EDWARD M. KENNEDY ORAL HISTORY PROJECT

INTERVIEW WITH STEPHEN BREYER

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Interviewer

James Sterling Young

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TRANSCRIPT

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Young: This is an interview with Justice Stephen Breyer in Cambridge, June 17, 2008. We start with your first encounters with Senator [Edward] Kennedy, maybe starting with your work with Archibald Cox and the Watergate time. Maybe you knew him before that.

Breyer: I didn't. I had worked for Archie that summer of '74, because I had worked for Don Turner in the Justice Department in the Antitrust Division. I was teaching at Harvard, and I was teaching antitrust. Part of the Watergate investigation involved Dita Beard's memo and the antitrust investigation, and I think Archie and Jim Vorenberg thought it would be a good idea for me to come down and get that organized. I was there for three or four months in that summer trying to organize that portion of the investigation. And I guess Archie was pleased with what I'd done.

Then, in the beginning of '75, Kennedy became chairman of a subcommittee of the Judiciary Committee, called the Subcommittee on Administrative Practices and Procedures, which no one had ever heard of. My guess is he's trying to think, *How am I going to build this up? What does this subcommittee do?* Nobody had a clue, because there was no set agenda. It had something to do with administrative practices and procedures. There was a title. There was no staff.

I knew Carey Parker because I had known his brother at Oxford. Probably Carey said—but maybe Archie—I don't know who said it, but Kennedy had the idea to bring down a Harvard professor. It sounded like a great idea. He could run the subcommittee and that would help get it organized. I guess they recommended me. His idea was to get me to take a leave from Harvard, and to come down and run the subcommittee for a couple of years. When he gets an idea like that, he wants it to happen immediately, like tomorrow. So I had talked to Carey, and Carey had arranged that I would have dinner at the Senator's house. I came down, and I met the Senator then.

Young: This was in McLean?

Breyer: Yes, that's right. I remember him showing me the pictures of his brothers and the family; we had a very nice dinner, and we talked about what the subcommittee would do. I'd had a number of different possible ideas, and prepared a memorandum for him of possible uses of the subcommittee. If you really are interested in the details of this, some of it is in this book about the airline hearings that I wrote, called *Regulation and Its Reform*. They have a case on it in the Kennedy School, and there's another case in the Business School. So between those, there's

more information than you'd ever want to know.

But why did he go into this? Well, first, I couldn't come down and run the subcommittee. That was clear to me, because I had already taken enough time off from Harvard, and I did not want to give two years to this, given the fact that I had my teaching career to continue with. But the dinner went pretty well.

Young: Was it just you and he who were there?

Breyer: Yes. Just the two of us.

Young: No staff?

Breyer: No. We talked about the different possible directions for the committee. I was interested in airline dereg because I was teaching economic regulation administrative law. I thought this was an example of an agency that everybody thinks is wonderful because it has good procedures, but it was doing a terrible job, because it was raising prices of airline rates. So it was crazy to do all this work to give everyone the opportunity to pay higher prices. And it would be a very good opportunity to look into this and see if we could get a pro-competitive approach. But there were other candidates for this thing that we methodically went through.

Young: Such as?

Breyer: I can't remember them. That's why you have to get the memo. I knew from Archie's investigation that the airlines had given a lot of illegal campaign contributions, so one of them would be to look at the campaign contributions. Another one would be—well, there's an administrative conference. The United States has all these boring procedural reforms. Why not just *do* them? Then we could get credit for doing them. They won't be that difficult, because no one even understands what they are. They do understand it, but they're not controversial. There were five or six different things.

Young: Any other kind of deregulation issues?

Breyer: No. We talked about trucking, and trucking was important, but the Teamsters would have been opposed, and it would have been hard to get done. With the airlines, it was easier and more glamorous. Everyone knows about airlines. Everyone likes to fly. There is more consumer benefit in trucking. If you could deregulate trucking, the fall in price would likely mean huge gains for the consumer, but it would be much harder to do.

Moreover, there was a jurisdictional problem, that is, Senator [Howard] Cannon thought he was in charge of airlines, trucks, and ships in the Commerce Committee. So we had to just look at procedures. They might put up with that for airlines, but they'd never put up with it for trucks because of the Teamsters, and lots of interest over there on people who are affected.

Now, why did he go into it? You'd have to ask him. You're getting an impression from me. He said one thing once that was very interesting to me. He said, "Well, you know, this Governor [Jimmy] Carter is going around talking about too much government, and he's getting a very good response." I remember thinking, *This is a very good thing because it's both less government and*

consumer benefit, and it can be done. It's less government, consumer benefit, and people are interested in airlines so maybe there will be a little publicity. You can make a name for the subcommittee. The subcommittee will mean something because it will have accomplished something significant.

Young: And it can resonate because of the interest in that.

Breyer: Correct. And it fits into a logical pattern. The logical pattern is that the Democrats are pragmatic. We wrote this up, and he liked this, and said, "You see, we're not for deregulating everything; we're not for regulating everything. We are for what will work, and what will work means it benefits the average American." Now, that sounds like the Fourth of July speaker—

Young: But aren't liberals supposed to be for more government?

Breyer: Yes. That's not so. Maybe, maybe not. He saw what was happening with Carter. You'd have ask him about the politics, which he understands very well.

Young: But he wasn't a consumerist, would you say?

Breyer: Not particularly. But if he's thinking of running for President—and you'd have to ask him—if he's thinking of Presidential politics, I don't think he wants to be at one extreme. He wants to take a pragmatic approach. First of all, a pragmatic approach for him is truthful. That's totally true to his character. He is for what works. He does not have definite ideological views. You see that throughout. He's a very good politician.

The thing that I saw at that time—the way he worked with me would be the way he would work with staff. That's why the staff likes him. The way he works with the staff is, "Go ahead and do it. And I'll help. And as long as it's working, fabulous! If you can get something done, that's super-fabulous. You're the one who has to do it." That's his approach with the staff. He's there as a resource to help you accomplish the objective. And he does that throughout. It's total spoke-and-wheel.

That is, my job is airlines. That's my responsibility. As long as we're getting somewhere—He will learn how to set an airline rate. He actually learned that! Probably not the thing highest on his agenda, but he learned it to the point where he could actually question—not just reading questions. He'd internalized how they set a rate, to the point where he could catch them out, because part of the mechanism meant higher rates. So I have to use him so that he can be the resource to help us to accomplish something. That's what the method is. I'm sure you've heard that from other people.

Young: But you had to educate him about—

Breyer: Yes, but I didn't know either. I have a rough idea of where we're going. Probably what he liked about me is I'm fairly organized in my thinking. I may seem a mess, but I will figure the thing out eventually after wallowing in this mess, and can put together a very substantive part, and use that committee as a research tool, which in fact is what we did. Fine. He'll let me alone. I'm there to do that. He's there to come in and at the key moment get the thing done. And that's what he did.

Young: So this wasn't an idea he had that, *I want to deregulate the airlines and I'm going to get Steve Breyer to help me do that*.

Breyer: No, no.

Young: He first formulates the idea—

Breyer: The idea is, "Let's get this subcommittee going. Let's do something."

Young: And there's something out there about the Commerce saying—

Breyer: He cannot bear—he doesn't like wasting time. We have a limited amount of time given to us to do things. Let's organize and get something done. That, I would say, is how he thinks. As long as I'm helping, great! If it all falls apart and it isn't working, his time is limited, and he'll go on to something else. So the staff is competing for his time, and the way you win some of his time is to get something done.

Carey writes a lot of his speeches, but one he did not write—and I thought to myself, *This is the Senator. This is what he thinks*. It was at the reunion that we had at Hyannis. He was being pretty informal, speaking like I am at the moment, not in whole sentences. He said, to these two or three hundred people, that his father had told him that what you do is you get people together of different abilities in different areas. You get them all together, and they help. Help *what*? I mean, he doesn't say help what. I would say help each other. Help accomplish a political objective. Help accomplish particularly something that will work for other people, like the country, the state, or whatever. So he has policy objectives, he has political objectives, and he seems himself as being part of a group of people who will, together, accomplish something. That's what moves him.

And of course he builds the loyalty, because he will give the person the responsibility. There's the common objective. He contributes his part; he expects them to contribute theirs. That way he gets from other people the best they have to give. Once you are in an operation where the person who's running it wants you to do your best and rewards you for doing your best, and punishes you by ignoring you if you're not, then of course you're very pleased with that, and people have tremendous loyalty. That's why. We fight like mad. It's chaos! But out of that chaos, you accomplish an objective. That's what he expects of us. At least, that's how I saw it. And every bit of experience I had there bore that out.

So we get into this, and of course I'm learning. I like it because I have a certain academic side and I also have a certain practical side. But this is the greatest research tool I've ever seen. I can find out everything about airlines anyone would want to know. You just ask them. You send them the questionnaires and they'll answer it. You send the CAB [Civil Aeronautics Board] the questionnaire and they'll answer it.

