

WORKING ON THE STAFF OF SENATOR TED KENNEDY

*The Honorable Stephen G. Breyer**

Thank you, Caroline [Kennedy]. You gave a sense of what working for Senator Kennedy was like. We all found it fascinating and certainly worthwhile. Tommy Susman will remember that when we worked together on the Judiciary Committee staff, we would arrive early, leave late, and find every hour there interesting. Something would be happening every minute. I wish I could convey the excitement of working there.

Senator Kennedy left a legislative legacy of hundreds of laws—a legacy developed over many years. I worked on the Judiciary Committee staff for only a few years. And he worked with other committees at the time. Still, his presence there was pervasive, and his positive influence upon me and upon others, whatever their political persuasion, was great. Let me try to communicate this with a few anecdotes.

Two weeks ago, the Republican Chairman of the House Judiciary Committee called and asked me to speak to the committee members. When I walked into the room, I was surprised to see almost all of the 34 committee members present. I doubted that there could be such widespread interest in the judicial system. It turned out that I was right. When I asked the Members (who were seated alternately Republican, Democrat) if they wanted me to start with a brief description of the Court, the Chairman said, “No. We want you to tell us how Senator Kennedy ran the Senate Judiciary Committee when you were Chief Counsel.” During the next half hour they asked questions about that experience. They understood that Senator Kennedy had been able to cross party boundaries. They began to realize that, on a business basis, he had opponents; but when business ended for the day, his opponents became his personal friends. And he would help them as friends when he could.

* Associate Justice, Supreme Court of the United States. An earlier version of this text was delivered as remarks at the *New York University Journal of Legislation and Public Policy*'s Dedication to the Legislative Legacy of Senator Edward Kennedy, hosted at New York University School of Law on February 1, 2011.

My first experience working for Senator Kennedy concerned airline deregulation.¹ At the time, airfares were highly regulated. That meant much better service. Airplanes carried Aloha Bars in the back, they served steak sandwiches, and there were many empty seats. But one witness commented, “A business traveler is happy when he finds an empty seat for his briefcase; but would he be as pleased if he knew he was paying full fare for the briefcase?” Senator Kennedy became involved because he had decided that less regulation of fares would mean lower fares. Another witness had said that in Texas—where fares were not regulated—the farmers could afford to fly with their chicken coops in an airplane. The Senator added, “Even if it is not fun flying with chicken coops, we’re trying to help those farmers.” And he was successful. A few weeks ago, I looked up the numbers, and they’re low; in real terms, since the 1970s, they have fallen nearly seventy percent.²

What was it like to work with Senator Kennedy on a project like that? Airline regulation by the Civil Aeronautics Board (CAB) is not an inherently exciting subject. It involved learning the details of determining regulatory rates and awarding airline routes. But I saw Senator Kennedy involved in that subject in part, I believe, because he was willing to give his time to staff people (who competed for his time) when, and to the extent that, he found that doing so would help accomplish something worthwhile. So I saw him learn how to set an airline rate—to the point where he could discuss the matter at a hearing³ with Richard O’Melia, the CAB Chairman,⁴ and say, “Well, Mr. Chairman, I think you would actually do it like this.” And the Senator would be right. I began to think that we would accomplish something.

Even in this subject the Senator was quick; he would make it fun, and he could emphasize the main point. We had a hearing in Boston.

1. See Stephen G. Breyer, *Airline Deregulation, Revisited*, BLOOMBERG BUSINESSWEEK (Jan. 20, 2011, 5:00 PM), http://www.businessweek.com/bwdaily/dnflash/content/jan2011/db20110120_138711.htm.

2. See Scott McCartney, *The Golden Age of Flight*, WALL ST. J. (July 22, 2010), <http://online.wsj.com/article/SB10001424052748704684604575380992283473182.html>.

3. *Oversight of Civil Aeronautics Board Practices and Procedures: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary*, 94th Cong. (1975).

4. Richard O’Melia was a board member of the CAB from 1973 to 1980 and Acting Chairman of the CAB from January 1, 1975 to April 21, 1975. See Andrew D. Crain, *Ford, Carter, and Deregulation in the 1970s*, 5 J. ON TELECOMM. & HIGH TECH. L. 413, 425; *Richard J. O’Melia Dies; Vice Chairman of the Civil Board, Attorney, Aviation Executive*, STATE BAR OF WIS. (Oct. 26, 2005), http://www.wisbar.org/AM/Template.cfm?Section=Nonresident_Lawyers&CONTENTID=54265&TEMPLATE=/CM/ContentDisplay.cfm.

