



## EDWARD M. KENNEDY ORAL HISTORY PROJECT

### **Interviewer's Briefing Materials** **Jeff Blattner Interview, 03/30/2007**

Robert A. Martin, Research Director

#### **Miller Center Documents<sup>1</sup>**

- Jeff Blattner Fact Sheet.
- Edward M. Kennedy Civil Rights Legislative Highlights.
- 1982 Voting Rights Extension Act Overview Memo.
- The 1986 Rehnquist and Scalia Nominations Timeline.
- The Bork Nomination Timeline.
- The Americans with Disabilities Act Overview Memo.
- Civil Rights Act of 1991 Timeline.
- The Thomas Nomination Timeline.
- Clarence Thomas Nomination Overview Memo. [Prepared for the Alan Simpson interview.]
- The 1994 Breyer Nomination Timeline.

#### **Secondary Source Materials**

- Jeff Blattner bio, [www.eeoc.gov](http://www.eeoc.gov).
- Colin D. Moore, "Extensions of the Voting Rights Act," in Richard Vallely, ed. *The Voting Rights Act: Securing the Ballot* (Washington, DC: CQ Press, 2006) pp. 95-111.
- Adam Clymer, *Edward M. Kennedy: A Biography* (New York: William Morrow, 1999) pp. 416-422, 440-441, 449-456, 470-471, 481, 495-497.
- Carolyn Osolinik memo to Edward M. Kennedy, "Souter Update," John F. Kennedy Presidential Library, 08/28/1990.
- Unknown author, "Literacy Test," John F. Kennedy Presidential Library, undated.

#### **Oral History Interviews**

- Ralph Neas interview, Kennedy Oral History Project, Miller Center, University of Virginia, 11/14/2006.

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<sup>1</sup> These are original documents created by Miller Center researchers for the Edward M. Kennedy Oral History Project. Please acknowledge credit for any use of these materials.

- Burt Wides interview, Kennedy Oral History Project, Miller Center, University of Virginia, 02/02/2007.
- William Taylor interview, Kennedy Oral History Project, Miller Center, University of Virginia, 01/25/2006.
- Nan Aron interview, Kennedy Oral History Project, Miller Center, University of Virginia, 01/26/2007.
- Melody Barnes interview, Kennedy Oral History Project, Miller Center, University of Virginia, 08/16/2006.

#### **Other**

- “Senator Kennedy – Bork Chronology,” undated.
- Jeff Blattner memo to “Bork Nomination – Overview of Efforts in Process,” 07/17/1987.
- Carolyn Osolinik, Jeff Blattner, and Tony Podesta memo to EMK, “Bork Nomination – Public Strategy,” 07/31/1987.
- Carolyn Osolinik memo to EMK, “Bork Meeting with Senators, 1:15 pm today,” 08/06/1987.
- “Key Topics in Senator Kennedy’s Questioning of Robert Bork,” undated.
- Jeff Blattner, “Memo: To Clarence Thomas File,” 07/16/1991.

## **EMK CIVIL RIGHTS STAFFER FACT SHEETS**

*Prepared by Rob Martin*

*Miller Center, University of Virginia, 03/05/2007*

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### **Jeff Blattner (1987-1995)**

#### *Positions w/ EMK:*

- General counsel and later chief counsel on Senate Judiciary Committee

#### *Other positions:*

- Deputy Asst. Attorney General in Antitrust Division of Clinton's Justice Department

#### *Issues he worked on w/ EMK:*

- 1987 Bork nomination
- 1988 Fair Housing Amendments
- 1990 Souter nomination
- 1991 Thomas nomination
- 1991 Civil Rights Act

#### *Other issues that came up during this time:*

- 1988 Civil Rights Restoration Act and veto override
- 1991 crime bill
- 1992 VRA extension (language minorities)

## EMK'S CIVIL RIGHTS LEGISLATIVE HIGHLIGHTS

*Prepared by Rob Martin, Anne Mariel Peters, and Emily Jane Charnock  
Miller Center, University of Virginia, 02/11/2007*

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**(Successful legislation in bold)**

<i>1963 Civil Rights Bill</i>	JFK's attempt to broadly improve civil rights protections for African-Americans. Little progress before his death.
<b>1964 Civil Rights Act</b>	Landmark legislation introduced by Mansfield to prohibit discrimination in public places, employment, and at the polls. It allows the AG to sue to force school desegregation. EMK votes in favor, only hours before his plane crash.
<b>1965 Voting Rights Act</b>	Sent to Congress by LBJ; outlaws literacy tests & allows DOJ to oversee voter registration. In his first legislative initiative, EMK tries unsuccessfully to add a poll-tax ban to the bill. The Supreme Court rules the poll tax unconstitutional in '66.
<i>1966 Civil Rights Bill</i>	Unsuccessful LBJ-requested legislation to strengthen protection of civil rights; includes controversial fair housing legislation.
<i>1967 Civil Rights Bill</i>	LBJ's follow up on '66 legislation also unsuccessful; EMK fights to keep controversial fair housing provisions in bill.
<b>1968 Civil Rights Act</b>	Landmark fair housing legislation, co-sponsored by EMK.
<b>1969 Philadelphia Plan</b>	EMK-supported bill requiring govt. contractors to hire minority workers according to quotas; bill passes.
<b>1970 VRA Extension</b>	EMK calls for legislation lowering voting age to 18 to be legislation as an amendment with EMK and Magnuson as cosponsors; the bill easily passes. Supreme Court rules it constitutional only in federal elections; Congress passes it as 26 <sup>th</sup> Amendment in '71.
<i>1970 Indian Education Bill</i>	Legislation from Sen. Interior & Insular Affairs Com. to allow Dept. of Interior to improve classrooms in Native American schools, place students in local public schools rather than boarding schools, & specify equal standards; EMK supports the bill, but it fails.

<b>1970 Mental Retardation &amp; Developmental Disabilities Act</b>	EMK-sponsored legislation to improve federal programs to help the developmentally disabled; the bill passes 69-0 and the conference report is adopted by voice vote.
<b>1971 Indian Education Act</b>	EMK & others introduce bill to improve education for Native Americans, particularly in non-reservation schools; gives Native Americans greater role in setting their own education policy; the bill passes the Senate & is eventually incorporated into the 1972 Education Amendments.
<i>1972 Equal Rights Amendment</i>	Bayh proposes Senate version of legislation to prevent discrimination on account of sex. EMK switches his position to support it; the amendment passes 84-8 in Senate, but fails to gain ratification in 3/4 of US states.
<b>Title IX of 1972 Education Amendments</b>	Bayh proposes an amendment to the aid-to-education bill, prohibiting sex discrimination in most education programs receiving federal funds. EMK votes against the education bill itself because strong anti-busing provisions have been added in conference.
1970s Anti-busing Amendments	After federal courts rule in the early 70s that busing can be used to integrate public schools, EMK fights a series of anti-busing amendments in '72, '74 & '75 aimed at limiting the ability of courts and HEW to order busing. EMK successfully fights some of the stronger anti-busing amendments, but is unable to stop compromise legislation in '74 & '75 that placed limits on the ability of the courts and HEW to force busing. EMK had first proposed a bill in 1966 to provide federal aid for busing and to withhold funds from segregated schools, but the bill wasn't reported.
<b>1973 Rehabilitation Act</b>	EMK co-sponsors legislation to extend aid to the handicapped and prohibit discrimination in federal programs or those receiving federal funds.
<b>1975 Voting Rights Act Ext.</b>	EMK supports successful legislation to extend the VRA, and to bring language minorities under its protection.
<b>1975 Older Americans Act Ext.</b>	EMK supports successful legislation from the House to extend and strengthen the 1965 Older Americans Act.
<b>1975 Age Discrimination Act</b> [Title III of Older Americans Act]	EMK supports successful legislation prohibiting age discrimination in programs receiving federal aid.

**1980 Protection of Rights of Institutionalized Individuals**

Bayh and Kastenmaier legislation allowing the federal govt. to file suits against states to protect prisoners, mental patients, etc. EMK is a co-sponsor on the Senate measure, announces for the bill, but does not vote; the bill passes.

**1980 Mental Health Systems Act**

EMK-sponsored legislation to expand and restructure federal aid for mental health services; EMK & Javits are unable to include a patients' "bill of rights" and EMK does not vote on the final bill.

*1980 Fair Housing Bill*

EMK and Byrd unsuccessfully attempt to pass a bill to strengthen the enforcement mechanisms of the 1968 Fair Housing Act by making it easier for the fed. govt. to sue. EMK is cosponsor and floor manager of the Senate version.

**1982 VRA Extension**

EMK helps draft compromise legislation (forged by Dole) to extend the VRA for 25 years and establish a "results" test; making it easier to find that election laws are discriminatory. Previously, proof was required that the "intent" behind the election laws was discriminatory. The 1982 Act follows stronger but unsuccessful legislation that EMK and a group of other senators had introduced in '81.

**1983 MLK Holiday**

EMK and Mathias lead the Senate fight to make King's birthday a national holiday (EMK is a cosponsor, though the House version passes); EMK and Helms enter a bitter and personal debate; the legislation passes.

