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EDWARD M. KENNEDY ORAL HISTORY PROJECT

FINAL EDITED TRANSCRIPT

INTERVIEW 2 WITH STEPHEN BREYER

September 28, 2008
Washington

Interviewer

University of Virginia

James Sterling Young

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INTERVIEW 2 WITH STEPHEN BREYER

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Young: This is a follow-up interview with Stephen Breyer, September 28th, in Washington.

Breyer: As I was thinking about when I had worked with Kennedy, I wanted to mention two things that I remembered as general observations, some of which came later. The first is what he'd said quite a lot of times, directly or indirectly. It was a warning and also good advice. When someone is working on the Judiciary Committee or working in the Senate, the normal staff desire is to get credit for something. You want your boss to know you did a good job, or at least it wasn't you who did a bad job, and you'd like to get credit publicly for accomplishing something, because the Senator, or any elected Representative, must have the public understand that he's done something good, or he won't get reelected. You can't be entirely secretive about that kind of thing, not entirely modest.

Kennedy usually made a pretty big point about using the credit for a good thing that's going to happen as a weapon. It's a way of getting something to happen. He used to say we should have the credit. If they know that they are going to get credit for something good that's about to happen, they're more likely to work for it. If you would like it to happen, then don't worry about their getting the credit for it. That's fine. If in fact they know they'll get the credit, they will work harder. Even if it's a different Senator, a different party, that's all right if you accomplish something. If that helps you accomplish a good objective for other people, by all means use it.

And he added, "If there is a success—" (If, for example, airline deregulation brings about lower fares, if in fact the public is happier because the price goes down, or anything at all, and you were a part of a team that did lead to a success) "—there's always plenty of credit to go around. If it isn't a success, who wants or needs it?" It's either a success or it's not. If it is a success, you'll have plenty of credit and so will other people, and if it isn't a success, you don't want the credit anyway. Don't be afraid of giving other people credit for things. That's very important to him.

Young: His brother Jack [John F. Kennedy]—it's not original with him, of course, but he said once that, "Success has many fathers; failure is always an orphan."

Breyer: That's certainly true.

Young: There have been a number of occasions that people have referred to, and maybe you have such an occasion to relate yourself, in which—I wouldn't say there are many, but there have been some—For example, he played a leading role in getting a major increase in cancer research. [Richard] Nixon got the credit for that. There was a bill with Kennedy's name on it and Nixon communicated indirectly, through an intermediary, that he would sign the bill but not if Kennedy's name was on it. This man approached Kennedy and Kennedy said, "Fine."

Breyer: "It's fine," that's what he would say. He's very busy. There are a thousand things going on in his life at once. Ninety percent of those things are different projects that are likely to do some good. Some will succeed and some will not succeed. We stop this one, go on to the next one, and if he does not get credit for everything he does, so what? Eventually, if these things are successful, there will be some credit, even if people don't know exactly what it's for. That's fine. If someone else wants his name on the bill, fine, let's get the bill passed.

I'm sure he's more pleased if, when he's worked on a project and it's successful, he's identified with it. Anyone would be, but it is not the be-all and the end-all. It isn't the end of the world, and it is very helpful to say, just as in your example, it's perfect to be able to say, "Give this other person the credit." He was perfectly happy to have Strom Thurmond working on airline deregulation with him. And the immigration bill that Kennedy did with [Romano L.] Mazzoli and [Alan] Simpson and the others. Whose name is on it is not—it's good if your name is on it, but it isn't the end of the world if it isn't.

Young: And this is also establishing his good feelings afterwards, for the next time.

Breyer: Yes, it's fine.

Young: He doesn't run away with the credit.

Breyer: No, not at all. I do remember, on one occasion, we had a very difficult bill involving an effort to enact a bill that would make it more difficult for the press to get a hold of and print material about the CIA [Central Intelligence Agency]. The press was very much against it and we were against it, and it was going through the Judiciary Committee. It wasn't clear whether it would pass or not pass, and it actually came quite close to passing but it didn't. Eventually it did, when the Republicans came to control the Congress about a year later.

Young: This was to restrict the press?

Breyer: Yes. It was intended to restrict the press if it had found out about an incident with a CIA agent in Greece who had been killed. There was a point, but I think the details of it went rather far. I remember he had a meeting with the press people there. He wanted to know, "What do you, the press, think we ought to do? If you think we should pass it now, it might not be as bad as what's going to happen if it comes back later and you're finished with the issue. If you think it's better for doing your work as a journalist to try not to have this bill at all, it's possible we can defeat it." And we did it. It was defeated, I think, on a tie vote in the committee.

