



EDWARD M. KENNEDY ORAL HISTORY PROJECT

INTERVIEW WITH KENNETH FEINBERG

July 8, 2008
Washington, D.C.

Interviewer

James Sterling Young

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TRANSCRIPT

INTERVIEW WITH KENNETH FEINBERG

July 8, 2008

Young: It's July 8, 2008, and this is an interview with Kenneth Feinberg, in Washington. Thank you for giving us this time.

Feinberg: Thank you.

Young: Why don't we start with where you started with him?

Feinberg: I started with Senator Kennedy in the fall of 1975. I had been an Assistant United States Attorney in one of the Department of Justice's premier offices, the Southern District of New York, and had been a prosecutor there for three and a half years. But I had been Massachusetts born and bred, and had gone to the University of Massachusetts, in Amherst, before attending law school in New York, at NYU [New York University]. I had always been enamored of the Kennedys, growing up in Massachusetts, a firm supporter of President [John F.] Kennedy and Robert Kennedy, and was politically attuned to and an admirer of Senator Kennedy.

As I was completing my tenure as a prosecutor, I had never met Senator Kennedy, ever. I had decided that it was time for me to make a choice: Did I want to stay in New York and be a litigator and a white-collar defense lawyer or remain a prosecutor; did I want to go to a big law firm and make some money, or did I still have public-interest law in mind? And what about the idea of doing criminal justice policy work for the United States Senate, particularly for the Senate Judiciary Committee, and particularly for Senator Kennedy? Through third parties who were friendly with Robert Kennedy's family and the Kennedy family, I learned that Senator Kennedy was in the market to find somebody with some criminal justice experience to come to Washington and fill a hole in his Senator Judiciary Committee staff, on the subject of criminal justice.

Young: Was that Dave Burke, or others?

Feinberg: Dave Burke was primarily the one.

Young: Dave was out then. Was he with [Hugh] Carey, or CBS [Columbia Broadcasting System]?

Feinberg: I think he was with CBS. I'm not sure.

Young: Okay, but he was in New York.

Feinberg: Dave Burke was the source of the information, but it was clear that Kennedy was interested. I didn't get that directly from Dave Burke; I got it third hand, from Peter Fishbein, a lawyer in New York who had been a key aide to Robert Kennedy and who was a friend of mine. As I recall it, Peter Fishbein contacted me, at my request, and said, "I've checked with Dave Burke, who has checked with Senator Kennedy's staff. Yes, they are interested in finding an experienced prosecutor to come down and interview about the possibility of the job." With that intro, I went down and met with Tom Susman, who then was the chief counsel for Senator Kennedy's Subcommittee on Administrative Practice and Procedure. That would be the slot. I spent an hour with Tom Susman, who was sufficiently impressed that he suggested I return for another meeting with Chief Legislative Assistant Carey Parker, and perhaps Senator Kennedy himself.

Sure enough, within a couple of weeks, I came back and I met briefly with Carey Parker, to learn that Senator Kennedy was available and would like to chat with me for a few minutes. I went in and had a one-on-one interview, in the fall of '75, with Senator Kennedy. We chatted a little bit about [Federal] Criminal Code reform, criminal justice issues, and other related issues—bail, civil justice, reform of the courts—and I explained to Senator Kennedy my interest. He said, "Do you have any questions you'd like to raise with me?" I said, "Well, you know I am a prosecutor, a federal prosecutor, a member of the Department of Justice. I'm not sure that my relatively tougher views on crime and criminal justice would comport with my perception of your concerns about the system and discrimination, poverty, and other issues, the genesis of crime. I'm not sure that I'd be attuned with you philosophically." I said that because I didn't want to take a job and find myself at odds with my boss.

Young: What was your perception of his views?

Feinberg: My perception at the time was that he was a liberal Democratic Senator, who, when it came to criminal justice issues, was looking at the underlying causes of crime—poverty and discrimination and the absence of education—rather than tough measures like sentencing and bail and gun control and things like that. I was surprised, in this one-on-one conversation, by Senator Kennedy's response, which was—and I'll never forget this—"Don't assume what you think my attitude might be on these subjects. I'm interested in getting somebody on board with experience and expertise. You shouldn't assume how I feel about criminal justice issues. I can be educated. I welcome your credibility to the committee. You may find, Ken, that all is not what you perceive." I was stunned by that, that flexibility, that openness. I would have signed on the dotted line right then and there. Sure enough, within a week, Susman offered me the position, which I took. That's how I came to the committee, as a counsel.

Young: This is the Ad Prac?

Feinberg: Administrative Practice and Procedure, that's where I was situated.

Young: That had been Jim Flug's position, and Susman replaced Flug.

Feinberg: That's right. When I arrived to begin work, I was working for Tom Susman, but I was on a parallel position with Phil Bakes, who was working on airline deregulation. He was focusing on that issue full time. A consultant to Ad Prac was Professor [Steven] Breyer; that's how I got to know Steve Breyer, and began a 35-year friendship with him. That was the team, mainly: Bakes and Breyer, airline deregulation; Feinberg, crime; Susman, everything else—immigration, judicial machinery, civil reform, judges, et cetera. That's how I began the work.

Over the next three years, I learned that Senator Kennedy had an open mind and was incredibly eager to retain people with credibility, expertise, and competence. That was the hallmark of the Kennedy staff: very able, experienced people. When Kennedy became head of the Senate Judiciary Committee in '76, Breyer became chief counsel, and I then worked directly for Steve Breyer, still Ad Prac, but now for the full committee. Criminal Code reform was a major initiative of the [Richard M.] Nixon administration, carried forward in Congress by the [Gerald R.] Ford administration, so it was there as a major issue, whether Senator Kennedy wanted it or not.