2011] *WORKING ON THE STAFF OF SENATOR TED KENNEDY* 609

At the time, school busing was a problem there. A woman, who had been picketing, entered the committee room and said, “Senator Kennedy, why are you having hearings on airlines? I’ve never been able to fly.” And the Senator replied, “That’s why I’m having the hearings.”

Some years later the Senator asked me to come back to the Judiciary Committee to serve as Chief Counsel.⁵ Some time during the first week he took me to see Senator Alan Simpson, a Republican member. When we walked into Senator Simpson’s office, Senator Kennedy said, “Alan, this is Steve Breyer. He is going to be the chief counsel of the committee. So, if you have any problems, you call him and let him know.” I got the message. So did Senator Simpson. And we on the staff had good relations with the Republican members because Senator Kennedy had good relations with the Republican members. The rule we followed was “no tricks.” Although we would develop legislative strategies, Ken Feinberg and I called the basic approach “open conniving, openly arrived at.” All sides understood just what we would be doing.

Every morning, Ken and I would have breakfast with Emory Sneed, the Republicans’ Chief Counsel. And we would plan out the day. We would try to agree upon legislation that both sides would find useful, and we would work out what different members might say about it, different senators often speaking from different points of view. Often, but not always, this system worked well.

The committee voted to confirm about 200 federal judges nominated by President Carter.⁶ The records of all of the nominees were looked into jointly by a Republican staff member (Duke Short) and a Democratic staff member (first, Carmine Bellino, who had worked for Bobby Kennedy, then Burt Wides). They almost always wrote a joint report and reached a joint recommendation.

One day towards the end of the session, Senator Thurmond told Emory: “Don’t meet with the Kennedy staff anymore; it’s too close to the election.” The next afternoon there was an executive session of the committee to consider several judicial nominees. Before we knew it, the senators were in a fierce argument, one almost shaking his fist at another. Senator Kennedy then looked at me and said, “Well, what did they teach you about how to deal with something like this at

5. I served as Chief Counsel of the U.S. Senate Judiciary Committee from 1979 to 1980.

6. Denis S. Rutkus & Mitchel A. Sollenberger, *CONG. RESEARCH SERV.*, RL 31635, *JUDICIAL NOMINATION STATISTICS: U.S. DISTRICT AND CIRCUIT COURTS, 1977-2003* 15 (2004).

Harvard?” Very funny. The Senator then appointed subcommittees, with members from both parties, each to deal with a different group of nominees. But the subcommittees did not have to meet, for Senator Kennedy had worked out with Senator Thurmond that their different staffs could resume their breakfast meetings. That is what he wanted. And that is how he showed the staff what he wanted.

I remember clearly three words he often used to use when speaking to the staff. For example, Ken Feinberg had been working on Criminal Code reform.⁷ He and I met in Senator Kennedy’s office. He was running for President at that time, and he spoke to the office from an airplane via a telephone hook-up. Senator Hatch was in the office, trying to work out an agreement on a highly controversial item, where the labor unions felt strongly one way and a group of realtors felt strongly the other way. Senator Kennedy told Ken and me, “Work it out.”

The Senator made another good point—about credit. He pointed out that everyone likes credit, and he was not an exception. But he would say do not worry too much about credit. Give credit to your opponents when they begin to agree. Tell them: “What a good idea *you* have there. Brilliant! Genius! Let’s do it.” Credit, he said, is a weapon. “If you are successful, don’t worry, there will be more than enough credit to go around. And if you are not successful, who wants it?”

Perhaps the Senator’s words that I remember best of all I heard when I was at a reunion of 100 or 200 former staff members. After dinner, the Senator wanted to describe a few of his basic goals. He told us that his father had told him: “What you do is gather around you men and women of different talents, different experiences, with different contributions to make, and you all help.” Help whom? As staff, we’d help Senator Kennedy. We are a team. We help each other. But most of all, you help others, people who need your help. You help that ordinary American who needs help in his or her daily life. You help those abroad who need your help. You do what you can, you get together, and you help.

That message stuck. It is a good message that certainly has served me well. I miss Senator Kennedy. I shall not forget him, the work, the good times, or that message.

7. Kenneth R. Feinberg, *Sentencing Reform and the Proposed Federal Criminal Code*, 5 *HAMLIN L. REV.* 217 (1982) (citing S. 1630, 97th Cong. (1st Sess. 1981)).