**1983 Civil Rights Commission Reauthorization**

An EMK-supported bill to extend mandate of the Civil Rights Commission for 6 years; delayed by Hatch's attempts to secure Reagan nominees; a compromise passes but, reportedly, it is not fully honored.

*1983 Equal Rights Amendment*

O'Neill unsuccessfully tries to resurrect the ERA, which has failed to gain ratification by the required 3/4 of states. EMK co-sponsors a companion Senate measure, but the attempt fails in the House.

*1984 Civil Rights (Restoration) Act*

EMK-sponsored proposal to overturn *Grove City* – a Supreme Court decision which hampers the fed govt's ability to restrict educational aid eligibility on the grounds of discrimination. Byrd tries to attach it to the FY 1985 appropriations bill, but the amendment is tabled.

<i>1985 Anti-Apartheid Legislation</i>	EMK sponsors a resolution condemning Apartheid in South Africa, which passes 89-4 but does not make it to the House floor. EMK also sponsors a sanctions bill, but a weaker bill is supported in committee, passing the Senate 80-12. Amid parliamentary maneuvering, the conference report is “lost,” preventing further action.
<b>1986 Anti-Apartheid Act and Veto Override</b>	EMK-supported bill imposing sanctions on S. Africa; it passes 84-14, is vetoed by Reagan, but overridden 78-21.
<b>1988 Civil Rights Restoration Act and Veto Override</b>	EMK-sponsored bill prohibiting discrimination by organizations receiving fed assistance (with an amendment exempting medical organizations from being required to carry out abortions). Bill passes (75-14) and is vetoed by Reagan, but then overturned 73-24.
<b>1988 Fair Housing Amendments Act</b>	EMK-supported bill to strengthen fed law against housing discrimination and increase housing options for the disabled (wider doors, lower light switches in new units). EMK sponsors the Senate version and recruits Muhammad Ali to persuade Hatch; Reagan signs the bill.
<b>1990 Amer. w/ Disabilities Act</b>	After a similar bill fails in '89, a measure sponsored by Harkin (and co-sponsored by EMK, among others) passes. It gives broad protection to the disabled against bias in public accommodations and housing.
<b>1991 Civil Rights Act</b>	Danforth legislation making it easier for victims of discrimination or sexual harassment to sue their employers for damages; Bush had vetoed a similar bill, sponsored by EMK, in '90 (for including employment quotas). Quotas are dropped, EMK votes in favor, and Bush signs into law.
<i>1991 Crime Bill</i>	Authorizes the death penalty for more than fifty federal crimes, restricts habeas corpus petitions by those already convicted, and imposes a 5-day waiting period on handgun purchases; the bill fails, due in part to an EMK-sponsored provision to allow defendants to challenge death penalty sentences on grounds of racial discrimination.
<b>1992 VRA Extension</b>	Extends and expands the bilingual assistance provision of the VRA, which was first extended to language minorities in '75; EMK supports the bill (co-sponsoring the Senate version, though the House version is substituted).

<b>1993 Family &amp; Medical Leave Act</b>	Allows an employee to take unpaid leave to care for a sick family member or a newborn child without losing employee benefits; the act was drafted by the National Women's Defense Fund and supported by EMK; Dodd had been leading the fight for the bill in the Senate since 1983.
<b>1996 Defense of Marriage Act</b>	Allows states to refuse to recognize gay marriages. EMK opposes the bill and threatens to add an amendment to extend employment discrimination protection under '64 CRA to sexual preference, but is persuaded to offer it as a separate bill. EMK's bill is defeated 49-50, while the Defense of Marriage Act is passed 85-14. EMK votes nay.
<i>2000 Hate Crimes Bill</i>	EMK sponsors an amendment to the defense authorization bill to expand federal hate crimes laws to include sexual orientation, gender and disability, but the bill is dropped in conference.
<b>2006 VRA Extension</b>	EMK co-sponsors the Senate bill to extend the VRA for 25 years, following House action. The bill maintains the requirement for certain states to obtain DOJ approval before changing precinct boundaries, polling places, legislative districts, ballot formats and other voting procedures. It is approved 98-0 and becomes law in July.



## 1982 VOTING RIGHTS EXTENSION ACT

Prepared by Anne Mariel Peters

Miller Center, University of Virginia, 03/23/2006

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*The Voting Rights Act Extension of 1982 was a bill introduced by EMK, Senator Charles Mathias (R-MD), and six other senators that extended key provisions of the 1965 Voting Rights Act. Following a yearlong battle over the burden-of-proof for voting discrimination, during which the Reagan administration remained largely aloof, the bill was passed after Dole, EMK, and Mathias engineered a compromise in the Senate.*

The Voting Rights Act (VRA) of 1965 prohibited the use of literacy tests or similar methods to discriminate against black voters; gave the Department of Justice the power to send federal examiners into areas with low black voting participation; and established criminal penalties for the obstruction of voting rights. The law was extended in 1970 and 1975, when its protection was extended to other racial minorities, but its key provisions would have become ineffective on August 6, 1982. Furthermore, the 1980 Supreme Court decision in *Mobile v. Bolden* ruled that racially discriminatory electoral districts must be drawn with intent and effect to warrant constitutional protection. This compelled civil rights groups to seek a “results” test in the 1982 VRA extension, which would overturn the “intent” ruling of the Supreme Court.

On April 7, 1981, Senator Charles McC. Mathias (R-MD), EMK, and six other senators introduced legislation to extend key provisions of the VRA until 1992. The same day, House Judiciary Chairman Peter Rodino (D-NJ) introduced a similar bill in the House. Rep. Henry Hyde (R-IL) later introduced his own bill that would have extended the VRA’s enforcement provisions but allowed jurisdictions meeting certain requirements to “bail out” from coverage. Chairman of the Civil and Constitutional Rights Committee Don Edwards (D-CA), Reps. Hamilton Fish, Jr. (R-NY), F. James Sensenbrenner (R-WI), and Rodino subsequently produced a compromise bill including a bail-out provision.

On October 5, the House approved the VRA extension (HR 3112) 389-24. Key provisions of the House bill included:

- Two-year extension of Section Five of the 1965 VRA, which required nine states and portions of thirteen others to receive Justice Department approval before making changes to election laws or procedures.
- Pre-clearance sections of Section Five would become permanent in 1984.
- Establishment of a new bail-out procedure, by which states could apply for exemption from Section Five, as of 1984. A covered jurisdiction would be allowed to bail out if it could show a three-judge panel in the District of Colombia that it had a clean voting rights record for the previous ten years.
- Certain voting rights violations under Section Two of the 1965 VRA would be proven by showing that an election law had *resulted* in discrimination. This is called the “results test,” and overturns a prior Supreme Court ruling that “intent” had to be proved in discrimination cases.

On October 14, Senate Democrats used procedural tactics to keep HR 3112 from going to the Senate Judiciary Committee after negotiations failed among staunchly conservative committee chairman Strom Thurmond (R-SC), Majority Leader Howard Baker, Jr. (R-TN), Minority Leader Robert Byrd (D-WV), Howard Metzenbaum (D-OH), Joseph Biden (D-DE), Mathias, and EMK. Minutes before normal procedures would have moved the bill to the Judiciary Committee, Byrd objected, fearing that the bill would be masticated by Thurmond. Dole, who was a member of the eighteen-person Judiciary Committee, appeared to be on the fence, as did Senator Howell Heflin (D-AL). In addition, administration officials refused to testify on voting rights in 1981. President Reagan took no position on the extension until November 6, 1981, when he announced that he favored a ten-year extension of the Section Five and a bail-out provision.

On December 16, 1981, Mathias and EMK introduced a carbon copy of the successful House version of the VRA extension. Following markup of the bill by the Constitution Subcommittee, it became clear that the Judiciary Committee was polarized on the bill, with Dole and Heflin as the crucial swing voters. Dole's political price for negotiating a compromise was small, but he was greatly needed by Mathias and EMK to bring along undecided Republicans and ensure a veto-proof majority. Dole then began working with the administration and other senators in pursuit of a compromise, the most notable collaboration of which appears to be between Dole staffer Sheila Blair and Mathias staffers Mike Klipper and Burt Wides. The most controversial aspect of the House bill was the provision for a "results" test, and this issue occupied most of Dole's efforts. On May 3, Dole announced that a compromise, which Mathias and EMK had helped to draft, had been reached. The Dole compromise, which was adopted May 4 by the Judiciary Committee, contained the following key provisions:

- Retained the House "results" test, but added a section specifying how the test could be met. The language for this section was lifted directly from a 1973 Supreme Court case, *White v. Register*, which involved the dilution of minority votes in two Texas counties.
- Twenty-five year extension of Section Five, rather than the ten years, as approved by the Constitution Subcommittee, or permanently, as approved in the 1981 House bill.
- Retained the House bail out provision.

