

PERSUADE, DON'T TRADE

*Thomas M. Susman**

Thank you, Dean [Revesz]. It really is more than a pleasure to be here. I get choked up looking out at colleagues and former Kennedy staff and thinking about those wonderful years that Justice Breyer speaks so eloquently about.

Let me first start with one thought and that is, when Justice Breyer talks about Harvard and Massachusetts, Kennedy's was not a parochial staff. Just to personalize it for a moment—I was in the Justice Department when I got a call from Jim Flug who was hiring the staff for the senator's new Administrative Practice and Procedure Subcommittee, AdPrac we called it.

It was 1969, right before the Nixon inauguration, when I went up to meet with Flug and then Senator Kennedy for the first time. Harvard? No, I went to Yale as an undergraduate and then to Texas law school. Massachusetts? No, I grew up in Texas. A Kennedy family political supporter? No, I actually was a Humphrey supporter in '68. About the only thing we had in common was an interest in good government, and I really wanted an opportunity to make a difference and to work in public service in Washington. Senator Kennedy gave me that opportunity.

Now Justice Breyer is the expert on airline deregulation, so I won't touch that issue other than to tell one story that marks the beginning of the entire regulatory reform process. Professor Breyer came to Washington with the proposal that the AdPrac subcommittee should look at airline deregulation, conduct oversight hearings, and work towards potential deregulation of the airline industry. And so we scheduled our first hearing on trans-Atlantic charter flights (okay, a slightly

* Mr. Susman served as an Assistant Adviser to Senator Kennedy on the Senate Judiciary Committee from 1968 to 1979. In 1979, he became General Counsel to the Senate Judiciary Committee. In his almost twelve years working with Senator Kennedy in Congress, he also served as Chief Counsel to the Senate Subcommittee on Administrative Practice and Procedure and General Counsel to the Antitrust Subcommittee and to the Senate Judiciary Committee. Mr. Susman also worked on Senator Kennedy's 1980 presidential campaign. Subsequently, Mr. Susman worked at the law firm Ropes & Gray for twenty-seven years until retiring in 2008 to assume his current position as the Director for the American Bar Association's Governmental Affairs Office.

different memory than Justice Breyer's). After we set the hearing date, we got a phone call to meet the senator. It was in his car; staff in the backseat, the senator in the front seat.

He needed to talk to us and didn't have much time, so we were driving in his car and he turns around and hands Breyer a letter from Howard Cannon, chairman of the Senate Aviation Subcommittee saying basically: "You don't have jurisdiction over this subject. This is a horrible idea. Don't interfere with a finely tuned regulatory system. And if you do look at charter flights, you're going to disrupt things and Pan American Airlines will go out of business." Need I say more? Well, we did, and it did.

Senator Kennedy had a long list of legislative accomplishments during his time in the Senate, and I was trying to figure out how to catalog or characterize them. Many of them have been discussed by Caroline [Kennedy] and will be discussed by others today—civil rights, health care, workers' rights, immigration, refugees. All of these come from the senator's heart, from his compassion.

And then there is another set of issues—like good government and the legal system—this includes administrative procedure and economic deregulation and those sorts of issues.

I want to mention two issues that don't quite fit this pattern. His work started from a sense of responsibility that he had to undertake these matters—matters on which he wasn't so keen at first. And yet in the course of both of these exercises, he became personally committed and indeed fired up on the subjects and achieved substantial legislative accomplishments.

The first isn't known very widely and hasn't been talked about for decades, and that is his work relating to American Indians. This was not something he had a long-standing interest in, it was not something that he had a history in, but Robert Kennedy had been chair of the Select Subcommittee on Indian Education, and after his death, there was no subcommittee chair and nothing was happening. So members of both the Indian community and of the Senate asked Senator Edward Kennedy to take up that subcommittee chairmanship and to finish the work of the subcommittee.

And he did so, reluctantly at first. But he soon got into it. He had field hearings in Alaska and California and the Southwest, and the subcommittee produced a landmark report on Indian education. I was asked at the AdPrac subcommittee—because the Indian Education Subcommittee was a select subcommittee and was therefore dissolved at the end of the year—to take the report and make something happen.

During the course of the next few years, we participated in hearings in the Senate Education and Labor committee. We drafted and secured enactment in the early '70s of the Indian Education Act, which transformed the system of Indian education. I can capture the thrust of that bill in the title of an article Senator Kennedy wrote in *Look* magazine—some of you are old enough to remember *Look* magazine—the title of which was “Let Indians Run Indian Education.”

That was the gist of the legislation. It established a new office in HEW [the Department of Health, Education, and Welfare] to provide programs outside of the paternalism of the Bureau of Indian Affairs, with its archaic approaches to education. The legislation transformed the face of Indian education to the benefit of generations of Native Americans.