The *Boston Globe* wrote a big article about that, as they tend to do if you're on their side, to say how good this was. I remember his looking at that and pointing it out. I knew he was pleased

about that, but it wouldn't have been the end of the world if there hadn't been an article. That made a major impression on me.

The other thing, which was some years later, is I was talking to Eddie Martin, who knew Senator Kennedy very well. He's a longstanding friend who had worked with him for many years. He said that he always found the distinction important to the Kennedys—Senator Kennedy and the others whom he had known—the distinction in people between what he called the givers and the takers. He said the givers are people who really aren't quite so self-conscious, and they are continuously helping. Their own ego is suppressed, which is hard for a human being to do. And the takers, it's the contrary.

Senator Kennedy the person, from the point of view of his own psychology, reminds me a lot of Sandra O'Connor. He's outgoing, and Sandra is like that. It's on to the next project, and lots of energy, a high energy level, focusing on other people always. Whoever is in the room, he's focusing on them. He's not thinking about his own problems, he's thinking about them and he's thinking about the next project, and he's thinking, *Where do we go from here?* That is helpful to people who work for him. They learn something.

Young: This is not attributable to the safe seat he occupies, and the fact that he does not have to focus on the next election.

Breyer: That's his psychology. No, he's happy that his name is in that newspaper, for example, in respect to that press story, and he knows he has to have a certain number of those. He's not self-abnegating. None of us are saints, and of course he has an ego like every other human being. It's just that he's very interested in accomplishing something.

Young: And credit is fine where credit is due.

Breyer: Yes.

Young: Givers and takers. Was this a filter for him in choosing who would—

Breyer: I don't know if it was. I doubt that. He had a big mix of people working there.

Young: Yes, he did.

Breyer: They all had something to offer and they weren't all saints.

Young: I'm not sure all of them were entirely givers either.

Breyer: No, that's probably right too. So that's not a filter. It's an interesting distinction. It's easier to be around people who are more on the giver side than it is being around people who are on the taker side, and it's also a good test to use for yourself when you're tempted.

Young: Sure.

Breyer: Those were the two things I remembered, and I'll bet you find examples of it as you go along.

Young: Do you have any thoughts about how he has changed over the years? Grown? Is he the same kind of person?

Breyer: I think he is. Like all of us, as you get older you become a little bit more—there's a little more equanimity, and your energy level is not quite so high, but his started very high, unusually high, probably out on the upper one percent at the top on the energy level, and in his continuous effort to be doing things to help.

I see him occasionally. He knows that with him there is a certain mystique, and that, too, is a weapon that can be used, because people would like to meet him. That's a kind of tool, too, to achieve something that's helpful.

Young: One of the things that strikes me is that people want to help him when he asks for it.

Breyer: Because it's very good for a person to be asked to help. People respond to that. He's pleased with the members of his family. He'll talk about these members of his family who are working on the Special Olympics, or they're working on a cancer program, or they're working on scholarships and Pell grants, or the different things that he's done. They spend a lot of time on projects. You don't hear them always talking about it, but it's something that pleases him.

Young: It's quite impressive the way, even from his early days in the Senate, the time you were there, he can call up anybody and get them to come and educate him on whatever.

Breyer: That's right, and he would.

Young: Was it self-education?

Breyer: Well, yes, to find out what is the right position to take, what's the best—he wants to get the advice that will help him make a good decision. Different people have different specialties and there is no single person who knows the answer to every problem, and so he would always look for a range of advice. He had meetings at his house.

Young: People who are experts in their fields, the best in their fields—He would call them.

Breyer: That's right.

Young: Did you know of any other Senator who made that such a regular practice?

Breyer: No, but I don't know other Senators. Moreover, I was on the staff, one of the spokes where he was the hub. I've had my particular things that I've done with him, for him, whether it was the airline dereg or the Judiciary Committee. I don't know his entire life. I would see him from those perspectives.

Young: But did you see other Senators who shared some of those—

Breyer: Some, but I was glad I was working for him for the most part. He did have an ability to mobilize the talent. It was like working with the Judiciary Committee. I've said that. I've never found such a great research tool. You can find out anything. You not only had the Senate, but

you also have the Kennedy name, and you also have his influence, and you know the responsibility that goes with that.

If you can mobilize the information and talent, it becomes easier to work with people in different parts of the government. This is a tremendous asset. You can use it, as long as you're using it for something that's a worthwhile purpose.

Young: Who were the Senators you would pick out?

Breyer: On the committee at that time? It was a wonderful committee, the Judiciary Committee, when I worked there.

Young: Or any of the Senators he had good relationships with.