What was somewhat surprising but very important is we stayed away from things that—let's call it "the frozen dog." We found instances where they'd carry the dog on the airplane and it would come off frozen. Or the crippled person, the handicapped person in the wheelchair that they bring on the plane and fly to Chicago, and then they find a rule that says you can't carry somebody in a wheelchair. So they take her off in Chicago and she can't go forward and she

can't go backward. That gets on the front page of the newspaper. Don't do it. Resist it. Limit it. Of the days of airline hearings, we had one day—what we called "the consumer day"—devoted to that kind of thing. But five of the six were devoted in a systematic way to a serious investigation of: How do you set rates? How do you set routes? What do you do about enforcement? What is the theme here?

It was like a theater. But it was like theater that's not superficial. Beneath each movement on the stage is an enormous amount of substantive material backing up the question that's asked. No wasted questions—not doing it for the press. Talking to the press in the sense that it's simplified. Getting them to understand what you're doing. It's sort of substantive and political at the same time. I think he liked it. I hope he did.

Young: Well, you're right in this, certainly, that the hearings become the theater, in a certain sense, where the interested parties come in.

Breyer: Yes.

Young: You hope for press attention.

Breyer: Yes.

Young: Some people have said it doesn't happen if you don't do something and try to take an initiative. But before the hearings, there is some politics going on. And the Senator is doing what about that?

Breyer: The politics that are going on—there are two separate things: First of all, the substance of the investigation. We want a story. What's the story on day one? Well, we have two parts to the story: Number one, isn't it interesting that all the groups you'd think regulation was good for, and would want it—the consumers, the unions, even Ralph Nader—the economists, different people—they all say it's bad. Who are the only people who like it? The airlines! They love it! So, that's a story.

But more than that story, here's the Republican administration and the Democratic Senator, and they agree. They think something's wrong at the CAB, and they think that, from the consumer's point of view, less regulation is important. That's why we got [John W.] Barnum, who was Acting Secretary of Transportation. He was our lead witness. Strom Thurmond is there, and Kennedy is there, and then we have two or three people high up in the administration, and the airlines. I don't remember who else. The economists. Then it was front page of the *New York Times*. David Burnham was the person who covered it.

Young: That was his beat, wasn't it?

Breyer: Yes, I guess it was.

Young: He was making it his beat.

Breyer: Yes. Page one! We didn't think it would be page one. The [Gerald] Ford administration appears before Senator Kennedy and says, "We've got to think about less regulation." There we

have Kennedy and Ford right there working on this project. Now, I didn't dream it would be on page one.

Young: It was your hope.

Breyer: Well, I didn't hope for page one, but I hoped they'd cover it. Of course we explained it to Burnham first, exactly what we were doing. I don't know the extent to which that's Kennedy, or whether it was the combination, or what. Ken Feinberg, with whom I used to work, labeled it—he and I would put it in a kind of jokey way, but of course there is a certain amount of manipulation and conniving that goes on in the Senate, on the staff, among the Senators. We would say, "Our policy, always, in the Kennedy office is called, 'Open Conniving Openly Arrived At.'"

That is, there are no secrets. That is, if the Republicans want to know, or the unions want to know what you're doing, tell them. Tell them what you're doing. No dishonesty, no deception. Explain to anyone willing to listen. We'll bore them to death. But there are no secrets. We will tell them what we know. And if things work out the way we hope, fine! But it's not going to be because we fooled someone. Kennedy liked this. I think he liked it, because he began to devote more and more time to it.

Young: He got into it.

Breyer: Yes, he got into it. Oh, on a fabulous day we came up to Boston. That was a great moment, because all the busing controversy was going on. We were having hearings about—the theme of the hearing was, why can I fly from Los Angeles to San Francisco for $18, but to go from Washington to Boston is $45? That was at that time. You have to multiply it by about four to get inflation in. And the answer was: Because they're not regulated, and they let people charge lower prices.

We were going systematically though that. We were in the hearing room up here, and the school bus demonstrators came in. They start causing an enormous fuss. One woman shouts out, "Senator Kennedy, you're having a hearing on *airlines*? I've never been able to fly," meaning, "What are you doing? You're ridiculous." He says, "Well, that's why I'm having a hearing." That was good. And that was that.

Young: This was one of the women who stalked him every time he came to Boston.

Breyer: Yes, yes, probably. Is that right? Is that what it was?

Young: Yes.

Breyer: Oh.

Young: He said, "They stalked me. They stalked me!" [*laughter]* "I couldn't go anywhere."

Breyer: I didn't know that. But that was good because, once again, that is why we were having the hearings. Obviously, I liked it.

About four years ago, I gave a talk to a group of lawyers for airlines. They wanted to know about airline deregulation. I explained to them, "Look at what you were doing in helping with deregulation. You were offering people something they want." The theme was, offer people what they want to pay for, at the price they're willing to pay. Why not? Now, by the time they're finished, the people in that audience were enthusiastic. It was like a patriotic thing. They hadn't seen themselves—they saw themselves in this boring role of just running something in their company that's very boring. You suddenly transform that into, "You're doing something for someone. You're actually helping some other person when you do your job properly."

That's the ethos in that office, too. It's fun. I can't describe it exactly. I wish there were more incidents—

Young: Well, Freddie Laker helped.

Breyer: Oh, Freddie! That was the first thing.

Young: And you discovered—

Breyer: Oh, Freddie Laker, that was fabulous!

Young: Was that serendipitous?

Breyer: Serendipitous, because that wasn't the real hearings. That was in the preceding fall. The hearings—we had an enormous amount of preparation. We had two months of preparation for those hearings. Every question was worked out to show something. And that was not in the fall.

Young: Was this done in an executive session in the committee?

Breyer: What?

Young: Going over the agenda for the hearings.

Breyer: No, no.

Young: Well, where was [James] Eastland in all of this?

Breyer: He wasn't around. He had nothing to do with anything.

Young: Nothing?

Breyer: There were two political parts. The main problem with getting the hearings was Cannon, because Cannon had the jurisdiction.

Young: Commerce.

Breyer: Yes. So we're getting this set up and figuring out how to do this. This is Kennedy. He got this done. He says, "OK, we'll have the hearings. I'll figure it out." He goes to Cannon, and he asks Cannon to give him some money to run the hearing. My guess is—and this is total guess because I have no idea—Cannon thought he wanted the money to hire somebody who would

help him in some political capacity. Who knows what Cannon thought? But Cannon gave his approval to Kennedy getting the money, because Cannon was chairman of Rules. That was why. He approved the money to go to the investigation. And Kennedy told him we had a memo saying what all—I'm sure he never read it.

Young: Nor did his staff, apparently.

Breyer: Right. Well, nobody guessed that this would take off like this. Once he had approved it, he couldn't go back on that. And there we were.

The thing you're talking about, with Freddie Laker, was before. It also cast a very interesting light on Kennedy. I'm down there in the fall. Tommy Susman and I are sitting there, and we read in the paper—At that moment, [Claude] Brinegar was the head of Transportation, and there was a big problem with inflation, so there was a meeting at the White House with all the Cabinet members to discuss inflation. On that very day, we learned, he's coming back from the White House to talk to a group of airline heads and charter carriers. And what is it he's going to talk about? To keep the prices up. I thought, *Hey, this is a good point here, isn't it? He's talking to them to keep the prices up, just after he's come from—* I said, "Let's go to the meeting!"

We go over to the meeting, and somebody at the door says, "Why are you here?" Tommy and I said, "We're members of the Senate Administrative Practices staff, and we've been asked to come over here. We thought we'd like to see it. Is this all right?" Well, they didn't know to say no, so we went into the meeting. Sure enough, there's Brinegar telling everybody they've got to get the prices up, particularly because of Freddie Laker, because they think Freddie Laker is a big threat.

Young: He was on the charter?

Breyer: Yes, he was on the charter. He's not at the meeting. I think it was just the regular carriers. I don't remember that. But I remember coming out of the meeting, and I said, "Why don't we call them all in and say, 'Why are they doing this?' We'll get Freddie Laker. We'll say, 'He can carry people across the Atlantic for $90,' and say, 'They won't let you do it? Why not?' Then we'll say, 'Why didn't you let him do it?' It'll be very interesting."

Young: That was just a beautiful—

Breyer: Then I get a message from an Assistant Secretary of Transportation who was in the charge of Congress, or Congressional Relations. It wasn't John Snow. It was before John Snow. He called and asked me to come to see him. So I'd better see him. He said, "You shouldn't have these hearings." I said, "Why not?" He said, "We're doing this because Pan Am is on the verge of bankruptcy. I think if you have these hearings, they'll go bankrupt." I said, "*Please*, that seems very unlikely." He said, "Well, you never know. They're just teetering, and we're trying to help them out." I said, "OK, fine. I'll ask the Senator."