Senator Kennedy quickly became of the view that Criminal Code reform was a worthy undertaking, not only because substantively it was something that *ought* to be done—It hadn't been done in 200 years and it ought to be done—but also politically. He saw it, in the '70s, as an affiliate with the crime issue that Nixon had made a key, pivotal part of his administration. Kennedy saw it as an important opportunity for him to be perceived as somebody who could not be labeled automatically liberal: education, health, and poverty, and that a flip side of those issues was a responsible position on criminal offenders.

Senator Kennedy at the time, with his eye on 1980, thought he'd better develop a position on one of the leading issues at the time—crime, violence in the streets—a responsible position. That's why Criminal Code reform, which was a massive undertaking that in the '70s would have died a fairly certain death but for Senator Kennedy's willingness to demonstrate cooperation with the Ford administration and conservative Democrats like [John] McClellan and [James] Eastland. He was willing, with his eye on 1980 and the merits, to try to develop a bipartisan bill in the Senate. In the back of his mind were twin views: one, 1980 and the campaign possibility; and two, his reluctance to be automatically labeled anything.

This notion that he was perceived to be liberal or conservative or left-wing or right-wing bothered him. He felt he was a Senator and a legislator, and that he was there to get things done. He saw, even subconsciously, a gap between public perception about his political beliefs and the reality of him as a formidable legislator, and he saw S. 1 [Criminal Justice Codification, Revision and Reform Act of 1973, S. 1, 93d Congress] and Criminal Code reform as the vehicles to modify public perception as to his seriousness as a substantive legislator in the U.S. Senate. That led to him embracing not only the Criminal Code as a vehicle to demonstrate this but also to his incredible, unique alliance, which must not be forgotten, between himself and Attorney General Edward Levi.

Young: Yes. Would you talk about that?

Feinberg: This was an extraordinary, trusting relationship. The relationship between Senator Kennedy and Edward Levi on Criminal Code reform, but more importantly on FISA—the Foreign Intelligence Surveillance Act [of 1978], which is in the news today, and which was Kennedy’s bipartisan bill with Edward Levi—was extraordinary. Levi had great confidence in Kennedy’s abilities and in his word, and when Levi went to Kennedy and said, on Criminal Code and FISA, “Senator, I’m telling you straight out, this is what I can do in the administration. Beyond this, I can’t bargain any further,” Kennedy took that at face value and delivered on those compromise positions.

Young: Levi was also rehabilitating the Department of Justice.

Feinberg: That’s right, after Watergate. That’s right. FISA was an important example.

Young: It must have appealed to the Senator as well.

Feinberg: That’s right. That relationship was unique and not well known to this day. It was extraordinary. They had great trust in one another.

Young: There was no background there, to their relationship?

Feinberg: No, no background. Levi approached Kennedy—“I need your help”—post-Watergate, and Kennedy gave it.

Over the next three years, ’75 through ’78, I worked on the Criminal Code almost exclusively, and FISA. I became Kennedy’s point man on the Justice Department, and worked closely with the Justice Department, directly with Levi on FISA. That was an extraordinary time, with Kennedy under pressure from the American Civil Liberties Union and liberal academics and interest groups: “What are you doing, working with McClellan and Levi and the Ford administration in developing these bills?” Kennedy replied, in effect, “It’s important. We need Criminal Code reform, we need FISA, and I’m here to bridge differences and get something done. And by the way, I’m running, perhaps, in 1980, and I do not like this perception that you can automatically categorize me as one philosophy or another. I’m here to legislate and get something done, as the people’s representative.”

That resulted in Kennedy taking a hands-on, personal position in trying to get the Criminal Code and FISA, twins, passed in the Senate, in a bipartisan way, and he succeeded magnificently. In 1978, as I recall it, the Criminal Code passed the Senate, 78 to 12, a *major* victory for Senator Kennedy legislatively. It died a slow death in the House. FISA passed the Senate, I think 96 to 3, for Kennedy, with complete bipartisan support, and became the law of the land.

Young: Even [Strom] Thurmond was—?

Feinberg: On board.

Young: Eastland was Chair at that time.

Feinberg: Eastland, I think, was Chair, or just about gave it up to Kennedy in ’78. Those achievements in the Senate went a long way in demonstrating Kennedy’s skill as a legislator, in

taking very polarizing issues—crime, warrantless wiretaps, administrative separation of power, executive power—and molding consensus in these areas.

In 1978, with Breyer as chief counsel, Kennedy asked me to replace Eddie Martin as administrative aide, over in the main office. From '78 to '80, I became chief of staff. Breyer remained as chief counsel of the Senate Judiciary Committee and I became chief of staff during this two-year period, leading up to his run for the Presidency. I had very little to do with the campaign. I stayed, as one of his trusted aides, with Breyer, overseeing and coordinating his ongoing Senate activity. The Presidential race and who was important and who ran and who was key, I really can't help this oral history on that.

Young: But it was separate.

Feinberg: It was separate. I remained back at Senate headquarters, running the staff and overseeing various legislative initiatives and reporting back to Senator Kennedy.

Young: Going back a bit, in '75, when you came, Breyer came also, on a—

Feinberg: Consulting basis. He was teaching at Harvard.

Young: That's right. And airline deregulation was one of the things that he was concerned with. You had also Phil Bakes, wasn't it?

Feinberg: That's right.

Young: So both of these initiatives of Kennedy's were out of the liberal mold—

Feinberg: And bipartisan.

Young: And bipartisan. This is why this period gets to be very interesting.

Feinberg: It gets very interesting for two reasons. It gets very interesting to me for the obvious reason that everybody focuses on: that Kennedy, leading up to 1980, wanted to distance himself from the label that he was so far on the left that he was not electable. I think he wanted to distance himself. There is also the rather superficial historical analysis that says that Kennedy, leading up to '80, saw the political mileage in moving closer to the center and not being perceived, as a candidate for President, as being too doctrinaire.

Young: This is the conventional wisdom, that this was opportunistic?

Feinberg: Yes, it was politically opportunistic. That's not unfair.

Young: But you're saying there's much more to it.