Debate in the Senate began in earnest on June 17, after Senator Jesse Helms (R-NC) gave up on a filibuster he had been waging since June 9. Before approving the bill, the Senate overwhelmingly rejected fifteen amendments that Mathias, Dole, and EMK claimed would weaken the measure. The sponsors wanted to prevent all non-technical amendments in order to avoid a conference with the House, where sponsors promised to accept the Senate bill if it passed without substantive change from the Judiciary Committee version.

The VRA Extension of 1982 was passed 85-8 by the Senate on June 18, 1982, and by the House on June 23, 1982. EMK, Byrd, and Dole voted in favor. Key provisions of the bill included:

- Twenty-five year extension of Section Five of the 1965 VRA.
- Starting in 1984, the bill permitted covered jurisdictions to exempt themselves from Section Five if they could prove that they had a clean voting rights record for the previous ten years.

- Certain voting rights violations under Section Two of the 1965 VRA would be proven by showing that an election law had *resulted* in discrimination. This provision also specified that a court would have to look at the “totality of circumstances” in determining whether a voting rights violation had been proved.

In contrast to the 1965 VRA, the VRA Extension of 1982 commanded broad Southern support. Fourteen Southern Democratic senators voted in favor of the 1982 VRA extension versus five voting in favor of the original VRA in 1965.

## THE 1986 REHNQUIST AND SCALIA NOMINATIONS

Prepared by Anne Mariel Peters and Rob Martin

Miller Center, University of Virginia, 03/05/2007

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### 1986

*June* On the 20<sup>th</sup>, William Rehnquist is nominated by Reagan to replace Burger as Chief Justice and, on the 24<sup>th</sup>, Federal Circuit judge Antonin Scalia is nominated to replace Rehnquist as Associate Justice. EMK, like most Democrats, “reserves judgment,” although Minority Whip Alan Cranston (D-CA) deems Rehnquist an “ideological extremist.” (U.S. Senate Homepage; *The Washington Post*, 06/18/1986)

*July* On the 29<sup>th</sup>, the Judiciary Committee opens confirmation hearings for Rehnquist. Senator Howard Metzenbaum (D-OH) and EMK suggest that Rehnquist was “less than candid” in his statements during his 1971 confirmation hearings. EMK says that Rehnquist has an “appalling record on race,” and that he is “too extreme” to be Chief Justice. Senator Orrin Hatch (R-UT) claims that EMK’s accusations are “somewhat ridiculous” and too old to take seriously, and witness and former Carter Attorney General Griffin Bell urges the committee to approve the nomination. (*The New York Times*, 07/30/1986; *The Washington Post* 07/30/1986)

On the 30<sup>th</sup>, EMK and Metzenbaum question Rehnquist about allegations that he harassed and intimidated voters by inquiring into their personal qualifications and reading abilities at minority precincts in Phoenix during the early 1960s. Rehnquist denies the allegations. He has acknowledged that he did make such inquiries as a Republican lawyer in the 1950s and 1960s, but that these inquiries were meant to instruct other Republican workers on applicable laws and settle disputes over qualifications of Republican challengers. Other ethical concerns arise around this time, including whether Rehnquist had given truthful testimony in his 1971 confirmation hearing regarding the alleged intimidation of minority voters. Other questions include Rehnquist’s failure to recuse himself from a lawsuit against the Secretary of Defense regarding military surveillance of civilians. (*The New York Times*, 07/31/1986)

Also on the 30<sup>th</sup>, Rehnquist acknowledges that a deed on a Vermont vacation home that he purchased in 1974 contained a restrictive covenant prohibiting lease or sale of the property to “any member of the Hebrew race.” Rehnquist claims he was unaware of the restriction until several days ago, and that he would like to void the restriction if possible under Vermont law. (*The Washington Post*, 07/31/1986)

On the 31<sup>st</sup>, EMK claims that Rehnquist once owned a house in Phoenix with a deed forbidding the sale to non-whites. Rehnquist claims that he did not know about the existence of this provision on the deed. Metzenbaum and EMK engage in a heated exchange with Republicans, suggesting that both the Arizona and

Vermont deeds might be relevant to Rehnquist's qualifications. (*The New York Times*, 08/01/1986)

Also on the 31<sup>st</sup>, Reagan invokes executive privilege and refuses to release internal memoranda pertaining to civil rights, civil liberties, and surveillance authored by Rehnquist during his time at the Justice Department. EMK accuses Reagan of "stonewalling" to protect advice given by Rehnquist to Nixon and his attorney general, John N. Mitchell. (*The New York Times*, 08/01/1986)

Also on the 31<sup>st</sup>, EMK tells reporters that Rehnquist has agreed to have his medical records examined by a physician to be selected by the Judiciary Committee, and to make his personal doctor available for testimony. Until his records are examined, there will be no questioning on Rehnquist's health. Rehnquist was hospitalized in 1982 after suffering adverse effects from a drug intended to ease back pain. (*The Wall Street Journal*, 08/01/1986)

#### August

On the 5<sup>th</sup>, confirmation hearings for Scalia begin. Scalia emerges confident and unscathed. EMK questions Scalia on his views on *Roe v. Wade*, to which Scalia responds that although he has no agenda for the Court, he will not say that he will never overrule a Supreme Court precedent. EMK says, "The nomination of Judge Scalia presents none of the troubling issues with respect to truthfulness, candor, judicial ethics and full disclosure that have marred the nomination of Justice Rehnquist." (*The Washington Post*, 08/06/1986)

On the 7<sup>th</sup>, Senator Paul Simon (D-IL) and EMK request and receive access to additional memos dating from Rehnquist's time as head of the Office of Legal Counsel under Nixon. While other Democrats are circumspect about the contents of the documents, EMK claims that he is certain that the documents will reveal that Rehnquist was very much involved in shaping government policy towards surveillance of domestic groups during the antiwar period and the use of the Army and the FBI during the May Day protests in 1971. (*The New York Times*, 08/08/1986)

On the 15<sup>th</sup>, the Judiciary Committee votes 13-5 in favor of the Rehnquist nomination and unanimously in favor of the Scalia nomination. Senators Joseph Biden (D-DE), Patrick Leahy (D-VT), Metzenbaum, Simon, and EMK vote against Rehnquist. EMK reportedly reminds the committee that Carswell was recommended 13-4 by the committee before his nomination was defeated on the floor. (*The New York Times*, 08/15/1986)

On the 26<sup>th</sup>, Metzenbaum, Cranston, Simon, and EMK request that the FBI re-open its investigation into Rehnquist's handling of a trust account set up for a relative in the 1960s. The inquiry would determine whether or not Rehnquist defrauded his ill brother-in-law by keeping the trust a secret from him. (*The Washington Post*, 08/27/1986)

*September* On the 15<sup>th</sup>, Senate Majority Leader Dole proposes a motion to invoke cloture and limit debate on the Rehnquist confirmation. Liberal Democrats, led by EMK, refuse to agree to a time limit, requesting a “full and complete debate,” though not a formal filibuster. Democrats say support for Rehnquist is eroding, though Dole claims he will have sufficient cloture votes. (*The Washington Post*, 09/16/1986)

On the 17<sup>th</sup>, the Senate votes to confirm Rehnquist 65-33 and Scalia 98-0. EMK votes against the Rehnquist nomination and in favor of Scalia. Mathias, who had voted for Rehnquist in committee, switches his vote in the full Senate, claiming to be convinced by new evidence that Rehnquist had helped to shape surveillance policy under Nixon, thereby leading Mathias to believe that Rehnquist had not been truthful in his 1971 confirmation hearings. Rehnquist receives more negative votes than any other justice who has been confirmed to the Supreme Court to date. (*1986 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1986, p. 45-S; *The New York Times*, 09/18/1986)

## ROBERT BORK TIMELINE

Prepared by Anne Mariel Peters and Rob Martin

Miller Center, University of Virginia, 02/06/2007

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### 1987

July

On the 1<sup>st</sup>, Reagan announces his nomination of Federal Circuit judge Robert H. Bork to replace Powell. Bork has spoken out strongly against Supreme Court precedents important to liberals, including *Brown v. Board of Education*, *Griswold v. Connecticut*, and *Roe v. Wade*. EMK calls Archibald Cox to tell him that he will lead the fight against Bork, and asks Cox to help. Cox, whom acting Attorney General Bork had reportedly fired from his position as the first Watergate special prosecutor, declines; he does not want his opposition to Bork to seem like a personal vendetta. (Clymer, pp. 416-417)