I go to see Kennedy. He has a lot to do, so going to see him has to be—you don't want to waste his time. I'd sent him a memo that we can have these hearings, that it sounded good, and we're going to ask these questions. I said, "This man called me over there, and he said they might go bankrupt and then we'll get blamed for it." He said, "Well, will they go bankrupt?" I said, "They

might." He said, "Would we drive them into bankruptcy?" I said, "No, we wouldn't drive them into bankruptcy. That's ridiculous. But we'll get blamed for it. I have no doubt that's what the administration will say." He said, "What would you like to do?" I said, "I'd like to have the hearing." He said, "Have the hearing." Fine! That is *him*, isn't it? It's absolutely him.

So we have the hearing—Oh, it was great! Freddie Laker turns out to be this great character. He loved it and Kennedy loved it. He said, "What is the problem, Mr. Laker? Why won't they let you fly?" He said, "PanAmania! PanAmania!" Kennedy said, "What's PanAmania?" He said, "*Do everything for Pan Am*, that's what it is." Kennedy was in his element, you know? I mean, he said, "That's why they won't let you fly for $98? That's terrible!" and so forth. Then we wrote a little report on the procedures and practices of the CAB, of the administration, in respect to the charter carriers. We wrote all this up, and we said it was the wrong procedure and they shouldn't have had these secret meetings. It wasn't bad in tone. It was fine in tone.

That got us a little bit of credibility within the Senate, that we're actually a subcommittee that can do something. Then he gets the money from Cannon so that we can go ahead with the main hearing. Basically during those main hearings what he did was give his time to learning it. And he did learn it. It was great. Once he knows this thing, he can work with it.

Young: So up to that point, he was not really deep?

Breyer: No. He was not deep into this at all.

Young: It was going OK, so he doesn't need to—

Breyer: Correct. It's going OK, the first hearings were fine, we're doing what a subcommittee should do. We have a little report. We make a recommendation. We've done our job. Now let's ratchet this up a step.

Young: OK. Is he thinking co-sponsors at this time?

Breyer: No, we're way before that. We never dreamt that this would actually lead to deregulation. Our goal here was simply to get the Board to open itself to listen to the Antitrust Division of the Justice Department. We thought, if we can get the Justice Department in there as a force, then the Board will liberalize their very anti-competitive policies. That's what I thought of growing out of this. I never dreamt it would end up like that.

But what happened was it got enough publicity in that—and the substance was terribly strong. I spent the summer writing a 300-page report, which is probably the best thing I ever wrote, because it's very detailed, very thorough. I have every fact in it, all the arguments pro and against. It's really a brief. It doesn't look like a brief, it looks like a report, but it's really a brief. We sent it around. Everybody commented on it. We were totally fair, and did everything as fair as you possibly could. It ended up being an enormously powerful case for dereg. By the fall, a lot of people in the industry had read it, and they'd read it over at the CAB, and they'd read it in enough places that they became very interested. By that point, now '76, it's the fall, Carter's in the campaign, and Carter is making a lot of dereg.

Young: Why do you suppose he picked that up?

Breyer: Because of [Simon] Si Lazarus. Si Lazarus is a great friend of mine.

Young: Tell me about that.

Breyer: First of all, there is a coterie of people that I'm keyed into there. In the Ford administration, it's Phil Areeda. Over in the White House, it was John Snow. In the Department of Transportation, it was Lee Rankin. He was on the Warren Commission, too. Running the Federal Trade Commission, there was Jim Miller. There was George Eads. It was a bipartisan group of people. Its headquarters was Brookings Institution. They were all over the place, this group of people interested in deregulation, or lessened regulation.

So Si Lazarus is a friend of mine. I know him pretty well from law school forever, and he's working for Carter. He gets Carter to give a speech as a good example of how you can help the consumer with lessened regulation. They have this example sitting there, the 300-page document. Carter gives a speech about it.

In the meantime, we have Mary Schumann, who's now Mary Boies. She's over in the White House. She comes in with Carter, as does Si. Si is working for [Stuart] Eizenstat, and they all think this is a good idea.

[BREAK]

Breyer: So Si gets the candidate interested in this, and Eizenstat. They're trying to figure out something to make concrete their idea, and there we have it—the report, the hearings, they're all there. They pick it up. It's Tom Clark who said about appointment, "You have to be on the corner when the bus comes by." That's what the hearings were.

What we wanted to happen, Kennedy and the staff—me, Phil Bakes, and Tommy Susman. That's the staff. The three of us were more or less doing all this. That committee, you see, gives you a fulcrum: You can move the world if you can use the lever. That's what Kennedy's good at.

The object was to get [Alfred E.] Fred Kahn appointed Chairman of the CAB. [John] Robson missed his chance. Oh! By the way, Kennedy had this idea for me that was nice. I forgot about that. He said, "Why don't we get—" *me*, namely— "appointed to be the Deputy Secretary of Transportation?" He won't remember that, but I remember it. Brock [Brockman] Adams was Secretary of Transportation. So he and I go over to visit Brock Adams. He went in and talked to him; I wasn't in the room. Anyway, Adams wanted to appoint his own person, and he did, and that was that. It was very lucky for me I wasn't appointed, but anyway, Kennedy obviously was pleased with the way this was going, or he wouldn't have done that.

Robson missed his chance. He was too timid. He was Ford's appointee, and he sort of changed. We called in all the Board at the—I'm jumping back and forth in time. We're now back in February. [Richard J.] O'Melia was the head of the Civil Aeronautics Board. The one just before him, Robert Timm, had resigned, because it turned out they did have a certain number of illegal

campaign contributions, and I think he quit at that point. But that was not the object of the investigation. We did uncover a variety of things, but that was not the object.

O'Melia became the head. They had this thing called the "route moratorium." Their object was to keep prices as high as possible. You have a competitive industry, you have a price floor, and people compete in other ways. They kept trying to stifle competition, and limit routes, and there was a thing called the route moratorium. They wouldn't let any more people have routes. Kennedy said, "What is the point of this route moratorium?"

Young: How did you discover that? The route moratorium?

Breyer: We asked them! We asked them thousands of questions. We knew there were meetings where they discussed it. This was a long and big project that had gone on for about three or four months. It was organized. You can read a summary of the details in that.

O'Melia responded to Kennedy, and said, "The route moratorium has been terminated. It's over as of now." I say that's the moment when airline dereg began, right at that moment in the response of O'Melia to Kennedy. That's in my mind. Obviously I don't know that, but that's in my mind.

Subsequently, we get Kahn appointed. Everybody is working for that. I don't know if Kennedy had a conversation or not. Whether he did or not—probably not—Kahn is appointed head of the CAB, and Phil Bakes goes over there to be his general counsel. I'm back up at Harvard. And Kahn just does all this! That's the good thing about bringing in an academic sometimes. The academic will just do it, because he doesn't know enough not to do it. They had all this done and they went forward with it. It was great.

At the same time, we're working on the bill, and the first thing that happened—

Young: And Carter is a convert?

Breyer: Oh, yes—well, Carter is a convert to airline dereg, but Carter has been talking for a long time about less government. Yes. He's a convert.

Young: So have the Republicans.

Breyer: Yes. Correct. And they never did it. They never did it. We're the ones who did it.

Young: But they're on board with this?

Breyer: They're on board with it. They want the credit for it, and the Democrats like them to have the credit for it because they're afraid to say that we want less government. They don't mind, so [Ronald] Reagan takes all the credit for this. Fine! It doesn't matter. The thing gets done.

At the same time, we're working on the bill. The bill was very popular. I was more of a consultant on that, because Bakes would be there every day writing this thing. I would see drafts, and I'd go over it from up here, or occasionally come down there as necessary.

The bill goes through pretty easily, because [Elliott] Levitas takes it up in the House, and he puts in the thing to sunset the CAB. The reason it goes through so quickly is because—I'd like to say this report helped, and all the substance helped, and I'm sure it did help to show people that we did have substance. The first effect of Kahn's opening the routes up and taking away the price regs is that there is competition, so prices go down. But since there isn't yet time for a lot of new entry, profits go up. The airlines are making a lot of money at the same time the prices go down, and all the politicians figure they've found nirvana. They think, *this is the best thing we've ever seen.* So it passes, and there we have the Airline Deregulation Act of 1978 on their sleeve. That's it. That's basically the story.

I think it's important—of course, this is something that interests me: I don't know, in the big picture of Kennedy's own goals and achievements, if this bodes large, small, or whatever, but I'd like you to see a movie done by Daniel Yergin, a series of hour-long productions for the BBC [British Broadcasting Corporation], for the PBS [Public Broadcasting Service]. It's called *Commanding Heights*, and it is the story of deregulation.