Feinberg: Oh, much more, much more. Historically what it demonstrated—It was the embryonic sign, using airline dereg[ulation] and Criminal Code, of a *master* legislator, of a consensus builder, of a man with the name and the personality to forge bipartisanship.

At the time, after his unsuccessful bid for the Presidency, I was stunned, *stunned*—as I was leaving to move on to make a living for my wife and small children—when he announced to me that he was going, in 1980, to leave the Judiciary chair and move over to chair Labor and Human Resources. I was stunned that he would give up the majesty of Chairman of the Senate Judiciary Committee, which you'll recall in the '60s was a driving force toward the Voting Rights Act and immigration reform. In retrospect, Kennedy's instincts were absolutely right: Why should I remain in the Senate Judiciary Committee, with all the polarizing issues of judgeships, abortion, school prayer, gun control? Why don't I go over to the committee that really matters, in terms of improving the day-to-day lives of the American people: education, health—

Young: Jobs.

Feinberg: Jobs. That's where it's at. I've learned, in the '70s, that I can forge that type of consensus, even on provocative issues like crime and executive power. What am I doing? I could spend another 30 years here. Why don't I get on a committee, and run it, where I can really have an impact, not on which judge is going to be in the District Court of Massachusetts or whether abortion should be legislated or not? Let's go deal with Title I of the Education Act. Let's go deal with jobs. Let's go deal with poverty in America. Let's go deal with the issues that can change the way the American people live.

The real value of the '70s is not the short-term political opportunism of moving in that direction. The real value, historically, is to see, in that period, how Kennedy, working on very specific legislative initiatives, could make a big, big difference. That has been lost, largely, on people, and that is why today, in 2008, he's viewed as a giant in the history of the Senate; something that I don't think would have happened had he stayed in Judiciary. The seemingly insignificant decision, to move as Chair from one committee to another, had enormous ramifications and impact for the American people, and gave him a free-wheeling opportunity to really deal with these issues.

Young: Just to try to clarify, the two committees that he chose—or that were chosen for him, when he came to the Senate in '62/'64—were Judiciary and Labor, as it was called then, so he had a history on that committee. He could now be Chair, to be sure, but he had played a major—He was a major voice in healthcare reform, wasn't he?

Feinberg: Yes, but you have to understand the Senate. From '62 to '80, even though yes, absolutely, he dabbled in healthcare as it became an issue, don't forget that there were giants there: Warren Magnuson, [Henry] Scoop Jackson, Robert Byrd. There were people with much more seniority than Kennedy—[Michael] Mansfield. It took a while, just through the sheer aspect of longevity, for these people to gradually percolate and develop as a resource, a history. Although it's true that he was always on Labor, Labor was [Harrison] Pete Williams of New Jersey, and Jake Javits and Warren Magnuson, and W. Jennings Randolph of West Virginia. These guys were the barons running the show.

It wasn't until post-1980 that Kennedy gradually took over that committee and began his 25-year quest to develop a legislative agenda, so that today, when people talk about Senator Kennedy's legislative career, very little is said about his legislative career from '62 to '80. In the national outpouring of sympathy for his current illness—President [George W.] Bush's statement that we

have here a major force, a legislator of history; and Byrd saying this man ranks as one of the greatest Senators in the history of the country—they're all looking over a lifetime, but really post-1980. The irony is, of course, that the Criminal Code ended up being an albatross around his neck. He jokes about it now.

I remember Senator Kennedy coming to see me during the campaign in 1980, prepared to give me the bad news that he was going to have to stop work on the Criminal Code, because it was killing him, politically, around the country, with liberal groups who saw it as a betrayal of pure liberal principle. I'll never forget him sitting down and regretting that he was going to have to tell me he had to stop this, politically. My response shocked him. I'll never forget it. I said to him, "You'd better stop it. This isn't helping you one bit. I completely agree with you, that Presidential politics is overtaking it." He walked out muttering, "That guy understands. Ken understands." He didn't expect that reaction. I had been working on it tirelessly.

Now, the Criminal Code did not go for naught, of course. They never passed it, but substantively, over the next six years, in the '80s, criminal sentencing reform was pulled out of it and passed separately. Bail reform was pulled out of it and passed separately. Various substantive provisions, piecemeal, were pulled out and passed separately in both Houses. Today, in 2008, when you look at the federal criminal sentencing system or the federal bail system—FISA, of course, is a *major* part of the law—it wasn't all for naught, despite the failure to pass the whole thing at once.

Now in 1980, it became apparent to me—After his unsuccessful bid for the Presidency, and his decision to go over to Labor as his primary committee, and after the fact that for five years I had worked for him in various capacities, Breyer went on the First Circuit Court of Appeals, and David Boies was now chief counsel. I had spent ten years in the public sector, as a U.S. Attorney—it was time for me to make a professional switch. I went to Senator Kennedy and said, "Senator, it is time for me to move on." He understood completely. He also recognized that, at Labor, he needed different skill sets than Ken's expertise. Crime was disappearing as an issue after the '80 election, and I left his employ to go, for the first time, into private practice.

I didn't realize, at the time, that I would remain so close to him over the next 27 or 28 years. I learned a valuable lesson in working for Senator Kennedy for five years: You're always an employee. You may have other jobs and you may go on and do other things, but if he truly trusted your service to him and if he liked you and respected you, you should not be surprised if, periodically, he picked up the phone: "Ken, I want you to look at this legislation." "Ken, what do you think of this?" "Ken, can you help me raise money for my campaign?" "Ken, do you want to go to the Kennedy Center for a show?" "Ken, can you come out to the house for dinner?"

To this day, I am one of the very few people who called him "Boss" in all of my correspondence. If you look at my letters to him and my e-mails to him—Dean Acheson used to call President [Harry S.] Truman "Boss," not "Mr. President," not "Harry." I don't call Senator Kennedy "Ted," and I don't call him "Senator." I say, "Hello, is the boss there?" "Boss, this is Ken." I think he sees that as a sign of affection. I don't know how many other people call him "Boss." I don't think any of his former staff call him "Ted," and Stephen Breyer, Justice Breyer, doesn't call him "Ted." That's a measure of respect. "Boss" is my salutation.