Within an hour of the announcement, EMK delivers a controversial floor speech calling for the Senate to reject Bork's nomination. EMK claims, "Robert Bork's America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police would break down citizens' doors in midnight raids..." During the speech, EMK invokes two key arguments against Bork: his involvement in Nixon's Saturday Night Massacre and his "extremist" judicial interpretation, particularly with regards to civil rights. Although EMK is later criticized for the speech, none of Bork's proponents issue an immediate rebuke, assuming that the speech would be self-defeating. EMK claims that the statement had to "sound the alarm and hold people in their places until we could get the material together." Bork, who watched the speech from the White House, later wrote, "Not one line of that tirade was true...this was a calculated personal assault by a shrewd politician...As it turned out, Kennedy set the themes and the tone for the entire campaign." Former Judiciary Committee chief counsel Mark Gitenstein claims that EMK's "unqualified" attack forced undecided moderates to delay their opposition to Bork, as well as worrying civil rights leaders. Although Gitenstein claims that there is little evidence that the civil rights community had encouraged EMK's speech, he also notes that there is general agreement within and without the White House that EMK represents the civil rights and civil liberties community. (*1987 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1987, p. 271; Robert Bork, *The Tempting of America*, New York: The Free Press, 1990; Clymer, pp. 417-419; Mark Gitenstein, *Matters of Principle*, New York: Simon and Schuster, 1992, pp. 56, 70; Michael Pertschuk and Wendy Schaetzel, *The People Rising*, USA: Thunder's Mouth Press, 1987, pp. 26-27, 123-124)

On the 2<sup>nd</sup>, EMK hires Anthony Podesta, People for the American Way (PFAW) founding president and a veteran of EMK's 1980 campaign, to organize opposition to the Bork nomination. (Clymer, p. 420) He also calls prominent civil rights lawyer Bill Taylor to coordinate constitutional law scholars and law school deans that are opposed to Bork. Taylor is joined by Herman Schwartz of

American University, Laurence Tribe of Harvard, Walter Dellinger of Duke, Philip Kurland of Chicago, and PFAW's John Haber and Seidman. Although the ABA has given Bork its highest rating, the opposition to Bork within the legal community is strong, and many lawyers and scholars even take it upon themselves to organize against the nominee. This high level of participation stands in stark contrast to previous confirmation proceedings. (Pertschuk, pp. 189-190; Norman Vieira and Leonard Gross, *Supreme Court Appointments*, Carbondale: Southern Illinois University Press, 1998, p. 143)

On the 7<sup>th</sup>, the Bork nomination is received by the Senate. EMK, Metzenbaum, and Senate Judiciary Committee Chairman Biden decide to postpone the hearings until after August recess. Biden, who is running for president, tells civil rights groups that he, not EMK, is in charge, and that he will lead the fight against Bork. One year ago, Biden had said that while somebody like EMK would vote against someone like Bork, Biden would vote for him. Biden later explains that he would not oppose Bork to replace a more conservative justice, but that Powell's swing status is a complicating factor. (Clymer, p. 420; *The Washington Post*, 10/24/1987; Congressional Research Service, p. CRS-21)

On the 9<sup>th</sup>, *The New York Times* reports that "civil rights activists had been keeping files on Judge Bork in anticipation of this moment." (*The New York Times*, 07/09/1987)

On the 11<sup>th</sup>, NARAL holds its annual convention in Washington and maps out a national campaign against the Bork nomination. (Bork, p. 285)

On the 27<sup>th</sup>, Democratic Whip Alan Cranston (D-CA) decides that Bork opponents should abandon a filibuster strategy. EMK and Biden agree, and Neas tells the Leadership Conference on Civil Rights (LCCR) to stop talking about a filibuster. (Gitenstein, p. 276)

*July/August* At EMK's private meeting with Bork, Bork later writes in his book that EMK is accompanied by several aides and "seemed mildly depressed and was mostly silent... Every so often, Kennedy looked up at me –about three or four times, I suppose—and said, 'Nothing personal.'" (Bork, pp. 280-281)

Later in the summer, Senators Arlen Specter (R-PA), Biden, and EMK study Bork's writings and discuss them with law professors. Tribe plays Bork for EMK and Biden in mock-hearings. (Clymer, p. 421)

*August* Early in the month, EMK meets with twenty "Block Bork" coalition leaders to discuss strategy. They decide to "freeze the Senate" by urging no position on the Bork nomination until the end of the confirmation hearings. There is also a desire within the coalition to keep pressure low-profile to prevent undecided senators from bucking. EMK encourages the coalition members to hold weekly meetings with key Judiciary Committee staffers, something they had already been doing



since Powell's resignation. Pertschuk claims that although EMK welcomes the "Block Bork" coalition as trusted allies, some coalition members are concerned about being perceived as part of EMK's apparatus. The coalition consists of more than three hundred national organizations, including PFAW, the 190-member umbrella group of the LCCR and NARAL. LCCR lobbyists already have a close relationship with EMK and his chief counsel Carolyn Osolinik. PFAW has a close relationship with Judiciary Committee members, and PFAW's legal director, Ricki Seidman, later becomes an EMK aide and Labor Committee staffer. (Pertschuk, pp. 95-102, 125)

While vacationing in Massachusetts during the Senate recess, EMK makes hundreds of calls to black political leaders and ministers, particularly in the South, and directly lobbies his Senate colleagues with Bork briefing books and phone calls to their VIP constituents. The annual conferences of the NAACP and the National Education Association are subsequently used as anti-Bork platforms. EMK also calls each of thirty executive members of the AFL-CIO and holds a conference call with forty state labor leaders to organize opposition. According to Podesta, EMK worked harder at organizing the anti-Bork forces than he had for his 1980 presidential campaign. (Clymer, pp. 420-421; Pertschuk, p. 27; Bork, p. 283; *The Washington Post*, 10/24/1987)

In a press release, the AFL-CIO claims that Bork is "a man moved not by deference to the democratic process but by an overriding commitment to the interests of the wealthy and powerful in our society. He has never shown the least concern for working people, minorities, the poor, or for individuals seeking the protection of the law to vindicate their political and civil rights." (Bork, p. 286)

On the 12<sup>th</sup>, EMK sends a letter to 6,200 black political leaders reportedly arguing that Bork is an opponent of civil rights.

Between the 13<sup>th</sup> and the 17<sup>th</sup>, Boston pollster Thomas Kiley surveys voters on the Bork nomination for the American Federation of State County and Municipal Employees (AFSCME). He concludes that Bork is vulnerable on three grounds: civil rights, privacy and individual freedom, and big business versus the individual. Furthermore, he concludes that voters will be turned against Bork if they perceive him as not "fair-minded," and that the best way to increase voter skepticism is to attack Bork's record on civil rights. A Roper poll of voters in twelve southern states shows that fifty-one percent oppose confirmation. Bork opponents use these figures to help win over swing votes in the Senate—the Southern Democrats, who now represent large black constituencies. Focus groups have also indicated that the public is indifferent to Bork's role in Watergate. (Pertschuk, pp. 134, 142, 154; Vieira, p. 152; *The Washington Post*, 10/24/1987)

On the 31<sup>st</sup>, the American Civil Liberties Union (ACLU) sends a cable claiming that "Detailed research reveals Bork far more dangerous than previously believed... We risk nothing short of wrecking the entire Bill of Rights... His

confirmation would threaten our system of government... Time is short..." (Bork, pp. 287-288)

*September*

On the 2<sup>nd</sup>, Biden releases a report on Bork attacking his record on civil rights and antitrust law. (Bork, pp. 287, 291)

On the 11<sup>th</sup>, EMK delivers a speech at Georgetown Law School, railing against Bork's argument that the *Griswold v. Connecticut* decision invented a right to privacy without a constitutional basis, in addition to attacking Bork's contempt for judicial precedent. Reagan deems attacks on Bork as "pure politics," defending Bork's commitment to individual freedom and equality. (Clymer, p. 422; *The Washington Post*, 09/12/1987)

On the 13<sup>th</sup>, *The Washington Post* reports that EMK has been urged not to repeat his initial outburst against the nomination during the confirmation hearings. It is also reported that three committee members are considered genuinely undecided: Senators Howell Heflin (D-AL), Dennis DeConcini (D-AZ), and Specter. Specter is considered the most likely to oppose the nomination, but Heflin, a former chief justice of the Alabama Supreme Court, is viewed as the most important vote by both sides. (*The Washington Post*, 09/13/1987)

Prior to and during the confirmation hearings, PFAW runs sixty-second television ads featuring actor Gregory Peck, who claims that Bork "defended poll taxes and literacy tests, which kept many Americans from voting." (Bork, p. 288)

On the 15<sup>th</sup>, confirmation hearings begin for Bork. *The Washington Post* calls the give and take between Bork and EMK "electrifying and instructive." (*The Washington Post*, 9/16/1987) EMK gives Bork a scathing greeting, not covered or re-capped by CBS, in which he portrays Bork as hostile to women and blacks, irreverent to judicial precedence, and the superiority of the executive to the legislative branch. EMK then jostles Bork until he admits having made an "intellectual mistake" by writing articles for *The New Republic* and the *Chicago Tribune* attacking civil rights. The exchanges frequently reach the level of "profound constitutional debate," but Bork's cold, technical discussion of essentially political issues is often overpowered by EMK's media-ready sound bites accusing Bork of being "an activist of the right" and "hostile to the rule of law." Biden passes EMK congratulatory notes throughout the questioning, but avoids berating or interrupting Bork himself. Clymer observes that the different approaches of EMK and Biden are complementary: EMK rallies the outside opposition, and Biden focuses on winning over senators on the committee. Others find Biden too restrained. (Clymer, pp. 422-424) In his account of his exchanges with Democrats and Specter, Bork claims, "Because I was, out of necessity, patient with him [Specter], a lot of people not versed in constitutional law got the impression that this was a serious constitutional discussion. Nor was there any serious discussion of the law with the Democratic senators. Kennedy kept insisting that I was against everybody's rights. He and Metzenbaum tried to

establish, but could not, that my discharge of Archibald Cox was illegal... It was left to Metzenbaum, however, to make some of the most egregious accusations about my attitudes toward women.” (Bork, p. 306; Patrick McGuigan and Dawn Weyrich, *Ninth Justice: The Fight for Bork*, USA: Free Congress Foundation, 1990, p. 108; Congressional Research Service, p. CRS-21)