Breyer: Oh, he had a very good relationship with John Culver—John Culver was a personal friend—and Birch Bayh, when he had to be somewhere close, Birch Bayh would chair the committee meetings. Senator Thurmond would try to help too. If something had to be covered, Thurmond would help cover it, and [Orrin] Hatch was very helpful on a large number of occasions, and Alan Simpson. I think Simpson and he got along very well because they both had a very good sense of humor.

Young: Yes. Hatch in particular? From the outside, that seems one of the more improbable.

Breyer: Hatch was always helpful. There was a wonderful group. From the point of view of personality, on the Republican side, Simpson and Kennedy because of their sense of humor. The Republicans on the committee were: Simpson, Thurmond, [Charles] Mathias, who was a wonderful man, Hatch, Thad Cochran, [Robert] Dole, but Dole rarely came. [Paul] Laxalt.

On the Democratic side—and there were no real antagonisms. It was Kennedy, and [Howard] Metzenbaum, and Birch Bayh, and John Culver, and Dennis DeConcini, and [Robert] Byrd, but Byrd rarely came. Who have I left out?

Young: Were you in a position to observe him and Byrd, or work with Byrd's office?

Breyer: No, I really wasn't. [John] Tunney was a member for a while. He had just left by the time I got there. Max Baucus was a member.

Young: He was a very junior member, wasn't he?

Breyer: Yes he was. Joe Biden was a member.

Young: Junior also.

Breyer: Yes. [Patrick] Pat Leahy was a member.

Young: A lot of the earlier, the more senior, liberal group of Senators were out by 1981. They lost out in the 1980 election.

Breyer: Yes, but I was there in ’79–’80. When we had a difficult problem with Senator [Robert] Morgan, who wanted his campaign manager confirmed as a judge, Pat Leahy took that up, and he and Hatch together worked on that. They did a very good job.

Young: Morgan wanted to go after you.

Breyer: I don’t think it was personal.

Young: No, it wasn’t. It was against Kennedy. Payback. Paul Laxalt?

Breyer: Oh, he was great. My nomination to the Court of Appeals came after [Ronald] Reagan had been elected, and the floor of the Senate had to vote to break a filibuster. Senator Laxalt made it clear that it was OK with the Republicans. They were cooperative with Kennedy.

Young: Very different from what you observe—

Breyer: It was different from what I hear now. Maybe I’m romanticizing it, but my impression of his being there, at that time, was that the other 16 Senators, certainly the 14 or 15 others who would come to the meetings, was that they were not always fighting with each other.

Young: I think his standing in the Senate has not gone down at all. In fact, if anything, it has not only survived, but—

Breyer: The Chief Counsel of a Committee has to be sure enough members will show up at a meeting to get a quorum. I didn’t want Kennedy walking in and having to sit there waiting for 15 minutes, or no one shows up, or there aren’t enough, and then he’s wasted his time. So we would be calling around—It would have been very easy for people not to cooperate. All they’d have to do is just not show up, and then we wouldn’t have the quorum. That didn’t happen. They did show up and we did have the quorum. So Hatch once said, “Why are you always looking so worried?” I said, “Because maybe you wouldn’t show up.” And that would be why.

Young: He’s a perceptive fellow, isn’t he?

Breyer: Yes, that’s right.

Young: He can read your mood.

Breyer: That was funny. The first time I had ever sat in one of these committee meetings, there were going to be some votes. I knew that they were going to have a roll call vote. So what we’re going to do is we’re going to have Edie, my secretary, simply check on a piece of paper how each Senator votes If anything should go wrong, I had Bruce Morgan, who was an intern and general help, do it. Sure enough, we have the first vote and someone called Edie out of the room, and Bruce Morgan had disappeared. I was left with the piece of paper. I said, “I guess I can do this,” but sure enough, I did it wrong. Kennedy looked at it and said, “Jeez, don’t they teach you anything at Harvard?”

When I was back at Harvard before I was Chief Counsel, he had set up a committee that was going to screen applications for judicial office. President [Jimmy] Carter wanted the judges

screened by a "merit selection" committee who would make recommendations to the President. I was a member of that committee. Father Mohan was on it. Dick Donahue was the chairman, and Paul Freund was on it. There were people representing different communities in Massachusetts.

Young: I'd like to hear about it. You haven't talked about that earlier.

Breyer: They would come up with a list of two or three people for each slot for nominations to the Federal District Court. It was a screening committee for the Federal District Court in Massachusetts. This was probably '77-'78. Dick Donahue was the chairman.