I'm on the board of the JFK [John F. Kennedy] Library. I've raised a ton of money for Senator Kennedy. I'm considered one of his fundraisers. I am determined, in light of his recent illness, to lead the way, as a fundraiser, to fund the Senate oral history project, something very close to my heart. For the oral history project, as you probably know, we held a series of fundraisers. At one of them, on Cape Cod, we raised almost half a million dollars from the trial lawyers for the oral history project. Kennedy was extremely pleased.

With great pride, he was very pleased to see President Bush choose me to act as the Special Master of the September 11th Victim Compensation Fund. Senator Kennedy was helpful in my getting that position, but he wasn't critical. The critical person was Senator [Charles] Hagel, someone I've known for 35 years, who convinced the administration that the 9/11 Fund was so fraught with peril, and so unlikely to work, that the administration had better distance itself. What better way to distance itself than choose as its Special Master somebody who's so tuned in to Senator Kennedy that if it works, "We chose him," and if it fails, "Well, what did you expect? That's Senator Kennedy's guy." But Senator Kennedy was extremely pleased. He periodically called and asked what he should be doing, how he could help. When I was finished and it had proved successful, Senator Kennedy was instrumental in getting me that medal from the JFK Library, for distinguished service. He was there that day when I got the medal and was extremely gracious and thrilled by it.

I've talked with him periodically during his recent illness. I'll see him over the summer. When I'm up in Cape Cod, I'll go over and see him, with my wife. In a nutshell, those are the areas you wanted me to cover.

Young: Yes, but we're not finished.

Feinberg: Of course not, now we have to fill in the interstitial, as they say, details.

Young: Yes, that's the big picture. Could you talk a little bit more about what his gift was? What were his major gifts as a legislator, or as a Senator?

Feinberg: First, his incredible gregariousness; he's an old-fashioned shoulder slapper, fun, full of humor. Second, the commitment in his mind to get things done, not to just make political points. Kennedy, as a legislator, always had his eye on the end game, the signing of a bill into law. That led to a third gift: his incredible flexibility as a politician, his willingness not to be labeled or rigid or to think, *I can't move off this position* or *We can't bridge differences*. If you said to me, "Ken, what phrase describes Kennedy best as a legislator?" I would say, "The perfect is the enemy of the good." He would think, *I would love legislation that says A, B, and C, but if all I can get after fair, hardnosed, tough negotiating is A and B and not C, I'll take it. It's two-thirds of a loaf. We'll come back again.*

Young: And he has the longevity to bring it back up.

Feinberg: And he has the longevity. Not only can he fight another day, but he remembers last week.

Young: Yes.

Feinberg: Kennedy prides himself on his photographic memory. Kennedy is a resource, with 45 years in the Senate. Kennedy can say to Hillary Clinton, “Hillary, you’re trying to get this bill passed. Go talk to Ken Feinberg. He’ll remember. I think it was in ’78, we tried and we got—That might help.” In addition are his characteristics as a legislator: his flexibility, his willingness to bend, his sheer competence. Here’s another famous quote of his, “Ken, I don’t have to know this legislation as well as you. I have to know it better than 99 other Senators.” You put all of this—his doggedness to get it done—

Young: Book work.

Feinberg: Homework. During the Criminal Code debate on the floor, which passed 78 to 12, his nemesis leading the opposition was Jim Allen of Alabama. Allen let it be known that he was prepared to sit on the Senate floor every day, for ten hours a day, to make sure that the bill didn’t blow through in his absence. Kennedy looked at me and said, “We will outwait him. We’re going to sit here as long as he sits here. We will make him blink. He thinks we’ll quit. We’re not quitting. Be prepared. Ken, tell your wife you’re here for dinner. We’re going to stay here.” Eventually Allen gave up. Allen gave up when he saw it wouldn’t work. Kennedy’s doggedness, to usher this thing through bipartisanship, was the key.

Young: Someone said of him, “He had to know more about the issue than anybody else in the Senate.”

Feinberg: That’s right. That was his view.

Young: Where do you think that came from?

Feinberg: Kennedy learned from his brothers—especially from the President, but also from Mike Mansfield, who was a great friend of the Kennedy family—this notion that to be an effective Senator, you don’t have to know every paragraph of the legislation, but you have to know more than the other 99 Senators who are challenging you on this. That way they learn to respect Ted Kennedy on this issue: If Ted says the Criminal Code says this, it says this; we don’t have to read every line.

His view was that there are no shortcuts to being an effective legislator. You have to do the homework and create the impression that you’re a credible force. Never did he realize what an impression he had created over 45 years, where today he’s a god up there, even with Republicans; it doesn’t matter. People will disagree with him today, but they’ll all agree—they didn’t back in the ’70s, but today they’ll all agree that he’s a giant.

He never made it personal. It’s all about legislation. He could fight on the floor, against Jim Allen or Alan Simpson or Paul Laxalt in the [Ronald] Reagan years, and then afterward they’d be yucking it up and laughing and patting each other on the back. He never made it personal.

He told me once that the only Senator in his career—This was a few years ago—that he was unable to forge a special bond with, was Jesse Helms, yet I’m told—it’s hearsay—that even during the last few years that Helms was in the Senate, they began to be more sympathetic to one another. Kennedy even helped Mrs. [Dorothy Coble] Helms get treatment for her illness, and Jesse Helms was overwhelmed by Kennedy’s generosity. I don’t know if that’s true, but that’s an

example. He was a thorn in Kennedy's side and yet even then, apparently, there was some rapprochement between the two of them.