On the 17<sup>th</sup>, EMK focuses on Bork’s conception of presidential power, referring to the myriad number of cases in which Bork had sided with the executive branch against Congress. Bork addresses each case individually, but not the broader issue: Bork’s conception of presidential power. This issue is of particular importance to Byrd, who is still one of four undecided committee members. (Clymer, p. 425)

On the 18<sup>th</sup>, EMK challenges the sincerity of Bork’s claims to the committee that he will not overrule precedent even if he thinks that the logic behind the precedent is incorrect. (Clymer, p. 425)

On the 21<sup>st</sup>, three prominent black leaders describe Bork as “too risky” while testifying at his confirmation hearings. William T. Coleman, Jr., Transportation Secretary under Ford, former representative Barbara Jordan (D-TX), and Atlanta Mayor Andrew Young claims that Bork has consistently opposed the expansion of minority rights. Jordan claims that she is “incredulous” at some of the more moderate claims Bork has made during his testimony, and that she would give “little weight” to them. (*The Washington Post*, 09/22/1987)

On the 23<sup>rd</sup>, Biden withdraws his candidacy for president under the weight of charges that he committed plagiarism as a law student. (Clymer, p. 427)

On the 26<sup>th</sup>, Bork visits the White House and requests that Reagan address the nation next week on prime-time television on his behalf. Bork claims, “I’ve been trying to do this on my own. You guys aren’t doing everything you can. I need the President.” Gitenstein claims that the White House’s strategy from the beginning was to keep Reagan, who is suffering from Iran-Contra fallout, in the background of the confirmation proceedings. (Gitenstein, p. 11)

At the end of the month, Dole begins to visibly distance himself from Bork, incurring the wrath of right-wing organizations. (*The Washington Post*, 10/24/1987)

The confirmation hearings end on the 30<sup>th</sup>, after EMK and Biden persuade Bork’s eager opposition that their testimony would draw attention to the groups themselves and negatively affect their campaign in the Senate against Bork. (1987 *Congressional Quarterly Almanac*, p. 273; Clymer, p. 427)

October

On the 1<sup>st</sup>, Senators David H. Pryor (D-AR), Terry Sanford (D-NC), and Bennett Johnston (D-LA) announce that they will vote against Bork. Later in the day, Specter also announces his opposition. (*The Washington Post*, 10/24/1987)

On the 5<sup>th</sup> and 6<sup>th</sup>, Citizens for America and We the People run full-page ads in *The Washington Post* and *USA Today* attacking the anti-Bork advertising campaign. The ad claims that some of the anti-Bork senators have “serious personal character flaws.” Of EMK, the ads claim, “You always wondered how he ever made it from the Chappaquiddick incident or getting expelled from Harvard for cheating.” (Gitenstein, p. 297)

On the 6<sup>th</sup>, the Judiciary Committee votes 9-5 against the Bork nomination; the Committee reports on the 13<sup>th</sup>. (Congressional Research Service, p. CRS-21)

On the 8<sup>th</sup>, Bork delivers a statement in the White House press room in which he admonishes the public relations campaign against him and states, “I harbor no illusions...If I withdraw now, that campaign would be seen as a success and I would be mounted against future nominees. For the sake of the federal judiciary and the American people that must not happen.” (Bork, p. 314)

On the 13<sup>th</sup>, Reagan publicly acknowledges that Bork will probably not be confirmed by the Senate. Later in the day, at a meeting with the New Jersey Chamber of Commerce, Reagan attacks anti-Bork senators, claiming that they have turned Bork’s confirmation battle into a “political joke.” Reagan’s words undermine White House chief of staff Howard Baker’s attempts to tone down Reagan’s remarks on the Bork nomination in order to devote time to finding a more acceptable nominee. (*The Washington Post*, 10/14/1987)

Senate debate on the Bork nomination begins on the 21<sup>st</sup>. Biden opens the debate by dismissing charges that Bork is the victim of “lynch mobs” as “nothing but a smokescreen to distract the Senate and the American people” from Bork’s Judiciary Committee testimony. EMK calls the criticism of the confirmation process by Bork’s defenders “preposterous and hypocritical.” Bork’s wife and son leave the Senate chamber when EMK speaks, and return after EMK is finished. (1987 *Congressional Quarterly Almanac*, p. 274; *The Washington Post*, 10/22/1987)

The Bork nomination is rejected 42-58 on the 23<sup>rd</sup>. EMK votes with the majority and warns Reagan not produce another nominee equivalent to Bork in judicial philosophy. (1987 *Congressional Quarterly Almanac*, p. 60-S; Clymer, p. 427; Congressional Research Service, p. CRS-21)

## THE AMERICANS WITH DISABILITIES ACT

Prepared by Anne Mariel Peters

Miller Center, University of Virginia, 04/25/2006

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*The Americans with Disabilities Act sought to remedy extant civil rights legislation that did not extend protection against discrimination in public accommodations, private sector employment, and the provision of state and local government services to disabled individuals. The legislation met opposition from business groups concerned about costs of accommodation, and was also controversial because of its implicit coverage of individuals with HIV/AIDS. EMK co-sponsored the bill, saw it through the Labor and Human Resources committee, and chaired the conference. A consistent supporter of the bill, Dole took a lead in facilitating negotiations between the Bush administration and a bipartisan group of senators.*

The first version of the Americans with Disabilities Act (ADA) was introduced in April 1986 by Senator Lowell Weicker (R-CT). In 1988, Weicker introduced the bill again with Senator Tom Harkin (D-IA), who had succeeded Weicker as chairman of the subcommittee on the handicapped in 1987. No serious legislative effort was made to push the bill through in 1988, although its existence served as a rallying point for disabled advocacy groups. After Weicker was defeated for re-election in 1988, EMK replaced him as Harkin's chief cosponsor in 1989. In March and April of 1989, drafts of the bill went back and forth among the White House, Harkin, and Senator Orrin Hatch (R-UT). Although President George H.W. Bush had long supported the ADA concept, his administration was hesitant to support the bill because of the massive changes in accommodation and hiring practices that it would entail; these were also the primary concerns of the business community. The strongest administration critics of the bill were chief of staff John Sununu and Secretary of Transportation Samuel Skinner.

The ADA bill (S 933) was introduced on May 9, 1989, and hearings in the Senate Labor and Human Resources Committee (the only committee with jurisdiction over the bill) began immediately. On the 16<sup>th</sup>, Dole testified in general support of the bill, but expressed concern that some of its provisions might invite excessive litigation. He conveyed that the Bush administration wanted to support the bill, but that they required more time to "get their act together." On the 22<sup>nd</sup>, the Bush administration sent Attorney General Richard Thornburgh to testify; EMK designated Thornburgh's testimony as a full committee meeting, over which he presided. In his opening statements, EMK explained the bill in the context of civil rights, and emphasized that the bill's accommodation requirements would not adversely affect small businesses. Thornburgh conveyed administration concerns with the bill's cost, scope of public accommodations to be covered, and the precision of the terms "undue hardship" and "reasonable accommodation."

On May 27, negotiations between Senate leaders and the White House on the ADA began. Of the bill's cosponsors, administration officials preferred to deal with EMK, as Harkin was up for re-election and it was believed he would likely try to take credit for the bill. Early on in the negotiations, Sununu told EMK that all rifts could be settled easily if EMK removed his chief civil rights counsel, Carolyn Osolinik, from the negotiating team (EMK subsequently called Osolinik and congratulated her on a job well done).

During the month of July, Senate and White House negotiators met roughly ten times to discuss the ADA. A breakthrough meeting occurred on the 28<sup>th</sup>, when Senator Dave Durenberger (R-MN), Harkin, Hatch, Dole, and EMK met in Dole's Capitol office with Thornburgh, Harkin aide Bobby Silverstein, Samuel Skinner, Roger Porter, Sununu, and Osolinik. Sununu reportedly lost his temper with Silverstein, after which EMK turned red in the face and told Sununu that yelling at staff was unacceptable. After this exchange, a compromise was engineered in which EMK accepted a provision eliminating damages in lawsuits in exchange for administration acceptance of a broad definition of public accommodation. All disagreements occurring in negotiation were kept secret until after the bill's passage. The Bush administration threw its support behind the bill after congressional sponsors agreed to limit remedies for discrimination to those available under the 1964 Civil Rights Act. In public accommodations cases, the attorney general would only be allowed to seek compensatory (not punitive) damages and civil penalties of up to \$50,000 for the first violation and \$100,000 for subsequent violations. Initially S 933 would have allowed the victim to sue for both compensatory and punitive damages.