The socialists and the communists, when they come in, say, "We want to capture the 'commanding heights' of the economy." You have the conservatives who say no, and the communists and socialists who say yes. That is the basic politic divide for a hundred years. And suddenly that divide—this is the thesis and I think it's true—has disappeared. Now it's a question of a little more regulation, a little less regulation, and dereg played a big role in changing the terms of the political debate. The film gives airline dereg credit for starting that ball rolling down the hill, because airline dereg led to trucking dereg. That was when [David] Boies came into the Antitrust Subcommittee.

I could not do it. I was teaching. Boies ran the Antitrust Subcommittee. Boies took up motor carrier dereg. Carter liked it, and the political coalition was in place, and deregulation of motor transport became part of a normal political agenda.

Young: How could the coalition be in place on trucking?

Breyer: On trucking? It was there because airline deregulation worked. It became a consumer issue.

Young: What about the Teamsters?

Breyer: Well, the Teamsters—I don't know. You have to ask Boies. I think there was some monkey business going on with Cannon and the Teamsters. Whatever that monkey business was, there was enough concern on the part of those powers that they didn't put up a big fight. Why they didn't put up a big fight, I'd leave to you to find out. I don't know the details.

Young: But the outline of the coalition—

Breyer: Yes. Because we have the White House now, we have—

Young: Everything is now in place.

Breyer: That's right.

Young: And it's a good substantive case.

Breyer: Oh, it's worked beyond what anybody had dreamt possible. No one thought—I certainly didn't—that this would get such tremendous political steam behind it. The most I can say is the hearings helped some. It's perhaps necessary but not sufficient to build a good substantive case for reform. To do so we used the Senate committees in a way that a twelfth-grade civics text would describe.

Young: Right.

[BREAK]

Breyer: Well, now you've got me off on this other story, which has a lot to it. What is so typical about Kennedy's way of working is—Imagine his getting involved in this. Why does he get involved? And why does he find it interesting and devote so much time to it? Because it's working. Because we can use it as part of a theme. Because the theme is that we—I mean he, and his staff, and the Democratic Party, and the others—are for what works to help people, to pay less money for their flights, to get what they need, whatever the theme fits in with healthcare. It fits in with his other agenda items, once you see it through that lens. That's why it's not something far out on another limb on another tree.

Young: It makes air travel more affordable.

Breyer: That's right. Look what happened to the fares. They're down. They're still down. They're down 30 to 40 percent. Well, that's that story.

Young: You enjoyed the politics, too, did you?

Breyer: I loved it, of course.

Young: Was that why you did this?

Breyer: No. I did it because I thought it was interesting and helpful and it gave me the chance to work in the legislature and for Senator Kennedy. When we turn to my next job, Chief Counsel of Judiciary, we should begin in 1978—I was teaching in Salzburg that summer, and he called and said he was going to be chairman of the Judiciary Committee that following January, and would I like to be chief counsel?

Young: Let's go into that now.

Breyer: All right.

Young: So, the second time back—There's really never a break. It's a continuum.

Breyer: It is a continuum, but my activity was less when I went back to teaching at Harvard in

1976 and 1977. But once you're there, you're there. You always stay in touch, and there are always things going on, and that summer he wanted me to come down.

Young: What was the agenda this time?

Breyer: The agenda was the entire committee. Now, that's quite different. The committee, compared to a subcommittee, is like a battleship in relation to a tugboat. This Administrative Practices Subcommittee is a tiny thing with three people on the staff. The Judiciary Committee, we had no idea how big it was. In fact, there were about 180 professionals. It was huge. Senator Eastland—it used to be called "the Plantation," when he was chairman. We had 60 on our staff, professionals, working for the chairman. The minority had 60, and there were about 60 staff people among the other members of the majority, the Democrats, that were all on the committee staff, and worked, say, for Senator [Birch Evans] Bayh, or worked for the subcommittees that they ran.

We had the Antitrust Subcommittee; we had the Constitution Subcommittee; we had the Judicial Practices and Procedure; Administrative Practices and Procedure; Intellectual Property—

Young: Immigration.

Breyer: Immigration. That was Jerry Tinker who ran that staff. And there was another, the Criminal Justice subcommittee.

Young: Was Ad Prac still in existence?

Breyer: Yes, [John] Culver was chairman of Ad Prac. Each of the Senators had a subcommittee. I could not come down until April or May because I was teaching, so Boies ran it for a while, and then I was to come in, and Boies wanted to go back to—

Young: You were slated to be head—chief counsel.

Breyer: To come in around March or April. That's what I thought. That was our understanding. Boies, in the meantime, was running the committee. Apparently Kennedy thought he called me from time to time. Anyway, it worked out. [Richard] Rick Grogan came on board to do the administrative part of running the committee. I was the chief counsel. There was a certain rivalry among the staff: Tommy, Ken Feinberg, Boies, and there was a title for each of them: the general counsel, the special counsel, etc.

Young: What was Ken Feinberg doing?

Breyer: Ken Feinberg had been the AA [Administrative Assistant]. Ken was more interested in substance, to be honest with you, and you'd have to talk to him. You should talk to him.

Young: I'm going to.

Breyer: Good. Ken was in charge of a major project, reforming the criminal code, and criminal law things. Ken was, say, number one-and-a-half on the committee. And Tommy had a major role. Boies was going back up to Cravath [Cravath, Swaine & Moore LLP], which he did, but we

wanted him to stay and continue with the—

Young: Antitrust.

Breyer: Yes, and in particular, the trucking dereg. It was more to be a partnership than a hierarchical organization. In the back of my mind is we have six or seven subcommittees. What we want is that, in each subcommittee, something seriously substantive is occurring. When people ask, "What is it that Senator Kennedy is doing with the Judiciary Committee?" we answer, "In the Constitution Subcommittee, we have a fair housing proposal. In the Antitrust Subcommittee, we have a trucking dereg proposal. In the Criminal Law Subcommittee, we have FBI [Federal Bureau of Investigation] reform and we have the criminal code. In the Judicial Practices Subcommittee, we have several projects including reform of the judicial ethics law, so there's a system that citizens can complain about judges; the creation of the Federal Circuit; the Court of Appeals for the Federal Circuit will be the place where the patent law is decided."

In other words, we want each subcommittee to be working on something that is significant. Then, our job at the committee level is to see that this is happening as bills gradually come out, and to get the committee to vote on them and recommend them to the House if we think they're sound. If not, we hope it is defeated if it isn't sound. That job was a wonderful job.

That was the year Senator Kennedy was running for President, so he wasn't there all the time. My job in part was to make sure that he did always have to be there. He was always there, in the sense that he knows about all the significant events. He would come in and I would brief him. He wanted me to be able to say succinctly in a memo what was happening, no unnecessary detail. He was relying on me to make good use of his time. He was the chairman; therefore, he was in charge of the committee. My job is to make sure that he can do that job effectively. It was great.

Every single morning, Ken, and I, and Emory Sneeden, who was Thurmond's person, would have breakfast and we would work out the day. No secrets. Our job was to try, at that point, to get the committee to focus on things that would be of public value, and we would color an action politically, so that each Senator could vote for it. He could worry about the Republicans; we minimized disputes. That's what the chairman wanted. He liked it when people would agree about things.

Young: Was anybody on the committee bothered by his campaigning?

Breyer: No. I didn't notice it. They really helped. When he had to be some other place and there had to be a committee meeting for example, Senator Birch Bayh would take over. So we'd prepare our big briefing book, I'd go up to see Senator Birch Bayh, he'd read it overnight, and we'd have everything in detail for him. Or Senator John Culver would run it. Even Senator [Howard] Metzenbaum ran it at some points.

Young: John was on the committee?

Breyer: Yes. It was a great committee. People were very cooperative. The Republicans were cooperative. There was no one who caused trouble. Thurmond would be helpful. I'm not saying they all agreed about everything. They didn't. But they would be helpful in trying to get this into a really smoothly running operation. I'd work with their staffs.

Young: The agenda didn't have any really controversial issues.

Breyer: Well, sometimes it did. You had bills concerning oil, and bills concerning fair housing.

Young: Supreme Court nominations would come up.

Breyer: No. There was no Supreme Court nomination while I was there. There was the Attorney General nomination of [Benjamin] Civiletti. There was the [Charles B.] Renfrew nomination for Deputy Attorney General. You'd have to ask Senator Kennedy, but I think what he and Carey and the other people in the office were hoping for would be two years of things running smoothly. And they did run smoothly.

