including emphasis on women and minorities
- Trucking deregulation (out of Senate Commerce Committee)
- Federal criminal code reform

- Opposition to the death penalty
- FBI charter reform and the Law Enforcement Assistance Administration reform
- Antitrust reform; giving consumers the right to file antitrust cases
- Setting new standards for permissible mergers and takeovers
- Immigration reform and 1980 Refugee Reform Act
- 1980 Protection of Rights of Institutionalized Americans
- 1980 Fair Housing bill