On September 7, 1989, the Senate approved its version of the ADA by a 76-8 vote. EMK and Dole voted in favor of the bill, which also contained a Dole amendment to provide federal assistance to private entities to help them meet the law's accessibility requirements. Major provisions of the Senate bill included:

- **Employment.** Prohibited an employer from discriminating against a qualified individual with a disability with regards to job application procedures; the hiring or discharge of employees; compensation; advancement or job training; and other terms and conditions of employment. Individuals using illegal drugs were barred from being considered disabled, and the U.S. government, U.S. government corporations, and private membership clubs were exempted from the law.
- **Public Services.** Prohibited discrimination against a person with a disability in the provision of services by any state or local government agency.
- **Public Accommodations.** Barred discrimination on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. Failure of covered entities to provide accommodations for the disabled within thirty months of enactment would be considered discriminatory.
- **Telecommunications.** Required the Federal Communications Commission to ensure that communications relay services were constantly available for the deaf within and across states; also required common carriers to provide relay services either individually or through designees.

The House passed its version of the ADA (HR 2273) on May 22, 1990 by an overwhelming majority of 403-20. Support for the bill was so strong in both chambers that a House-Senate conference would probably not have been required but for the House bill's inclusion of a controversial amendment permitting employers to transfer employees with contagious diseases out of food-handling jobs (known as the Chapman amendment). Lawmakers claim that the amendment was aimed towards people with HIV/AIDS, and the White House opposed it. Dole was in favor of the amendment despite his dedication to the ADA, disabled rights groups, and AIDS research. The amendment was eventually dropped in the conference,

which EMK chaired. The conference report was passed by the House 377-28 on July 12, and on July 13, the Senate approved the conference report by a 91-6 vote. EMK and Dole voted in favor.

Bush signed the ADA (PL 101-336) on July 26, 1990. All of the managers of the bill were invited to the signing ceremony, but Dole was the only lawmaker mentioned by Bush during the ceremony. In his autobiography, Dole cites the ADA as one of his greatest legislative achievements.

## CIVIL RIGHTS ACT OF 1991

*Prepared by Nadia Shairzay*

*Miller Center, University of Virginia, 01/24/2006*

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**Background:** The Supreme Court's decision in *Wards Cove* reallocated the proof burden making it more onerous for the plaintiff to prove discrimination. Under the 1971 *Griggs* decision, to establish a case of unintentional discrimination, the plaintiff had to present evidence of a disparate impact resulting from an employment practice. Then the burden of proof shifted to the employer who could rebut the claim with a business necessity defense that the employment requirement had a manifest relationship to the employment in question. The 1989 *Wards Cove* decision required the plaintiff to show disparate impact through evidence of a statistical imbalance in the composition of the employer's workforce compared to the qualified labor pool. The employee also had to isolate and identify which specific employment practices were responsible for the statistical disparities. Under *Wards Cove* the employer could rebut discrimination claims by offering a business justification for the use of the challenged employment practice. The employer did not have to prove his defense; it was accepted unless the plaintiff could disprove its legitimacy. Moreover, the justification did not have to have a "manifest relationship" to the job as per *Griggs*. Under *Wards Cove*, a wider range qualified as business necessity justifications.

Legislative proposals to address this triggered debate over whether an employer could set up a qualification (i.e. business necessity justification) for employment that had nothing to do with the ability to do the job. Opponents insisted that the legislative proposals would cause employers to "hire by the numbers."

1989	5 Supreme Court decisions altered prior interpretations of federal employment law affecting burdens of proof requirements involving "disparate impact" discrimination and "mixed motive" discrimination under Title VII of the Civil Rights Act of 1964. The effect was to negatively affect the ability of victims of discrimination to obtain remedies for intentional and disparate impact discrimination.
February 1990	H.R. 4000 introduced by Hawkins with 122 original cosponsors (eventual 183); S. 2104 by Kennedy with 37 original cosponsors (eventual 49). Danforth became a cosponsor on 05/17/90.
July 18, 1990	S. 2140 adopted with amendment by Senate vote of 65-34
August 3, 1990	H.R. 4000 adopted by House vote of 272-154
October 22, 1990	S. 2104 (after conference) vetoed by President Bush.
October 24, 1990	Senate failed to override veto by 66-34.
January 1, 1991	H.R. 1 introduced by Brooks with 175 cosponsors. Provided for burdens of proof when allegation of unlawful employment practice is based on disparate impact. Declared when employment practice is alleged to have



mixed motives, unlawful employment practice is established when discriminatory basis was a motivating factor, even though other factors also contributed. Allowed certain types of compensatory damages and punitive damages (with caps) for intentional discrimination.

- June 4, 1991 S. 1207, S. 1208, S. 1209 introduced by Danforth with 8 cosponsors—referred to Labor Committee. S. 1207 dealt with “mixed motives” and provided limited types of relief (not damages). S. 1208 dealt with disparate impact and declared mere existence of statistical imbalance is not alone sufficient to establish a *prima facie* case of employment discrimination. Defined “required by business necessity” to mean that challenged practice must 1) in cases of *selection*, bear manifest relationship to requirements for effective job performance and 2) in case of other practices, bear manifest relationship to a legitimate objective of employer. S. 1209 dealt with compensatory and punitive damages (with caps) for intentional discrimination.
- September 24, 1991 Compromise bill S. 1745 introduced by Danforth with 6 cosponsors (Chafee, Durenberger, Jeffords, Cohen, Hatfield, and Specter). Became P.L. 102-166.
- S. 1745 defined “required by business necessity” as must: 1) in case of practices used as job qualifications or to measure the ability to perform the job, bear a manifest relationship to the employment; and 2) in the case of other practices, bear a manifest relationship to a legitimate business objective of employer. This language was broader than in S. 1208 because it affected more than just selection process (promotions etc.).
- Provided burdens of proof when allegation of unlawful employment practice is based on assertion of disparate impact. Used similar language to H.R. 1 on discriminatory intent and mixed motives.
- October 22, 1991 Cloture invoked 93-4 on S. 1745.
- October 30, 1991 S. 1745 passed Senate, as amended, by 93-5.
- November 7, 1991 S. 1745 passed House by 381-38.
- November 21, 1991 S. 1745 became Public Law No: 102-166.

## CLARENCE THOMAS TIMELINE

Prepared by Anne Mariel Peters and Rob Martin

Miller Center, University of Virginia, 02/06/2007

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### 1991

*Spring* EMK's nephew, William Kennedy Smith, is charged with sexual battery in Palm Beach. EMK had been with Smith earlier on the night in question and is later called to testify. (Clymer, pp. 488-491; Edward M. Kennedy Biography, *Almanac of American Politics* 2000)

*July* On the 8<sup>th</sup>, Thomas is nominated by Bush to replace Marshall as Associate Justice. Thomas is the only African American on Bush's short list of conservative nominees, and Bush calls Thomas "the best qualified," despite a minimal legal experience in entry-level jobs and an unremarkable year on the appeals court. Thomas is strongly supported by Danforth. (Clymer, p. 493; *The New York Times*, 7/7/1991; U.S. Senate Homepage)

Also on the 8<sup>th</sup>, the NAACP delays its stance on Thomas at its annual convention, opting to meet with Thomas to discuss his views before coming to a decision. (*The New York Times*, 07/09/1991)

On the 21<sup>st</sup>, the National Urban League votes to take no position on the Thomas nomination. (*The New York Times*, 08/01/1991)

On the 31<sup>st</sup>, the NAACP and the AFL-CIO declare their opposition to Thomas in coordinated statements. The NAACP, which reveals that it met with Thomas to discuss his views earlier in the month, charges him with an inconsistent view of civil rights policy, and the AFL-CIO calls the nomination a "disgraceful" attempt to pack the Court with conservatives. The White House and Danforth play down the significance of the opposition. Specter, who has not yet announced his position, says that the NAACP's opposition is "not going to help." (*The New York Times*, 08/01/1991)

*September* The Conservative Victory Committee and Citizens United air a commercial questioning the ethics of Biden, Cranston, and EMK, who are all expected to oppose the Thomas nomination. The ad notes EMK's suspension from Harvard for cheating, Chappaquiddick, and the recent rape charges filed against EMK's nephew, William K. Smith. Danforth calls the commercial "sleazy" and the White House deems the personal attacks "reprehensible." (*The New York Times*, 09/04/1991)

On the 5<sup>th</sup>, EMK aide and Labor Committee staff member Seidman interviews University of Oklahoma Law Professor Anita Hill as part of a systematic review of Thomas's colleagues. When asked about rumors that Thomas sexually harassed

Hill while she was his colleague at the Department of Education and the Equal Opportunity Employment Commission, Hill indicates that she needs more time to decide whether she will discuss the issue. (*The New York Times*, 10/08/1991)

On the 9<sup>th</sup>, Hill tells Seidman that she is willing to discuss Thomas's allegedly inappropriate sexual advances. Osolinik and Blattner tell Seidman that this is not time for EMK to become involved in a sexual harassment case—both for his own sake and because such an accusation would not be credible coming from EMK. Seidman refers Hill to a second Labor Committee staff member, Jim Brudney. (Clymer, p. 496; *The New York Times*, 10/08/1991)

On the 10<sup>th</sup>, confirmation hearings for Thomas begin. Biden interrogates Thomas on his philosophy towards abortion and property rights. EMK then briefly questions Thomas on his views on sexual discrimination in the workplace. (*The New York Times*, 09/11/1991)

Also on the 10<sup>th</sup>, Hill tells Brudney her story. Metzenbaum is not interested, and tells his staff to pass it along to Biden. (Clymer, p. 496)

On the 11<sup>th</sup>, the Labor Committee passes Hill's allegations on to the Judiciary Committee with the recommendation that they contact Hill. The Judiciary Committee responds that Hill will have to contact them instead.