I can't say we accomplished some huge thing. We might have gotten the criminal code through, but doing so required unanimity, because it was too major a thing. The fact that it almost passed unanimously speaks a lot about the Senate. At that time—I would say now it's hopeless. At that time, it was difficult but not hopeless. To get a major law through, a major change, one person could stop it. We (Ken Feinberg in particular) had a way of working around each person's objection when we were reforming the criminal code, which was a huge thing, a multi-year project. If anybody objects and they say, "We don't like this or that," we say, "OK. Keep present law there." But there were two people who wouldn't go along with that. One was Senator [Jesse] Helms—

Young: Within the committee?

####Breyer: No. This was in the Senate. We got it out of the committee. In the Senate it was [James] McClure and Helms. The reason that they wouldn't do it was they wanted Reagan to get the credit for it. Then we said, "Look, it's never going to happen." They wouldn't go along, so we didn't get it. We had it pre-conferenced. That was a disappointment.

We were towards the end of this process, and Kennedy said, "Well, there's also the fair housing law. What should I work on? Which should I do?" I thought he should work on the fair housing, because that's closer to his basic interest than criminal code reform. I don't know if I was right. You know, Napoleon [Bonaparte] sat there and wrote the Code Napoleon, and he said, "I wrote the Code Napoleon." They said, "Why are you sitting there each day? You don't know anything about this." And he said, "I am a great general, but I'll lose battles. If I get this code through, I live forever." That's what he said. I didn't know that at the time.

Young: Well, he had a history in housing, going right back to the '60s.

Breyer: That's right. And I don't think he could have brought McClure and Helms around anyway.

Young: Immigration was up for renewal in 1980.

Breyer: Yes. He worked with Alan Simpson, but that's Jerry Tinker, primarily, who was working with him on that. Oddly enough, immigration is so specialized, and he'd put so much effort into it, that even though in principle Jerry Tinker is on the committee staff and I'm chief counsel of the committee, in practice that's irrelevant. I mean, I'll find out what's going on,

because Jerry is keeping me informed, but he's going to work with Jerry on that. He's not going to work with me. It's the hub and the spoke, and that's sort of overriding. What I'm doing is organizing that staff, and organizing the events so that they run smoothly.

Young: Was the life of the committee and the committee staff quite separate from the life, at this juncture, of the personal staff?

Breyer: Yes.

Young: Which was consumed, in part, with the campaign?

Breyer: That's right. I had very little to do with the campaign. Probably that was done because I don't think you can mix that. I got a little involved. We had the great Kennedy economic program that was partly my responsibility. We had this binder with all these different proposals in it, and on the way into the office I managed to tie it to the back of my bicycle, where it fell off, and to this day it's somewhere in the sewers of Washington. I don't have it.

Young: This is on—you're in the midst of inflation?

Breyer: The oil crisis—that's right. The question was how do we work this out, and—

Young: Wage and price control?

Breyer: No. I didn't want—

Young: You didn't want controls?

Breyer: No!

Young: You suggested freeze?

Breyer: No. I can't remember the details, but it was not going to be general price controls. You'd have to go back and look. I might be misremembering that, but I do remember trying to get this done in a way—maybe there was a freeze of oil prices or something. Then you had to figure out how to allocate it. It was very complicated, and it was something that would sort of work politically. I remember we were trying very hard to get the Steelworkers to agree to this. I just remember talking to the Steelworkers' representative who was saying, "I'm not for trickle-down economics." I said, "Well, *I'm* not for trickle-down economics."

Young: I don't recall Kennedy saying very much on—

Breyer: We did have an economic program.

Young: But I don't recall it, personally.

Breyer: Nor do I.

Young: That's not what I was hearing.

Breyer: Yes, correct.

Young: [Richard] Rick Burke became—

Breyer: Rick Burke was doing the personal things over there, in his personal staff.

Young: How did he become chief of staff?

Breyer: I don't know. He wasn't. He was viewed as the person who would get the boat, and sort of get everything organized, but he did not come into my life. The way that Kennedy would run the meetings—I'd be in the meetings that concerned me, and occasionally in some others. Things would come up. For example, we had bills involving the press. I think Kennedy liked that we had the newspaper editors in there.

Young: The newsroom?

Breyer: Yes. There was some bill involving the CIA [Central Intelligence Agency] printing secret information, or secure—I can't remember. There was the death of a CIA agent, and there was going to be a law that would stop the newspapers from printing certain things about the CIA. I remember going into Kennedy's office. We had a group of—I think Tom Winship was there, and various others. I was trying to explain it to them, the various details of this. I can do that. I can explain pretty clearly a complicated thing. I know Kennedy liked that. He's relying on me to do that. He can see the point, and I can make this complicated thing—it has to be honest, and it has to be clear. He saw that I could do that. So whenever he sees me, the next year, he says, "There were three boxes running around…." He's funny. He has a sense of humor. He's just fun to work for.

Young: Did you go on the floor with him?

Breyer: Yes.

Young: What was that like?

Breyer: You have to be there! You're prepared. He wants you to be prepared. My job is to be prepared. His job is to make the statement. He'll see what's going on with all the other people, and he knows how to do that.

One day towards July, Thurmond said to Emory, "Don't talk to Breyer anymore. Enough of this cooperation. It's too near the election. Just stop your breakfasts." Emory said, "I'm sorry. What can I do? We can't discuss these things anymore." Kennedy was coming in for the meeting, so I said, "Oh God, this is going to be bad." We got the Exec going, and we were sitting there, and there were about four judges, and before you know it, everybody was in an argument about confirming these judges. John Culver was shaking his fist at Thurmond. It was total chaos.

Kennedy looked to me and said, "What did they teach you about how to deal with this at Harvard?" I said, "Not very much." He said, "Well, I'll show you what to do here. OK. Here's what we're going to do. Birch, you're going to be head of the first subcommittee, and that'll consider these two judges. And Strom, you're on the subcommittee with Birch." Then he said,

"All right. Orrin [Hatch], you're on this subcommittee over here with the other two," and we appoint somebody else to be on that subcommittee. Then they all appoint subcommittees, and that's the end of the Exec, and then it works very well. Then of course the subcommittees never meet, because by that time Thurmond said, "We'd better get together," and all the staffs got together, and it worked out.

I mean, he knows how to do that. It was very good. I loved it. You can tell from my enthusiasm. That's why this oral history isn't going to be so good, because it isn't so much what I say, it's just the enthusiasm I had for that job.

Young: Well, it's both.

Breyer: Oh, I'll tell you what he did, the first thing, within the first week of my having come down there as chief counsel—

Young: You came down in the summer?

Breyer: No, I came down in about April of '79. The first thing he does is he calls up, and we make an appointment with every Senator on the committee, the Republicans, too. He walks with me over to Senator Simpson's office, and we go in and meet Senator Simpson, and he says, "This is Steve Breyer, and he's going to be the chief counsel, and he's going to help you, Alan." We do that with each one.

Young: Always go to other Senators' offices?

Breyer: Yes.

Young: Most of them?

Breyer: Yes. That's right. He took me in tow. By the time he's finished that meeting, he's given me the credibility so I can talk to them. And of course I'm trying to help them. I mean, that's the object of this enterprise. The object of the enterprise is not to fight. The object of the enterprise is to try to get something done. That comes through loud and clear.

That thing with [Charles] Winberry—With Winberry, we got some bad—We got through 200 Carter nominees for judges, and there were a few that were a little bit tricky, and we didn't confirm everybody. We developed an independent investigatory capacity. It was [R.J.] Duke Short on Thurmond's side and Bert Wides on our side. They worked together. They'd investigate everybody together. They'd come in with a joint report. The joint report, in 99 percent of the cases, is fine. Done. In the 1 percent it's not fine, then it's not done. They came in with some doubts about Winberry.

With [Stephen] Reinhardt—Thurmond is against Reinhardt, because the Republicans don't like him. They had all kinds of allegations against him. So we say, "OK, we'll look into him." Wides and Short go off and investigate Reinhardt up, down, and sideways. It comes back. There's no problem. He's done nothing dishonest. And Thurmond, who had plenty of problems about it, finally says, "OK. We'll do it." We do it, and he's confirmed.

With Winberry, it comes back negative. [Robert] Morgan says, "No, I want him confirmed." So Kennedy sends Tommy over. Tommy and I go to see Morgan, and we say, "Senator, here's what we think. This is what we've learned. What we suggest that you do is we ask the ABA [American Bar Association] to reopen their investigation and look into it. If the ABA comes back, having seen these different things, and they say it's fine, he's no problem, we'll confirm him. If they say no, then it's their fault, not your fault, and you've done your—"

Morgan says, "No. Absolutely not. I want him confirmed, and that's it."