And after that, the senator got interested in a wide range of problems faced by Indians. We had oversight hearings on Indian water rights and land rights; he participated in pushing through the Alaska native claims legislation; he helped return Mount Adams to the Yakama Nation and Blue Lake to the Taos Pueblo; he authored an Indian Manpower and Training Act. And the result of all of that work was an important and historic legacy left by a senator from Massachusetts—certainly not driven by any constituent interests. He picked it up and made it happen.

The second piece of legislation that I'll discuss became Senator Kennedy's responsibility, not because of a family member's involvement or any kind of personal compassion, but because he happened to chair a subcommittee with jurisdiction over the subject of freedom of information. Justice Breyer remembers that because he was there for part of the time when we were working on a bill that became the Freedom of Information Act Amendments of 1974.

I remember sending to the senator's “bag” one evening the ubiquitous staff memorandum setting out the background: “The subcommittee has this jurisdiction. We propose this legislation. The House has been having hearings. The issue is important. Et cetera.” And in his style, you'd get the memo back with his definitive and decisive hand-written note at the top: “See me!” That wasn't so much a rejection as a “Sounds interesting, but I need to know more.”

I met him and explained that the original Freedom of Information Act passed in the '60s was developed in the AdPrac subcommittee, that it had proved a failure, and that we were being visited by media groups, by Ralph Nader, and by public interest organizations, asking that we strengthen the statute.

The result was that the senator presided over a number of hearings, worked with Senators Ervin and Muskie on a range of privacy, executive privilege, and information issues, and out of that mix came the 1974 Amendments. These stood for decades as a model for transparency legislation that was adopted in most states and has in the last couple of decades been emulated all over the world.

The legislation was substantively strong, but it was unlike Indian legislation, where there wasn't serious opposition. The FOIA Amendments bill was controversial—the Justice Department opposed it, the White House opposed it, all the agencies across government opposed it. Ultimately the senator managed to get the bill enacted by overriding a White House veto by President Ford, which succeeded by two votes.

Justice Breyer mentioned a couple of lessons learned. So I'll end with a few also. I remember when the FOIA bill was being teed up in the Judiciary Committee. Even though we had the votes in committee, we needed to get the chairman to bring it up for a markup and we knew the Justice Department and FBI opposed it. The memorable principle from this experience was: When in doubt, mumble.

It was critical for the senator to get this bill cleared with Senator Eastland for committee consideration. We knew Eastland was tight with Justice and the FBI. So one day I was accompanying Senator Kennedy headed for a meeting in the New Senate Office Building and, when we walked into the elevator, Senator Eastland walked in as well. Smoking cigars in the building, even the elevator, was routine at the time.

And I nudged Senator Kennedy and whispered "Freedom of information, senator,"—you know, to remind him. And Senator Kennedy goes, "Oh, Jim, [mumbling] we have, you know, freedom, we've got this law, free, and you know markup." And Eastland, without taking his cigar out of his mouth said, "[unintelligible mumbling sounds]." The elevator door opened, we walked out, and I asked, "What happened?" Senator Kennedy responded, "It's all set."

The second lesson came when we were getting ready to go to the floor on an important bill on which I was working, and we were in doubt of a vote. I said, "Well, why don't you ask him? Ask Senator So-and-so to support you on this." And his response was—these are my words, but the gist of it was—persuade, don't trade. "Don't trade votes, don't ask for personal favors, don't ask personally for votes. If you've got the position, persuade them; get them there on the merits. But if you get someone to give you a vote that's not on the merits, then that senator's going to want one back." He didn't want to have to reciprocate; lesson learned.

And the third was: always keep your commitments. Sometimes times would change, situations would change, and it would really be helpful not to have to do what you said you would do. But Senator Kennedy always kept those commitments and had his staff do the same.

One last comment, I met with a few friends last year and one of them was writing a book and planned to call it *The Senate in the 1960s and 70s: When the Senate Was Great*. And so we talked a lot about the Senate, asking “Isn’t it great anymore? What about that?” And we reflected for a moment on the giants in the Senate back then.

We pulled out a list—I actually looked at the list this morning from the 90th Congress—and there are a lot of giants from those years. Most of you wouldn’t know their names, but those of us who’ve been around politics and government for awhile do. There were a number of giants, even if you didn’t agree with them—Jim Eastland and Herman Talmadge and John Stennis and Mike Mansfield; Margaret Chase Smith and Ralph Yarborough, Jennings Randolph—it’s just incredible.

And then I thought, that’s the Senate in which Senator Kennedy came of age. It was a Senate full of giants from whom he learned his lessons. Those are the lessons that he in turn departed to his staff and to generations of lawmakers in the House and Senate who had a chance to work with him. They were lessons that really made Senator Kennedy one of the great statesmen, one of the great legislators of our time. And an incredible pleasure to work with.

Thank you.