The reason Helms and he had this tension, I don't think, had anything to do with ideology or legislation. It arose when Helms went to the floor during the Martin Luther King [Jr.] holiday legislation and reminded the Senators that Robert Kennedy authorized wiretaps on Martin Luther King. As I recall it, Senator Kennedy, his voice cracking with rage, said, "Easy for you to say, Senator. Robert Kennedy is not here to defend himself." Say what you want, that was a low blow, and really got under Kennedy's skin. It was personal, not legislative.

Young: When you came, was Paul Kirk still on the staff?

Feinberg: Paul Kirk was critical. He was the political arm. He sat in a special office, and was really Senator Kennedy's political consigliere, in terms of politics, of what it meant for Massachusetts.

Young: Could you give me a snapshot of the staff when you came there in '75?

Feinberg: Yes. Key men: Eddie Martin, administrative assistant; Paul Kirk, politics; Tommy Susman, Judiciary; Jerry Tinker, immigration. Around then came David Blumenthal, health, from Massachusetts General.

Young: Horowitz wasn't there?

Feinberg: Larry Horowitz, health. Larry Horowitz was key. I don't want to forget him; he was key.

Young: And Carey Parker was the—

Feinberg: Carey Parker, chief legislative assistant, closer than anybody. Around the fringes, not part of the inner circle: Steve Breyer, consultant; Phil Bakes, Judiciary; Ken Feinberg, Judiciary; David Blumenthal, health. That was the overall structure. Over the five years that I was there: Susman, relegated off; Bakes, relegated off; Breyer, not a consultant, key legislative guy, chief counsel of the committee; Feinberg, chief of staff; Horowitz, a man for all seasons, health, but also personal health advisor; and Paul Kirk, political. Eddie Martin left, to go to Boston and the campaign. There was some restructuring, but not much. Then, of course, around '80, around the time Kennedy wasn't going to be President, Breyer went to the First Circuit, replaced at the eleventh hour by David Boies. When you talk to David Boies, you'll find not much there. He came and stayed a very short period of time.

Young: He was with antitrust—

Feinberg: That's right. He started with antitrust—

Young: For a few months.

Feinberg: That's all, and then he became chief counsel when Breyer went to the First Circuit, and didn't stay very long. He is not—and he will admit this—a major player in any of this. He

was there a relatively short period, when Kennedy was either running for President or decided that Labor and Human Resources was his future, and David quickly went back to private practice.

Young: Can you talk a bit about the impact, or how things changed, when he set up a campaign office? This is a perennial subject of interest among people who study staffs and study the two offices. It's been said that there was a lot of competition—

Feinberg: Oh, there was.

Young: In the staff. Maybe that was as it always was. Maybe it was new; maybe it was different, but a source of tension perhaps, between the people who were minding the Senator's Senate business, and those who were minding his campaign. Was it a cleavage?

Feinberg: There was a cleavage. There was some tension, although I must say the tension was not as pronounced as it might have been, because of the wisdom of Stephen Breyer. When Breyer—this incredibly effective chief counsel of the committee, this person who wanted everything done on the merits, legislation, what's right—was told, "You stick around and run the committee; you're not going to be part of the staff," Breyer took Tommy Susman and me aside and said, "Look, guys, you're not going to be part of this major Presidential campaign, you're not. Don't view that as a demerit. Kennedy needs us to run the show here. We have to have the right people here who can monitor legislative developments and make the trains run on time."

Young: But also, wasn't there an agenda of what each of the subcommittees was going to do?

Feinberg: That's right.

Young: Throughout that? It was work.

Feinberg: It was work.

Young: And that was planned.

Feinberg: That was planned by Kennedy and his Presidential team and Breyer, I think. This was the way it ought to be. At the time the tension, of course, was twofold. There was tension because guys like Ken Feinberg think, *Gee, I want to work on the campaign; I want to help make him President.*

Young: Oh, you did?

Feinberg: Oh, I wanted to, I wanted to. "No, you stay here." But there was also substantive tension. Criminal Code is the best example: "Ken, we can't hold these hearings on the Criminal Code because Kennedy is campaigning." "Ken, you have to get this provision of the Criminal Code out, because it's hurting Senator Kennedy politically." There was substantive tension, not just personal tension. Also, for the record—and I think you've heard this—Kennedy made perhaps the most disastrous choice that he ever made in his career, staff-wise, when he put this Rick Burke—

Young: How did that happen?

Feinberg: I don't know. It was a debacle. Burke was a self-promoter with narrow vision, not very competent, and for whatever the reason, when the campaign started to run, Burke was there. The last few months, I went back to the committee.

Young: Was Burke on the campaign?

Feinberg: Burke was on the campaign.

Young: Well, he replaced you.

Feinberg: He replaced me. I went back to the committee. Kennedy wanted Burke there because Burke was going to be on the campaign *and* the liaison. He saw Burke playing two roles, and it was a debacle.

Young: That surely sticks out like a sore thumb, if you look at the history of his staff.

Feinberg: Like a sore thumb, and only Senator Kennedy can give you the reason why. I don't know; I was not privy to that. Kennedy came to me and said, "Ken, I'm running for President; you're not going to be part of the campaign. I want you back on Judiciary. There's a lot that has to be done. You're wasted here, now that I'm running. I'll put Rick in that position."

Young: What had Rick been doing?

Feinberg: He was his personal valet.

Young: His driver?

Feinberg: Yes, a driver. I said, "Senator, Rick?" Then it was, "All right, okay, Boss, whatever you say." I knew I was going back to the committee for six months, nine months, and I was leaving—so what for me.

Young: The question of access to the Senator to do business, what did you—?

Feinberg: During the campaign?

Young: During the campaign.

Feinberg: It was very difficult, very difficult. I had very little access to Senator Kennedy once he was campaigning. I would send him a memo, "Here's an update." He'd scribble back, "Good work," or "Do this."

Young: Did that all go through Rick, to him?

Feinberg: No. I think through Breyer, his chief counsel, right to the Senator. You know better than anybody, history is—Irony and history go hand in glove. Senator Kennedy's campaign didn't work, thank goodness, and he became a giant of the U.S. Senate after that. Go figure what might have been.