So we go to Kennedy and say, "Well, yes, that's what he says." Kennedy says, "What do *you* think?" Tommy thinks, and I think, we can't confirm him if these things are true. That's just it. Kennedy says, "Fine. Do what you think is the right thing. Do it." So we had a major set of hearings. [Patrick] Leahy and Hatch together do this investigation. That's why I admire both of them. It's harder for Leahy in a way, because this is a Democratic nominee. But they sat there, and we had the people from the crooked cigarette racket come up from North Carolina, and it ended up—We had the hearings, and we staffed it out, and we wrote a very detailed report, and recommended that they vote no. Morgan sat in my office every morning while I wrote the report. He wanted to see each page. Kennedy said, "Fine. Show him the page." I showed him the page. There we are. So, we circled it.

Young: He gave you some payback.

Breyer: Well, yes. It was all too good to be true. But I don't think it was me. See, I was not a significant person. He would be annoyed at Kennedy. Since Kennedy had stopped his person from going through, Morgan would say, "I'll stop *his* person from going through." I mean, Morgan would be very surprised that I would personally be annoyed. Why should I? It has nothing to do with me. It has to do with the Senators.

Young: How did you work with the Department of Justice?

Breyer: Oh, pretty well. Civiletti went through very well.

Young: Griffin Bell was there?

Breyer: Yes. Griffin Bell, and then Civiletti. We had the confirmation process with Civiletti, and there was some opposition from different groups, so we'd organize meetings with representatives of those groups, and with Civiletti. We'd help him out—

Young: Was this on the new judgeships?

Breyer: When Civiletti himself was confirmed. Oh, the new judgeships—we thought they sent up a few people who just couldn't be confirmed. They'd have a tax problem or something. Our job was to figure out—not necessarily to confirm them. Kennedy doesn't want it run in a non-straightforward way. If they're not supposed to be confirmed because they have a tax problem, then don't confirm them, because they have a tax problem! That isn't my job. My job is to say what the facts are. But it's perfectly obvious that once we see that this is the problem, that person is not going to be confirmed. That's not our decision on the staff; that's the Senator's decision. But it's going to be driven by what we find.

Young: Who was pushing the people who had a tax problem? Was this on the Executive side, or was this on the Senate side?

Breyer: I don't know.

Young: But not necessarily the Senators from those?

Breyer: No, I don't think so.

Young: I'm wondering about the chain of influence, whether the Senators go to—

Breyer: I don't know. I think it was the Executive. But there were services—

Young: They changed the procedure, didn't they?

Breyer: At that time, the Senate was a much more cooperative place. I think that in certain instances it was more the Carter people than it was the particular Senators, but I don't know.

My nomination was just a fluke. Kennedy got this idea. Probably Ken and he discussed it, and the idea was—My job was to get Archie Cox appointed. That was the beginning. We wanted Archie appointed. He should have been, but Carter wouldn't appoint him. The next thing that happened is we think, *Let's get somebody appointed from Puerto Rico. That will be nice*. Then Civiletti announces he's going to appoint somebody from Puerto Rico. Well, you can't do that, because the First Circuit is Puerto Rico plus Rhode Island plus Massachusetts.

[John] Chafee said to Civiletti, "You know, we're in the First Circuit, too. Am I supposed to tell the Bar that they can't apply?" Then the people in Puerto Rico couldn't agree. Time passes, and by this time it's September and the election's in November, and it's really too late. I think that then Kennedy got the idea that maybe—me. That was just chance.

Young: Would you have stayed, if the First Circuit appointment—

Breyer: No, because I had a two-year leave at Harvard, and it was up. As it turned out, the Senate changed sides. I was planning on going back.

Young: Is it your impression that when Reagan was elected, that this was another new stage, or a further stage of Kennedy's career?

Breyer: Yes.

Young: Did you sense his interest shifting?

Breyer: I knew he would be more interested in HELP [Health, Education, Labor, and Pensions] than he would be in Judiciary. I wouldn't say Judiciary was the love of his life. He found it interesting, and he would do it.

Young: I think he referred to it—not to me, but to somebody else—as a can of worms.

Breyer: Yes. And it became worse and worse.

Young: But, with the exception of Supreme Court appointments, did he want to get away from that?

Breyer: No. I mean, I don't know. I wasn't surprised when he became interested in working primarily with HELP, because health, labor, and education are things that have always interested him. He would spend the time on Judiciary. He would do it, and he'd even become enthusiastic about some of it, but this is not really how he wants to spend his time. But I'm not there, then.

Young: Right. But with the turn to the right in the Executive, I see him moving toward more interest in—

Breyer: Yes. I think that might have grown out of the Presidential campaign. The speech that he gave at the convention was a speech where he's basically saying, "I'm going to represent certain interests of the party that are very much involved in things like health, education, and labor. Those are the things I've worked on, and that's what I want to stand for." I think that speech said that.

Young: But the headlines on [Robert] Bork—

Breyer: That was after, wasn't it? I wasn't there.

Young: I know you weren't there. But it's—he wasn't sleeping.

Breyer: Carey knows—Carey Parker knows every single thing. What you've got from me is a somewhat more distant perspective, because I'm very enthusiastic about my job, and my job is to do my job.

Young: Well, OK, but going on the bench, yourself, after this exciting high-pressure politics—

Getting things done through the political process—

Breyer: Yes, I loved it.

Young: And now you're moving—you're in a less exciting—

Breyer: It's less exciting. It was very interesting. I liked it. I liked being a judge. I enjoyed the First Circuit. I thought that these were—it was a great, great circuit. I went there with Frank Coffin, and Lee [Levin] Campbell, and Bailey Aldrich, and Hugh Bownes. There were only four people. Three active, I was the fourth. It was ideal. I really liked it. And I think Kennedy, oddly enough—I mean, maybe it was just chance. It could be just chance. Or maybe he thought I'd like it. Or maybe he'd thought I'd be good at that job. I don't know that I was—I mean, I tried to be good at it.

It's not exactly the politics. A lot of it is what I think of as common sense. It's common sense. Not everybody thinks alike. You have to say things in ways that will be understandable to people who are limited in how much time they have to devote to your interests. You have to be clear, you have to be succinct, and you have to take other people's views into account. That's what he does, so I'd say I learned a lot working there. As you can see from my enthusiasm, that was a

great thing in my life.

Young: Your appointment to the Supreme Court.

Breyer: Ah! That's a different matter.

Young: Talk about that a bit.

Breyer: That, I'm sure he had a lot to do with. It came up—

Young: I think he had a great deal to do with your appointment to the First Circuit.

Breyer: Oh, yes, everything with First Circuit. What I think they did—and you'd have to find out—but I suspect what they did is they negotiated with Jimmy Carter, and I was part of the negotiation.

Young: That's right. You and somebody else.

Breyer: Yes, that's exactly what I think.

Young: Eddie Martin.

Breyer: Yes. Right. I was kept out of that.

Young: Gets his job back.

Breyer: Yes. At the EPA [Environmental Protection Agency]. I was kept out of that. I know he had everything to do with that. The Supreme Court—I think what he did the first year when I was not appointed, I think he brought my name to the attention of the White House.

Young: Certainly he did.

Breyer: I know he did. He had a big book that he wanted me to prepare, Carey got me to prepare, about everything I'd ever done. I sent Carey the book, and they had everything I had done there, and I'm sure he gave that book to [William J.] Clinton. Then Clinton paid attention to it. I know that.

Young: Well, they did more than give a book to Clinton.

Breyer: What did he say? I don't know what he said. You probably know.

Young: He was good strategically on this, I think.

Breyer: Yes.

Young: Very good, strategically.

Breyer: I remember he called when I was in the hospital—

Young: This was the first time around?

Breyer: Yes. I had this tube going into my lungs. He said, "Well, I'm sorry, but you've got to get down here." So they took the tube out of my lungs, and I got down there on the train.

Young: Had to get down on the train?

Breyer: Yes. I can't remember that day too well, because they had stuffed me full of some things. It might have not have gone perfectly. I think it went all right. President Clinton was interested in a number of different things. There was this thing with Nannygate. They were worried because—

Young: You didn't have Nannygate.

Breyer: No, but there was Molly, who had come in to take care of the house for years, who was an American citizen—there's no problem there. But Joanna [Freda Hare] had never paid Social Security taxes—and I didn't have anything to do with this, which I should have, but I didn't—because Molly was getting Social Security. Everybody thinks, well, she's getting Social Security; you don't have to pay Social Security. That was wrong. But way before there was any retirement, when we found that out from the Nannygate, we went and started the things in motion to pay all this, before there was a vacancy. I had to anyway, since I was a judge. But there was that floating around, though everybody knew the details of that.

Young: Yes. That was not a major issue, I don't think.

Breyer: No. In Clinton's mind, I think he wanted—Ruth [Bader Ginsburg] was fine. That was a good appointment. Kennedy then called me afterwards and said, "Well, this is when people look at you." Absolutely—that's him, isn't it? He's absolutely right.

Young: He, in effect, said there will be another time?

Breyer: No, he did not.

Young: He didn't say that to you?

Breyer: No. He did not.

Young: He didn't, but said it to others.