On the 12<sup>th</sup>, Thomas faces the toughest questioning yet from Democrats, who have become frustrated by Thomas's unwillingness to disclose his views on abortion and other social issues. Biden further grills Thomas on natural law and sexual relations between unmarried couples, and deems one of Thomas' hollow responses "the most unartful dodge that I have heard." (*The New York Times*, 09/13/1991)

Also on the 12<sup>th</sup>, Hill contacts the Judiciary Committee and speaks with Harriet Grant, the chief communications counsel. Hill requests that the allegations be kept secret from Thomas, but is told that the nominee must have a chance to respond. (*The New York Times*, 10/08/1991)

On the 16<sup>th</sup>, EMK chief of staff Ranny Cooper contacts Ellen Lovell, chief of staff to Leahy, reportedly concerned that nothing is happening with the Hill accusations.

On the 18<sup>th</sup>, the Judiciary Committee receives a call from a Hill associate who claims that Hill had complained to her about Thomas's behavior in the spring of 1981. (*The New York Times*, 10/08/1991)

On the 19<sup>th</sup>, Hill informs the Judiciary Committee that she wants the full committee to know of her concerns and asks to be apprised of her options. (*The New York Times*, 10/08/1991)

Also on the 19<sup>th</sup>, Leahy appeals to Biden to move on Hill's allegations, and Biden asks the FBI to investigate. Hill is unwilling to speak with the FBI. (Clymer, p. 496)

On the 23<sup>rd</sup>, Hill sends Biden a four-page account of Thomas's attempts to date her while she worked for him, his discussions of pornographic movies, and his admission that it would ruin his career if she ever told anyone. Biden informs the White House and Thurmond, the senior Republican on the Judiciary Committee, of Hill's willingness to testify, touching off a hasty FBI inquiry into Hill's allegations. (Clymer, pp. 496-497; *The New York Times*, 10/08/1991)

On the 25<sup>th</sup>, two days before the Judiciary Committee's scheduled vote on the nomination, the FBI reports its findings to the White House and Biden. (*The New York Times*, 10/08/1991)

Following Leahy's announcement of his opposition earlier in the week, Senator Herb Kohl (D-WI) and Heflin announce their opposition to Thomas on the 26<sup>th</sup>. All Democrats opposed to the nomination have not cited any single issue as a reason, but broad dissatisfaction with the quality of Thomas's responses, which they believe to be lacking in substance and rehearsed for specific audiences. Although they have not yet formally announced their intentions, Simon, Metzenbaum, and EMK are expected to oppose the nomination as well. Clymer states that EMK did not stake out an early position due to the delayed responses of rights groups and his current partnership with Danforth on a civil rights bill. (Clymer, p. 494; *The New York Times*, 09/27/1991)

On the 27<sup>th</sup>, the Judiciary Committee votes 7-7 on the Thomas nomination and sends it to the floor, even though a tie could have held the nomination in committee. (Clymer, p. 497)

*October* On the 5<sup>th</sup>, the Hill story is broken in the press. (Clymer, p. 497)

On the 7<sup>th</sup>, Hill holds a news conference in which she defends her accusation of sexual harassment against Thomas and assails the Judiciary Committee for giving her allegations short shrift. (*The New York Times*, 10/08/1991)

On the 8<sup>th</sup>, the full Senate vote on the Thomas nomination is postponed in favor of three additional days of Judiciary Committee hearings.

Additional Judiciary Committee hearings take place from the 10<sup>th</sup> to the early morning of the 14<sup>th</sup>. Hill discusses her allegations against Thomas in excruciating detail, yet Biden gives into the Republican offensive led by Specter, who accuses Hill of fantasy, resentment, political conspiracy, and later perjury. Although EMK has done some private negotiating for Hill witnesses, he has little to say but for a short defense of Hill's character on the 13<sup>th</sup>. EMK tells witnesses testifying on

behalf of Hill, “Some people just don’t want to believe you.” (Clymer, pp. 497-498; *The New York Times*, 10/14/1991)

On the 15<sup>th</sup>, the day of the full Senate vote, EMK denounces on the floor the Judiciary Committee’s treatment of Hill. Specter hits back, saying, “We do not need characterizations like ‘shame’ in this chamber coming from the Senator from Massachusetts,” and Hatch adds, “Anyone who believes that—I know a bridge up in Massachusetts that I’ll be happy to sell them.” Thomas is confirmed 52-48. EMK votes against the nomination. (*1991 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1991, p. 29-S; Clymer, p. 499)

EMK is criticized for not taking a more active role in attacking Thomas and defending Hill, and a post-confirmation Gallup poll finds that EMK has garnered only a twenty-two percent approval rating, whereas Specter receives a rating of forty-eight percent. A *Boston Globe* editorial speculates that EMK did not take a more definitive stand against Thomas due to his own reputation as a womanizer, and feminist columnist Anna Quindlen writes that EMK’s behavior during the Thomas hearings proved that personal behavior does matter to political fitness. (Clymer, p. 499; *The New York Times*, 10/19/1991, 10/21/1991)

## SENATOR ALAN K. SIMPSON AND THE CLARENCE THOMAS NOMINATION

*Prepared by Nadia Shairzay*

*Miller Center, University of Virginia, 04/10/06*

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The retirement of Supreme Court Justice Thurgood Marshall in the summer of 1991 left a vacancy on the Court which sparked intense controversy. President George H.W. Bush nominated D.C. Court of Appeals Judge Clarence Thomas to the Court in July. Thomas was a conservative and did not support affirmative action. Civil rights groups and women's organizations opposed the nomination arguing that with Thomas's appointment, the future of affirmative action programs and a women's right to choose would be in jeopardy.

The Senate Judiciary hearings of the Thomas nomination began in September. Senator Edward Kennedy (D-MA) (EMK) opposed the nomination while Senator Alan Simpson (R-WY) supported it. EMK and other Democrats were concerned when Thomas declined to talk about judicial issues he had previously written about. In response to this EMK said, "The vanishing views of Judge Thomas have become a major issue in these hearings....If we permit [nominees] to dismiss views full of sound and fury as signifying nothing, we are abdicating our constitutional role" (*Clymer*, 495). A few weeks into the hearings, allegations that Thomas sexually harassed Anita Hill, a law professor at the University of Oklahoma, surfaced. Ricki Seidman, an aide for EMK on the Labor Committee, was tipped off to Anita Hill and brought the charges before the committee. It was charged that Thomas sexual harassed Hill when they were colleagues at the Department of Education and Equal Employment Opportunity Commission (EEOC) in the late 1980s. The committee did not investigate these charges deeply and the committee deadlocked on the nomination. This changed after Hill's allegations were leaked to *Newsday*, a Long Island, NY, paper, and to Nina Totenberg, a reporter with National Public Radio (NPR). Women's groups voiced outrage that the committee did not closely investigate these claims and protested the nomination. Women contacted the offices of their Senators, calling on them to thoroughly investigate the charges.

The intense publicity pushed the committee to launch a second round of hearings. Hill and Thomas both testified and the hearings turned into a televised drama. On the first day, Thomas defended his innocence, saying, "Throughout the time that Anita Hill worked with me, I treated her as I treated my other special assistants. I tried to treat them all cordially, professionally and respectfully" (1991 *CQ Almanac*, 283). When Hill testified she defended her charges and explained how she tried to counter Thomas's harassment: "Because I was extremely uncomfortable talking about sex with him at all, particularly in such a graphic way, I told him that I did not want to talk about the subject. I would also try to change the subject to education matters or to non-sexual personal matters...." (1991 *CQ Almanac*, 284).