Young: Why do you think he ran?

Feinberg: I have no idea. That's psychobabble. I read Adam [Clymer]'s book and all this—Only he can tell you that, because he thought he could win.

Young: Maybe because he had to, to get—

Feinberg: Maybe. But in retrospect—I was a history major at UMass [University of Massachusetts]—the idea that you could unseat a sitting President. . . . There's a lot of pretentiousness to that, or courage.

Young: Well, the wish of his father. . . . He was always a potential President, wasn't he?

Feinberg: Always. Always a potential President.

Young: Was that a positive thing?

Feinberg: Yes.

Young: For his ability to attract people?

Feinberg: Oh, I think so.

Young: You, others?

Feinberg: Sure, but after he was no longer a potential President, he had this amazing ability to attract people like [Bancroft] Nick Littlefield [Jr.], who I helped find. Nick had been with me in the U.S. Attorney's Office, and when Kennedy came to me and said, "You're leaving; who do we get to do health and other—?" I said, "Nick Littlefield," and Nick began a great friendship with Senator Kennedy, a great friendship.

Young: I'm in a series of interviews with him, and we never finish. It's really very rich—I go up to Boston for these two-day sessions with him—very interesting, very rich testimony. He has such good notes, as well.

Is it your impression that he did not become reconciled, shall I say, to a Senate career—that this was not something that you could say was his life's endgame—when his brothers were there, or even after they—?

Feinberg: Yes. I think after 1980.

Young: This was the only thing left to do?

Feinberg: After 1980, Mike Mansfield told him, "Now you can become a great Senator." And he became the greatest. I'll always say I'm biased, but in terms of impact on the nation and public service, he ended up outshining his two brothers, even the one with the mantle of the Presidency, in terms of a real impact on the nation, Senator Kennedy.

Young: But he's had so much longer.

Feinberg: That's one part of it. He's had a great longevity, plus Senate legislative skills, which neither JFK nor Bobby Kennedy ever really had, or demonstrated at least. He wrote the book.

[BREAK]

Young: It's intriguing to try to understand the relationship between [Jimmy] Carter and Kennedy. Can you shed any light on that? He ended up running against Carter for the nomination, and the campaign was—Maybe you want to talk about that a bit, because there's a reason Bobby had run against, for the nomination, a sitting President. A lot of the advice was, "Don't do it," but he did it anyway.

Feinberg: Again, you're getting into an area where I have no firsthand knowledge as to why.

Young: But just as an observer.

Feinberg: I think Senator Kennedy felt that President Carter was an accident of history, and with the Ford campaign and the Ford administration, if there had been two more weeks of campaigning it might have been different. He just was not impressed with Carter's abilities to achieve success. He thought he was vulnerable as an accidental President. Why he did what he did, you'll have to ask the boss. I, at the time, thought that he would probably unseat President Carter. I wasn't thinking straight. If I had thought historically about the obstacles of unseating a President, I would have counseled otherwise.

Young: During your time there, how would you characterize the relations between the two of them on policy issues?

Feinberg: On policy issues, I was able to work closely with Griffin Bell in the Justice Department, on Criminal Code reform, and didn't see any great change in our ability to work together.

Young: Healthcare became a bone of contention.

Feinberg: Yes.

Young: But it was over the method, more or less, to get the entitlement now or—

Feinberg: The White House staff constantly asked me, during the years leading up to Kennedy's challenge to the President, "What does Ted want?" They were a little bit at sea over why Senator Kennedy felt so strongly about the relationship that he should mount a campaign against the President. I don't think they ever understood, other than personal self-promotion or entitlement. Why is he doing this? We can work out our differences. Is it worth giving the election to President Reagan? I guess his counselors, his wise advisors, told him he could win and become President. I don't know. I have no insight into that because I wasn't a part of that.

Young: Because the people who count these things, his support scores as measures—Carter went before Congress and Kennedy’s support scores were very high, so it’s not as though there was a gulf on much of the policy. The new judicial appointments to the bench—

Feinberg: I don’t think judicial appointments to the bench had any ultimate bearing. I know Kennedy was livid, visibly angry, over [Archibald] Cox, and was visibly incredibly annoyed at President Carter’s shortsightedness, and his unwillingness to intervene and overrule Griffin Bell, who threatened to resign over the issue of Cox, but I don’t think it was a case of “I’m running for President because Archie Cox isn’t a judge.”

Young: They were together on Ireland, mostly through [Cyrus] Vance. There were so many things on which they were together; that’s the puzzle.

Feinberg: That’s the puzzle. Also, if you’re saying Carter was too moderate on health and welfare issues, that he was promoting a type of triangulation—[William J.] Clinton, my goodness; talk about triangulation and moderation. Clinton was at odds with Senator Kennedy on so many issues, and yet they worked together and praised each other. Maybe it’s personal. Maybe you’ll have to delve inside the mind of Senator Kennedy when you speak with him next.

Young: Well, we’ve been over this.

Feinberg: And I assume you got unsatisfactory answers.

Young: It’s clear that neither has forgiven the other. I don’t know. It’s interesting that healthcare should have provided the occasion for what happened at midterm, and labor issues. Carter was a fiscal conservative. He always called himself a social liberal. I don’t know. Historians are going to make many interesting comments on Kennedy’s campaign against Carter in the light of, from many different perspectives, why it was not a model, the Kennedy campaign. It was not well organized. It started very late.

Feinberg: I’m not sure Senator Kennedy could have done anything to improve his campaign that would have been sufficient to counter the twin historical forces of a sitting President and Chappaquiddick. One can say, as a matter of political science, that if he was going to run, he should have run things differently. You can *certainly* say that about Senator Clinton today, with her campaign with [Barack] Obama. If she had it all to do over again, she would have done it differently, in a political science way, which might have gotten her the nomination. Having said that, I’m not sure that *any* type of change in how the campaign was run would have been any different from rearranging chairs on the deck of the *Titanic*. *Major* historical forces overwhelmed the Kennedy campaign.