They would recommend two or three people who would apply to be district judges, and we would screen them. In fact, one of my jobs was to try to get good people to apply. For example, Bob Keaton. Senator Kennedy wanted someone from Harvard to apply, and Bob Keaton applied. Although it wouldn't be sure you'd get through that committee, there would be a good chance for somebody who was qualified. And he wanted to make sure women applied, and he wanted to make sure minority people applied. We ended up, I think, with a very good group of people.

Young: This was after the expansion of the federal bench?

Breyer: That's right. I'm trying to remember who they all were.

Young: Was this something Kennedy did on his own?

Breyer: Well, he did, but the idea was floating around. He wasn't forced to do it, but it was part of a program of the administration. Whether he would have done that independently or not, I can't tell you.

Young: He is a Senator from Massachusetts.

Breyer: Yes, he's the Senator from Massachusetts and traditionally, the Senator of a majority party would name the person who would be the district court appointee. That didn't always happen but very often did. There was a view at that time that it would be good for the Senate to have a selection committee. The ABA [American Bar Association] liked that idea, the President liked that idea, and Griffin Bell wanted that. He was Attorney General. So Kennedy created my committee with Dick Donahue as the chairman. I remember Paul Freund being on it, at least for a while, and I can't remember the other members. I do remember that one of the things to do was to try to get people to try to apply.

Young: So you were recruiting.

Breyer: Yes, recruiting.

Young: Not just vetting.

Breyer: No, not just vetting, correct. It ended up with Bob Keaton, who was a very good judge, [John] McNaughton, who had been a state court judge, and there was somebody from the western part of the state, I think it was [Frank H.] Freedman. Rya Zobel, a woman, turned out to be a great judge. Dave Nelson was probably the first African American appointed in that region

of the country. He was a good judge. I think Dave Mazzone, a fine judge too, was already on the bench, I'm not positive.

The committee recommended—If there were five vacancies, they recommended maybe 10 or 15, something like that, and then Senator Kennedy made the ultimate selection and forwarded the name to the President and the Justice Department.

Young: What kind of criteria were you given, the committee?

Breyer: There weren't any definite criteria. Try to get a minority person, try to get a woman, try to get somebody from the western part of the state. There were four or five places, and what he'd want is somebody who was recognized as a person of ability in the community. I'd say that's the general thing: a person who would be able to do this job well. It wasn't like an academic test, but he wanted appointments that would be recognized as quality appointments.

Young: But it wasn't—

Breyer: It wasn't some old buddy of his.

Young: No, nor was it, I don't know, kind of an ideological test?

Breyer: No, it was not.

Young: It was bipartisan.

Breyer: Well, I don't know if it was bipartisan or not, because the Republican Party was not very strong in the State of Massachusetts. There might have been, I can't say, but if you told me they were—

Young: That they were all Democrats?

Breyer: They might have been all Democrats, or there might have been some Republicans.

Young: On the committee?

Breyer: I don't know. You'd have to go look it up. I wouldn't be surprised if they were all Democrats. I wouldn't be surprised if there were a couple of Republicans. It was supposed to be a merit selection committee. That was the idea of it.

Young: But such things as judicial temperament, and all that?

Breyer: You want somebody who is intelligent, knows something about law, is likely to have a judicial temperament, and is fair-minded. A judge has to sit and listen to people, that's the primary thing, to listen, and to have common sense, be fair-minded, not prejudiced. He got a very good group. I think history will bear that out.

Young: Was this a one-shot thing?

Breyer: No. It took place over a few years. There were several new positions. There were also a couple of vacancies that just occurred because the previous person had retired. I think there were five openings all together.

Young: Did you have any really controversial?

Breyer: No, I don't think so.

Young: At some point—perhaps you weren't involved in it at the time—he was under some pressure.

Breyer: Well, there was [Francis] Morrissey. There was the whole episode with Morrissey.

Young: That was way earlier.

Breyer: It was long earlier, yes.

Young: Oh yes, that was before you had commissions to vet. There was a relative of some Senator from the State of Washington. I forget his name.

Breyer: Oh, [Nathaniel M.] Gorton. Yes, but that was long after. Yes, he was appointed. He was a good judge. But that was long after. And he was a Republican.

Young: Yes.

Breyer: That was when a Republican President was—I don't know anything about that.

Young: That wasn't on your watch.

Breyer: No. I probably didn't remember it last time because nothing too unusual happened.

Young: That was something about which he's spoken a fair amount, and he is quite proud of it.

Breyer: Well, it ended up with good judges.

Young: It was the sort of thing, the approach that is characteristic of him, especially after the early Morrissey thing, when he was just starting out in the Senate.

Breyer: It was a success.

Young: That was family loyalty, I guess, which he got stuck with.

Breyer: I can't think of anything else.

Young: Fine, we'll close it off.