Breyer: I didn't think there would be. I mean, there might not be. That's it. Very interesting. I didn't know that he said that. He didn't say that to me.

Young: Yes, in an internal memorandum. It was not his. I don't know if it was Rick Sterns, or—no, it wouldn't have been Rick Sterns. Anyway, when Kennedy came out, he gave a statement, as you know, to the press. "Well, what about Ginsburg? Your guy lost."

Breyer: What did he say? I don't remember.

Young: He made a very statesman-like—

Breyer: Ruth, you can't—a fine appointment.

Young: He said, "He made a very good, first-rate appointment."

Breyer: Right.

Young: So, "Well, you've lost, haven't you?"

Breyer: It's not a game like that!

Young: No, no. He said, "We didn't get our person in, this time." *This time*.

Breyer: Oh, he said this?

Young: He didn't say, "There'll be another time," but he did say, "This time."

Breyer: I see.

Young: You know the interesting stories about his watching very carefully, about the next vacancy, dealing with Clinton on him, and so forth.

Breyer: And then probably Hatch was—I'm sure. He talks to Hatch.

Young: Oh, yes.

Breyer: Yes.

Young: That relationship developed while you were there?

Breyer: It was pretty good. They were working on the criminal code. I'll tell you another thing he said that was interesting. On the criminal code, there were a number of things we were trying to get agreement on in the committee. There are so many issues that are in the politics. One of the things was the Hobbs Act. The Hobbs Act had been interpreted as applying to when you threaten people to get money. The unions had always been worried, because the unions thought that you could view picketing and striking as an effort to extort money. They wanted to be sure they're not written in. A lot of the employers, and a lot of Hatch's people, thought they should be. You should go to jail, depending on what you do, but a real threat is a threat. All right. So we had to work that out. Kennedy's approach—he says, "Work it out. Work it out."

We get together with the Hatch staff, and with Senator Hatch, too, and we worked out a compromise where the unions are exempt, unless the threat to get money consists of actually murdering somebody. It is not saying you're going to murder somebody. You have to murder somebody. It listed six things, like murder, arson, rape, explosion—blowing things up— four or five things like that, right in the statute, and said, if they do this in order to get money then it's a violation of the act. But they actually have to do it. It was fairly reasonable, I have to say.

Hatch comes into his office. Kennedy's in an airplane because he's going off to somewhere, so we're talking by phone. It was Kennedy and Hatch, and we worked this thing out, and Hatch is saying, "OK, I guess I can sell that." And we have [Laurence] Larry Gold there, who is an AFL-

CIO [American Federation of Labor and Congress of Industrial Organizations] guy. Larry Gold agrees that this is pretty reasonable. We say to Larry, "Can you get the AFL-CIO to sign off on that?" And he says, "I'll try to do that." He does. They come back, they sign off on it. Now we've got our agreement.

Kennedy comes back in the office, and we're talking about it later. I say, "We got the agreement. The AFL-CIO signed off on it. We're fine." He says, "Fine? Wait until you see—" Sure enough, he is so right. In the primary campaign, he's in Pennsylvania. It's a big—they send out flyers all over, about how Kennedy betrayed the unions on the Hobbs Act! "Your activity on the picket line can subject you to criminal prosecution, thanks to Senator Kennedy." You see? He knew what would happen. He did it, however. He did it because it's a substantive achievement.

Young: You don't want to talk any more about your Supreme Court appointment?

Breyer: Well, what is there to say? He was right, even in the confirmation. Metzenbaum was a big troublemaker. Big troublemaker.

Young: Yes. Why do you suppose that was?

Breyer: This is my belief: Morgan started this rumor at that time that there were 17 people who weren't confirmed and we'd sold those 17 down the river to get me confirmed. That was completely false. Completely false. There were 17 people. Most of the 17 people could not have gotten confirmed, because there was some problem, and the remainder had been sent up too late. Thurmond pulled the window down in July, and we got several confirmed. After that, it was too late.

Metzenbaum had come to us late in the summer and said he had somebody he wanted confirmed, and we said, "We can't do it. There's no way." Because the Republicans won't make up a quorum at the Exec, and they have ways of stopping it if they want to stop it, procedurally. We said, "They're not going to agree to this, and it's too late. September is too late. We can't do anything about it." Well, he resented that, because he thought if we really wanted to, we could. And I thought if we really wanted to, we couldn't. Sorry. We can't. I think he resented that. He's jealous. *Kennedy's always getting his people through, and I can't get my people through*. His reaction—When he took over the committee one day, we gave him this briefing book, and he reads all our briefing books. He turns to his staff and says, "Why can't you ever prepare a briefing book like that? [*whimpering noises*]" Who knows? He might have been annoyed, still, at that.

Ralph Nader was campaigning like mad against me. I think the reason Ralph Nader is campaigning like mad is because first I worked for Don Turner, whom he didn't like because Don Turner was a friend of Lloyd Cutler's, and he hates Lloyd Cutler. He said what he thinks, and he testified against me; moreover, because I'm too conservative, because I don't like a lot of regulation, and I've written a book on risk regulation. He didn't like a lot of that, and a lot of the environmentalists didn't like it. Well, I'm sorry.

His whole hearing is how terrible Lloyd Cutler was. That was the hearing. It was supposed to be about me. It was about Lloyd Cutler. In the hearing, [Dennis] DeConcini said, "You make Lloyd Cutler sound like he's Al Capone." Because Nader said, "Lloyd Cutler is roaming at-large in the

White House." So he said to Nader, "You make him sound like Al Capone." And Nader said, "Oh, he's much worse than Al Capone." He said, "Well, can you actually name any really bad thing you think he did?" Nader said, "Yes! He helped get Breyer appointed." That was the bad thing.

Kennedy is sitting at this hearing, and Metzenbaum is reading these different things. Metzenbaum is absolutely working against me, which I know from various union sources, and the unions are not, for a variety of reasons. He starts in with some investment I'd had at Lloyd's, which was fine. There wasn't anything wrong that would make an issue out of that. Metzenbaum starts asking these questions. He says, "This person said this is unethical," or "That person said this is unethical." Kennedy says, "Let me see that book." He's sitting next to him. He grabs the book away from him! He says, "He did not say that!" [*laughter*] That was very good.

He knows just what he's doing, and he introduces me to different people. He made sure I met Dale Bumpers, because Dale Bumpers is a good friend of Richard Arnold, and Richard Arnold had not been appointed and probably would have been if he hadn't had serious cancer. It was terrible. Richard Arnold was a wonderful person. He really was great, as is Ruth. The other people on the list are very good people. But Kennedy wants to be sure that Bumpers takes me in, once I'm nominated, and isn't sitting there being resentful. So he makes sure I have a chance to meet Bumpers. Then he takes me around to meet this person, that person, the other person.

Young: He was your sponsor?

Breyer: Yes, yes. Absolutely. He's ratifying me, continuously, and he's trying to make certain that the others take me in, that I'm not from Mars, and that I'm a reasonable person. He knows just how to do that.

Young: Is there any one particular Senator, when he took you into the Senator's office, that you remember particularly well?

Breyer: I'm trying to remember. He took me to Arlen Specter. He said, "The thing is, you listen to him, but Arlen isn't going to listen." I listened. I didn't have to say anything. Very good.

Young: Specter came out for you.

Breyer: Oh, yes. Yes, it was much easier, actually, from the confirmation point of view, than the First Circuit had been, because there wasn't tremendous opposition.

Young: How were you briefed?

Breyer: For that?

Young: For the Supreme Court nomination.

Breyer: For the Supreme Court, I flew down. It had its moments. President Clinton called, and I didn't know if he was calling with good news or bad. I'd been waiting there in my office. Bernard Shaw—we saw him on television—said, "They're going to nominate Judge Breyer." Then I heard nothing for three hours. Joanna, who was in England because her mother wasn't

well, called and said, "Have you heard anything?" I said, "No. We've been through this before." I told my children, "Don't be disappointed." They're saying this on television, but no one's told me. I hadn't been down there, or part of it, or anything. Then the President called, and that was fine. I go outside—

Young: So it was leaked.

Breyer: Yes, late in the afternoon. He said, Would I come down? He'd gone off and done some other thing, and come back. I think he had a speech at Gallaudet, and our Governor, Deval Patrick, had been there. Deval says the President was standing next to him in the men's room, and he said to Deval, whom he knew was from Massachusetts, "Do you know Steve Breyer?" And Deval Patrick said, "Oh, yes, I do. He's great." The President said, "Well, I'm going to nominate him to the Supreme Court." And Deval said, "Good." I thought, *Well, it's a good thing he wasn't standing next to Ralph Nader.* [*laughter*]

Young: Or Metzenbaum!

Breyer: Yes. Right, right. He telephoned, and that was fine. I came back and there were all these press people.