Young: The possibility that Reagan would win—or the probability, given the Congress’s low standing—was not mentioned as a major consideration.

Feinberg: Consideration for what?

Young: Of anything, in my discussions with people about the campaign.

Feinberg: Well, President Carter, to this day, says Kennedy cost him the election.

Young: There's disagreement over that.

Feinberg: There certainly is. Your point just now, about it being President Reagan's turn, overwhelms, in my mind, any argument that somehow Senator Kennedy was the reason Carter lost. That's a little bit preposterous, but I don't know. I was just giving you a layman's version of this, from 30,000 feet. I wasn't really involved in these decisions.

Young: What did you take away from your experience with him? What was it like to work with Kennedy? Who was the person you came to know? You've mentioned his gifts as a Senator, as a legislator. How was he to work with?

Feinberg: It was fabulous. It was *fabulous* to work with Kennedy.

Young: Why?

Feinberg: Kennedy was a student of the issue. On Criminal Code, on FISA, once Senator Kennedy trusted you as his right arm on a particular issue, he wanted to be educated. He had tremendous respect for your opinions, and would ask you questions. You learned, working for him, how to simplify issues: One page, simple, simple; don't get into all the details. Give him the arguments and let him develop those arguments. He was very open to being convinced of the merit of what you were proposing him to bless, and did it with efficiency: *I have six more Feinbergs to see in the next three hours*. He did it with efficiency and camaraderie, as long as you passed his three-month employment test of competence and understanding of the political process. *Did I hire the right guy?* Once he trusted you, then you'd quickly learn: "Ken, your memo, did you run it past Stephen? Did you run it past Tom Susman?" After three months, you didn't have to run it past anybody: "I asked you."

You saw, through the legislative process, the results of your work: It's a bill; it's a hearing; it's on the agenda; it's out of committee; it's now on the floor; it's up on the floor; it's bipartisan. Fabulous! You saw, every day that you worked for him, the progress, instead of just spinning along, and got great personal satisfaction out of that, and he did too. He would write notes, "Why is this taking so long?" "Taking so long? Senator, the bill is 800 pages." "Oh, OK, yes," but he'd let you know.

Young: Was he very predictable?

Feinberg: No. I don't think he was predictable at all. He was constantly questioning, probing, taking devil's advocate positions.

Young: As part of the education?

Feinberg: It's part of the education process. He wasn't predictable.

Young: While he was being educated, he was deciding what else.

Feinberg: That's right. And he was synthesizing the substantive issues: *What are my instincts telling me about the politics of this?*

Young: Yes. *Am I going to make a major push in this?*

Feinberg: One of his favorite comments to me over the years of legislation was, “I have to trust my instincts on this.” Well, you learn not to second-guess his instincts.

He was very deferential to other Senators: Eastland, very deferential; McClellan. You see, these guys knew the Kennedys. Bobby worked for McClellan on the hearings. If Kennedy can’t work it out with McClellan—McClellan always thought that Kennedy was a little off-center in terms of where the Kennedys ought to be, because Bobby Kennedy was a ruthless, tough guy on crime, and McClellan humored Kennedy a little bit on these issues.

Young: He’s not quite his brother.

Feinberg: This is just my view, but Senator Kennedy had a much better personality for the legislative process than Bobby Kennedy did. Bobby Kennedy, from what I’ve read, from [Theodore] Sorensen and from [Arthur] Schlesinger [Jr.], was too frustrated by the institution, and was too eager to move quicker. I don’t think he would have been that effective a Senator, but who knows? He wasn’t there long enough to know.

Young: Which raises the question about the fit, about what works in the Senate. It’s very different from the Executive Branch.

Feinberg: Very.

Young: If you don’t command the Senate, you can’t command anybody’s compliance.

Feinberg: Unless your name is Lyndon Johnson.

Young: Well, yes, but even then, he proved himself in the Senate first. I’m talking about as President, the difference between a President and—

Feinberg: Yes, but when you say that you can’t command in the Senate, Lyndon Johnson is unique.

Young: In the old Senate, I guess. Can you do that now?

Feinberg: No, much to Senator Kennedy’s chagrin, by the way.

Young: He’s disappointed?

Feinberg: He’s disappointed in the institution relative to the way it was 30 years ago.

Young: Do you think so?

Feinberg: Oh, yes. I think sometimes Senator Kennedy feels, *If I could be the type of Senator I am now, 30 years ago, wow, what we could have gotten done.* See, Senator Kennedy tells me that one problem today in the Senate is that the guys you try to strike a deal with will say yes, but they can’t deliver. He says, “That’s the big problem. I can go in and get a deal struck with Mitch McConnell, and he’ll say, ‘OK, we’ll go along.’ The next day they don’t go along. He can’t

gather the votes; he can't deliver the votes." He says, "[Robert] Dole was somewhat successful that way, but [William] Frist, [Trent] Lott, McConnell, can't deliver." It's a different era. There are 50 fiefdoms, not one monolithic—It's problematic.

Young: But that doesn't deter him from trying.

Feinberg: Oh, it doesn't deter him; it just makes the challenge greater. Instead of going to McConnell and getting his word that these six Senators will go along, you have to go to the six Senators separately, and make sure they'll go along, and not trust McConnell to deliver. The institution is different. On judgeships today, you have to round up every member of the Judiciary Committee, and make sure they'll vote for your judgeship. When I was there, all you needed was Jim Eastland, and his bottle of bourbon, to force the issue. It was amazing to watch Eastland on judgeships: I'll give you yours if you give him his, and I get that one, and there we are, adjourned. That's all.

Young: Getting back to Kennedy's educating himself. Did you have dinners? Did he have any of the issues dinners?