Simpson was a vocal member of the committee who sought to discredit Hill. In his book, *Right in the Old Gazoo*, Simpson wrote that when Hill first talked to committee staff, she did not allege sexual harassment, but instead just wanted to committee members "to be aware of his behavior" (*Right in the Old Gazoo*, 210). Simpson argued that the committee understood the seriousness of sexual harassment, but did not act on Hill's information because it was her word against Thomas's and that no one else had accused Thomas of harassment. When the allegations became public, Simpson and Totenberg engaged in a heated debate on the show, *Nightline*. Simpson argued that Totenberg and the media were biased against Thomas. Upset about the allegations and the media attention, Simpson said in committee, "And now, I am really getting stuff over the transom about Professor Hill. I've got letters hanging out of my pockets. I've got

faxes. I've got statements from her former law professors, statements from people that know her, statements from Tulsa, Oklahoma, saying, 'Watch out for this woman!' But nobody has got the guts to say that because it gets all tangled up in this sexual harassment crap!" (*Right in the Old Gazoo*, 218). Simpson received criticism over his remarks during the Hill hearings. Speaking to Simpson about this, Betty Freidan said, "Men and women are absolutely outraged.... This is a week that is going to leave a lasting mark on history, and a lasting mark of shame on the Senate of the United States" (*Washington Post*, 10/16/1991). Richard Reeves, in an editorial for the */Atlanta Journal and Constitution/* wrote that Simpson was "the Republican Party's designated thug" (*Atlanta Journal and Constitution*, 10/19/1991).

In contrast to Simpson, EMK mostly laid low during the Hill hearings, owing to the Palm Beach scandal. In March of 1991, EMK's nephew, William Kennedy Smith, was charged with rape in Palm Beach, Florida, after he had been out to a bar with EMK and EMK's son, Patrick Kennedy. EMK did not want to get involved in another sexual harassment case and also, according to Clymer, because his involvement might have discredited Hill's charges (later in 1991, Smith was acquitted). EMK spoke on the third day of the hearings, saying in part, "We heard a good deal about character assassination yesterday, and I hope we are going to be more sensitive to the attempts of character assassination on Professor Hill. They are unworthy. They are unworthy" (*Clymer*, 498). Owing to his lack of involvement, EMK faced criticism in the media. Syndicated columnist Anna Quindlen wrote, "[EMK] let us down because he had to; he was muzzled by the facts of his life." An editorial in the */Boston Globe/* wrote that incidents such as Chappaquiddick, Palm Beach, and other "reports of reckless behavior by Kennedy have diminished his moral authority" (*Clymer*, 499).

After hearing testimony by character witnesses on both sides, most senators said that the allegations were inconclusive. Thomas was confirmed by the Senate in October with the closest vote for a Supreme Court Justice in more than a century, 52-48. Thomas was the second African-American to serve on the Supreme Court and at 43, was the youngest Justice on the Rehnquist Court.

After the hearings ended, Simpson at a fundraiser in Wyoming said of his behavior during the Thomas nomination that, "I have been riding high, a bit too cocky, arrogant, yeah, too smart by half sometimes... I think it's time for a little honest reassessment, and I'll be doing that... I do not blame the media for anything, nothing. I do not blame active feminist groups, for anything, nothing.... The responsibility is mine and I shall handle it and handle it well" (*USA Today*, 10/28/1991). Many in the press saw this as Simpson's apology, while Simpson maintained that he was only taking responsibility for his actions.

## 1991

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|------------------|---|
| <i>July</i>      | On the 30 <sup>th</sup> , Bush nominated Thomas to the Court.   |
| <i>September</i> | <p>The Thomas hearings started on the 10<sup>th</sup>, before the Senate Judiciary Committee.</p> <p>The Senate Judiciary Committee deadlocked on the Thomas nomination, 7-7 on the 27<sup>th</sup>. Hill's sexual harassment charges were known, but were not given much attention. EMK voted against the nomination and Simpson voted for it.</p> |
| <i>October</i>   | Hill's harassment charges were leaked to a Long Island newspaper and to NPR reporter Nina Totenberg.  |

On the 11<sup>th</sup>, the second round of hearings started.

Thomas was confirmed by the Senate on the 15, with a vote of 52-48.

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## THE 1994 BREYER NOMINATION

Prepared by Anne Mariel Peters and Rob Martin

Miller Center, University of Virginia, 02/06/2007

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### 1993

*June* On the 14<sup>th</sup>, Federal Appeals Court Judge Ruth Bader Ginsburg is nominated by President Bill Clinton to succeed Byron White as Associate Justice. Ginsburg is known as a thoughtful moderate who eschews judicial activism. (1993 *Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1993, p. 319)

The Ginsburg nomination is a disappointment for EMK, who favored the nomination of Harvard Law professor and Chief Justice of the U.S. Court of Appeals for the First Circuit Stephen Breyer, formerly an EMK aide and Chief Counsel to the Judiciary Committee. Breyer appeared to be the leading choice in late May and early June, but Senator Daniel Patrick Moynihan (D-NY) quietly backed Ginsburg until it was revealed that Breyer did not pay Social Security taxes for his house cleaner and he failed to impress Clinton in a highly publicized personal interview. Still, EMK praises Ginsburg's work for women's rights, eliciting a sigh of relief from the White House, which had feared offending EMK with the Ginsburg nomination. (Clymer, pp. 526-527; U.S. Senate Homepage)

*July* Confirmation hearings for Ginsburg take place from the 20<sup>th</sup> to the 23<sup>rd</sup>. During the first day of questioning, EMK prompts Ginsburg to discuss her efforts to break down legal barriers to the advancement of women. (*The New York Times*, 08/21/1993)

On the 29<sup>th</sup>, the Judiciary Committee unanimously approves the Ginsburg nomination. (*The New York Times*, 07/30/1993)

*August* On the 3<sup>rd</sup>, Ginsburg's nomination is approved 96-3 by the full Senate. EMK votes in favor. Ginsburg is the first Supreme Court justice to be nominated by a Democratic president since LBJ's nomination of Marshall, and her confirmation comes at a time when a woman's right to an abortion is hanging by a thread: the Court upheld it by a scant 5-4 vote in *Planned Parenthood of Southeastern Pennsylvania v. Casey* of 1992. (*The New York Times*, 08/04/1993)

### 1994

*April* On the 6<sup>th</sup>, Blackmun announces his retirement from the Supreme Court. Clinton has said he would like to place an individual with real-world political experience on the bench, and Senate Majority Leader George Mitchell (D-ME) becomes the leading contender to replace Blackmun. (Clymer, p. 539; 1994 *Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly, Inc., 1994, p. 303)

On the 12<sup>th</sup>, Mitchell announces that he will not take the post, claiming that it would compromise his ability to get health insurance legislation passed. EMK quickly advances Breyer's name to Clinton once more, who is also considering Federal Circuit judge Richard S. Arnold and Secretary of the Interior Bruce Babbitt as potential nominees. (Clymer, p. 539)

*May*

On the 7<sup>th</sup>, ranking Republican on the Judiciary Committee Hatch tells Clinton and EMK that he will oppose Babbitt, urging EMK to make the case for Breyer.

On the 10<sup>th</sup>, EMK and Clinton speak about national health insurance at a meeting of the American Federation of Teachers. In a corridor of the Hyatt Regency Hotel, Clinton praises EMK's new health insurance plan in front of a reporter. EMK thanks Clinton for spending time with his son Patrick, who is running for a House seat in Rhode Island. EMK then turns Clinton so the reporter cannot hear and tells him what a great selection Breyer would make. As Breyer's other allies, such as White House counsel Lloyd Cutler, push the nomination in the coming days, EMK continues to call Clinton, convinced that his 1993 failure was due to the fact that Moynihan spoke to Clinton last. (Clymer, pp. 539-540)

On the 13<sup>th</sup>, Clinton announces his selection of Breyer as Associate Justice after Judge Richard Stearns tells him that Babbitt would write fine dissents, but that Breyer would be a leader. Arnold's recent diagnosis with cancer has eliminated him from the pool, and Breyer's clear bipartisan support is appealing to Clinton, who is pursuing a loaded legislative agenda. (Clymer, p. 540; *The New York Times*, 05/14/1994)

On the 17<sup>th</sup>, Breyer's nomination is received by the Senate. (U.S. Senate Homepage)

*July*

Confirmation hearings for Breyer are held from the 12<sup>th</sup> to the 15<sup>th</sup>. During the hearings, Breyer tries to dispel his technocratic image, avoids saying too much on topical issues such as voting rights and abortion, and comments most extensively on the importance of the separation between church and state. Breyer is generally well-received; his most vocal critic is Metzenbaum, who questions Breyer on a potential conflict of interest between Breyer's investments with Lloyd's of London and several pollution cases over which he presided. (1994 *Congressional Quarterly Almanac*, pp. 308-309)

On the 19<sup>th</sup>, Breyer is approved 18-0 in the Judiciary Committee. Although he expresses fears that Breyer will not look out for the interest of consumers and small business in antitrust cases, Metzenbaum still votes for Breyer. (1994 *Congressional Quarterly Almanac*, p. 310)

On the 29<sup>th</sup>, Breyer is confirmed 87-9 by the full Senate. EMK votes in favor. Senator Richard Lugar (R-IN) leads the opposition based on Breyer's investments with Lloyd's. (*1994 Congressional Quarterly Almanac*, pp. 310, 42-S)