I'll show you another example of Kennedy's reaction after I'm confirmed—I've used this over and over because it makes a very important and interesting point. I'm confirmed, I'm at Logan Airport, and I'm flying back with Senator Kennedy. We get off the airplane and we're walking down the area there in front of the lobby, and a reporter comes up from a Jewish newspaper, and says to me, "How do you feel about two Jews being on the Supreme Court?" Kennedy sort of mutters to me, "*Fine.*" I said, "Fine." Just like that. "Fine!" You know, "Fine!" It's not a big deal. It's fine. That's Kennedy's instant reaction.

You see, that's a political reaction, knowing precisely what to say. That also is not just that it's the right thing to say from a political point of view, but it tells you in the tone of voice a whole story of Jews in America. That's where we're trying to end up. We're trying to end up where, from the point of view of race, the point of view of religion, the point of view of national origin, "Of course. Why shouldn't there be two Jews on the Supreme Court? What are you talking about?" And we're approaching that with race.

You see, in that tone of voice, it's not just a political reaction, it's also a statement of a goal. And the goal is a very good thing for the country. I can use that story about him in order to tell people something about the position of race and religion in America, and the progress. I just told that to a person who is a rapporteur from Senegal for some U.N. Committee on Human Rights. He's investigating racism in America. We had lunch. I told him that story. He says, "You're right! That's the goal." That's Kennedy. It's good.

Young: You've worked with, and you've observed Kennedy over a long period of time. Has he changed in any ways that you see?

Breyer: When I was first there, I suppose the question always was, well, is he going to be President? I'm sure that was a big issue in his mind. Part of it—who knows? He did run for President. I used to think when I was there that, in a way, we're running this institution of the

Senate Judiciary Committee, as anything that you work for Senator Kennedy—imagine you're working for the President. Not that it's ambitious for another office. I mean, treat it from a perspective of, what's the right thing to do for the country? And not in a phony, self-satisfied way, but where that's what our object is. He'd like to have his name in the newspaper. Most public politicians would. But that isn't the main point.

You can be President when you're President, but can you be President when you're not President? That's a certain perspective. In addition to his being a Senator, he's Senator Kennedy, and that means he represents something. That something is not just Massachusetts. It is Massachusetts, but it's more than Massachusetts, and it means something in the world. When you're working for Senator Kennedy, that's the opposite of the cause to be conceited. It's not being conceited. Remember that there is this perspective. We're going to live up to this thing. What is this thing? I don't know. I can't describe it. But it's not just being a Senator.

Now, how do you be something more than a Senator? You're a very good Senator. That's what he is. And I think he gets into this afterwards, where he doesn't have to worry about being a President, and he will accomplish what he can accomplish as a Senator, as Senator Kennedy, which is enormous. Enormous.

Young: So that's not a change, really, in terms of his motivation.

Breyer: I don't think it's a change, but I think he doesn't have to worry—he's not worrying about being President. He's thinking, *What can I do?* He'll help. That's why I go back to the word help. If, in fact, he thinks it's going to be helpful to have lunch with Justice [Anthony] Kennedy, Justice [Sandra Day] O'Connor, and me, he'll do that. Everything is part of an effort. An effort to do what? An effort to help. He's not Mother Teresa. No one thinks he is. But it's a practical mentality, and that's why I go back to that word "help." Help each other. It's fun. It's interesting. We have limited time; let's put every minute to good use.

Young: What do you think his biggest disappointment has been?

Breyer: I don't know. That's more personal. I don't know. You'd have to—

Young: Well, with the course of events. Not with him, personally, but with the course of events?

Breyer: Judging from what he's said on things—When Jack Kennedy was President, and even with Lyndon Johnson—I've heard him say that when Jack Kennedy was President, he worked at being President, which means he was in his office, which means he's thinking out substantive issues, which means he's thinking out, for a large part of the day, how to decide different things, and he's not spending each day shaking hands and giving talks.

He's seen the office—and maybe that extends to other political people, too—where the office becomes much more one in which what you get done is a function of what you say to the press, or what you say to a meeting that is then covered on television. It's a continuous plebiscite. It's continuous. And where is the substantive part of it? I don't think he's happy about that change. I don't think he's happy about some lost opportunities, that there is a lot to do, and there are lost opportunities that aren't his fault. I don't mean the lost opportunity of being President. I mean lost opportunity to accomplish this, or to accomplish that.

Young: I think the three times having come within shooting distance of getting something major done, systemic done, on healthcare, and the last time around, with Clinton, where everything was supposed to be in place—

Breyer: And then it didn't.

Young: And then nothing happens.

Breyer: I don't know why.

Young: Now it's coming up again.

He's talked considerably in some of the interviews, and others have, too, about the nominating process and judicial selection. That's a big thing with him, the turn to the Right. I don't know that he has the same degree of hope about that, except through another President who's Democratic. But he really sounds off a lot about that.

Breyer: Well, it's an attitude. It's a certain attitude towards life. If you grew up—When Jack Kennedy is President, 1964, I'm 25 years old, and that whole period is very important in a person's life. I worked for Arthur Goldberg after that, and that symbolizes a—it's not just a symbol. It's a certain attitude. It's a practical attitude. When you're around Senator Kennedy, you sense that. It's fun. You talk to him for a while, and it's fun. It's interesting. And you're trying to—it's pragmatic.

Young: And it's hopeful.

Breyer: Yes, hopeful. Always, always, always. That's Arthur Goldberg, too. I use that quite a lot in a talk, but it's so truthful. So, I'm writing a dissent? Next time it won't be a dissent. I write my dissent. Go complain? What's to complain about? Please! Write another one. I go back and tell Joanna, "I've written something, and this time everybody's going to agree." And she says, "I've heard that one before." So, they don't agree. Then we'll do another one. That is Kennedy.

The people in my life, in those positions, who have influenced me: Kennedy, Goldberg, Archie Cox. Did they have influence? They have every influence! I think why people are so unhappy now—We were a part of something. We were a part of something that's larger than ourselves, something that's working for a varied series of objectives. It sees people not as enemies; it sees people as people to work with, and bring them along, and listen to their problems, and do your best, and keep going. That's what he's like. I think, *He's quite sick now, and then he won't be there.* That'll be like—he's not our father, but he's a figure. He's the column there that's supporting this, so it's hard.

And Eddie! Eddie was great. I loved Eddie.

Young: Eddie?

Breyer: Eddie Martin. He was great. Everybody loved him.

Young: We got to interview him.

Breyer: Did you? Good. He's great.

Young: I have a little book of Kennedy's funeral orations, comments, and that's a prize. That's a prize. I guess one sees through Kennedy's eyes the possibility of another—I wouldn't call it a return, but a new momentum, such as you saw in the '60s, the possibility with [Barack] Obama. I see the same inspiration, the ability to motivate people.

Breyer: Fine.

Young: He's just been full of plans, as you know, so it's really hard to take this current illness. So, any more words for the oral history?

Breyer: No. I don't—

Young: You might think of something when you get the transcripts.

Breyer: Oh, the transcripts aren't going to help people, because I'm so incoherent when you read them, and it really is a question of emotion as much as it is a question of the particular.

Young: They're not all that incoherent. You don't have any final words?

Breyer: An afterthought, because I was thinking back to airlines: You started out asking about Carter and Kennedy, and the airline thing having led to something. What is it, from a perspective, that it might have led to? I had felt that if we were going to write the history of the Carter administration, the title of the book would be, *From Commanding Heights to Commanding Virtue.* That's where I started, and then I got on a sidetrack.

What does that mean? It means, with the thing that Kennedy was pushing, and that Carter took up, that this economic issue, which had been in a form of socialism versus capitalism for at least a hundred years, certainly through [Franklin Delano] Roosevelt and probably [Harry] Truman, suddenly changed. What did it change into? It changed into what we know as the mixed economy. The Democrats might want to put up a little more regulation, the Republicans a little less, but suddenly that isn't the issue that's dividing the country, politically. Everyone agrees it's a little more here, or a little less. And I don't mean literally everyone, but everyone except at the extremes.

Now we have Carter, Clinton, Tony Blair—Throughout Europe, they say, "We want our Tony Blair." What they mean by that is they want this approach to the economy, so that the country can focus its political efforts on other things. Well, what other things? Race, giving people a chance, working out a worldwide system so that you keep the very bad parts of human nature under control. All those are things to which Carter, Clinton, and the others have been turning, with more or less success. All right? So we've taken something off the table. That's excellent. And this is all bound up together. So what's the most grandiose way you could describe the airline thing? I'd say the most grandiose thing is it's part of that change in the political agenda for the country, which is just fine. That's what I thought of.

Young: And Kennedy was the catalyst?

Breyer: Yes, that's right. That's how I see it. It's a little self-serving, but that's how I see it. Yes.