Feinberg: Oh, criminal justice issues dinners were one of his favorite pastimes. "Ken, let's have an issue dinner on crime. Round up the six people around the country that we ought to be talking to on crime, and let's get everybody out to the house." And everybody invited *raced* down to McLean: Bob Morgenthau, district attorney in Manhattan, a friend of Bobby Kennedy's; James Q. Wilson, professor of criminal justice and government at Harvard at the time; Jack B. Weinstein, appointed to the Federal bench by Johnson, at Bobby Kennedy's request, down from Brooklyn; various academics teaching criminal justice policy around the country. "Let's all convene at McLean, at 6:30, for 30 minutes of a reception, an hour-and-a-half working dinner, and another 45 minutes continuing the working dinner in the parlor, adjourned at 9:30. Ken, you'll follow up with some of this—and not only notes to them, but follow up substantively—and see if we can develop something here on bail and sentencing, and LEAA [Law Enforcement Assistance Administration] and what have you."

Young: Did he chair the meeting or was he mostly a listener?

Feinberg: He chaired the meeting, welcomed everybody, and expected the key staff person, me, or on airline de-reg, Breyer or Bakes, to make sure it was substantive. "Make sure you flesh out from them what you think we ought to be focusing on." He'd host it, but he'd listen mostly and have questions, especially where there was the interlocking of substance with politics. He'd hear somebody say, "The way to do this is through legislation that would create a limit on the airlines." "No, no, no guys, we tried that two years ago with [Newton] Gingrich in the House. It won't go anywhere over there, so that isn't going to work. I appreciate what you're saying, but you academics don't get it. That approach won't work, so you have to go back to the drawing board."

Young: But advice about the politics was not what he was after?

Feinberg: No. He was after substantive policy. "Now, Bob, the crime in New York is going up and up. What are we going to do there?" "Well, one thing we're trying is this focused police work—where you go into a neighborhood where there are slums and guys demanding a dollar to

squeegee your window to make it clean, and get those people off the street—that, if you avoid the dumbing-down of the community, has a direct relationship to the crime rate.” “Did you get that all down, Ken? Let’s go with that.” That’s the way it worked.

Young: At what stage in the development of—

Feinberg: Usually at the beginning of the legislative process, as we were looking for new, creative ideas in health, in crime, immigration, this, that, the economy: “Let’s have a dinner right after Labor Day or early October, and let’s try to hit the ground running when the Congress comes back. Let’s do maybe a couple of hearings,” and so forth.

Young: Did he have an agenda-setting talk at the beginning of every re-Congress? “Here’s what we’re going to try to do this term.”

Feinberg: No. He had in his own mind an agenda—*Here’s what I want to do the first month, the second month*, but that was an internal—

Young: It wasn’t the assignment of priorities?

Feinberg: No. Right now, I think he has an agenda, in his own mind, as to what Obama ought to do the first 100 days: education, health, jobs, and the economy.

Young: It must be very hard for him to be out of it right now.

Feinberg: It is. It really is; it’s very hard.

Young: He’s making headlines in Boston, on healthcare.

Feinberg: He called me on that. He called me up and said, “Ken, have you seen the *Globe*? What are you doing? Go take a look.” “Okay, Boss, I’ll take a look at it.” He was thrilled with it. He was *thrilled* with it. Frankly, who knows? I don’t think even he knows, but he sees himself, maybe, showing up at the convention. He’ll bring down the house. Can you imagine, the historical moment? We’ll see.

Young: Well, it’s a very interesting and typical Kennedy move, the announcement of this, putting himself back in the picture.

Feinberg: Sure. It’s an interesting historical event. Again, I don’t know the answer to why he came out for Obama when he did. I don’t know if you’ve talked to Obama yet, but it would be very interesting to know how Obama reacts to all of this. Obama is incredibly beholden to Senator Kennedy, for giving him mainstream Democratic legitimacy.

Young: I have one parting issue. People have learning periods; they grow in office. The times change; the political road changes. What changes have you noticed, if any, in Kennedy, as he’s moved—since you first knew him in ’75?

Feinberg: The only changes I’ve seen in Kennedy go with the wisdom of longevity. There’s no other agenda competing, no other attraction that keeps him from his focus. Nothing has helped

Senator Kennedy's legislative agenda more than the perception and the reality that he has no other agenda. He's not doing this because he wants to get votes. He's doing it because he thinks it's the right thing to do. If you're going to oppose Senator Kennedy on the merits, go right ahead, but don't say that he's just trying to score political points. After 45 years, he doesn't need political points. You can be against his health plan or his job-creation plan or his program on immigration with [John] McCain, but you'd better marshal your substantive reasons as to why it's a bad idea. What we've learned over the years with Senator Kennedy is that he has engendered tremendous respect up there, for his work habits and for the fact that there's no other agenda, like in 1978. You can't say that about Senator Kennedy.

The other thing we've learned over the years is that he's in it for the long haul. His perspective is, Well, we'll take half a loaf this year and a quarter of a loaf next year, and by the third year we'll get the final quarter of the loaf as if we got the 100 percent this year. It doesn't matter; we're going to be here.

Young: So a defeat is never really a defeat.

Feinberg: That's right. A defeat merely delays the day of reckoning. A defeat is never really a defeat. It delays the day of reckoning. The Criminal Code didn't pass. So? We don't have to wait 200 years. Let's pass sentencing; let's pass bail; let's pass this; let's pass that.

Young: Healthcare reform didn't win.

Feinberg: Healthcare reform—Slowly but surely prescription drugs are now—It's all coming this way, because it takes time. "I'm in it for the long haul." Longevity becomes his greatest weapon, and the fact that there is no other agenda.

He has made a tremendous difference. His work ethic, which was always intense, is now more intense than ever. Sometimes he thinks, *I'm 76 and I'm ill. I'd better just reinvigorate myself. We still have a lot to do.*

Young: He's an optimist.

Feinberg: You have to be in his line of work. You'd better be.

Young: It's important.

Feinberg: Right. Thank you very much.

Young: Thank you.

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