



## EDWARD M. KENNEDY ORAL HISTORY PROJECT

### **Interviewer's Briefing Materials** **David Boies Interview, 09/23/2008**

Robert A. Martin, Research Director

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

- David Boies Timeline.
- David Boies Fact Sheet.
- Key EMK Staffers: 1970s.

#### **Secondary Source Materials**

- David Boies bio, <http://bsfllp.com>.
- "For IBM Takes Job as Senate Panel Aide," *The Wall Street Journal*, 06/16/1977.
- David Boies, *Courting Justice: From NY Yankees v. Major League Baseball to Bush v. Gore 1997-2000* (New York: Hyperion, 2004) pp. 17-18.
- John Averill and Ronald Ostrow, "Judiciary Committee to Get New Look under Kennedy," *The Los Angeles Times*, 12/10/1978.
- Nick Thimmesch, "Ted takes over Judiciary amid Murmurs of 'Power Grab,'" *Chicago Tribune*, 01/05/1979.
- David Ignatius, "Curb on Conglomerate Mergers Proposal by Justice Agency Lacks Carter Support," *The Wall Street Journal*, 03/08/1979.
- "Social Goals become an Antitrust Weapon," *Business Week*, 04/09/1979.
- Larry Kramer, "Kennedy Wins Panel Test on Antitrust Vote," *The Washington Post*, 05/09/1979.
- Charles Babcock, "Kennedy Touch at Judiciary: Bright, Fractious Staff," *The Washington Post*, 07/20/1979.
- Merrill Brown, "Trying to Sell Boardrooms on Kennedy," *The Washington Post*, 10/20/1979.

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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.

### **Oral History Interviews**

- Stephen Breyer interview, Kennedy Oral History Project, Miller Center, University of Virginia, 06/17/2008.
- Thomas Susman interview, Kennedy Oral History Project, Miller Center, University of Virginia, 05/23/2007.
- Ken Feinberg interview, Kennedy Oral History Project, Miller Center, University of Virginia, 07/08/2008.
- Antonia Hernandez interview, Kennedy Oral History Project, Miller Center, University of Virginia, 03/22/2007.
- Patti Saris interview, Kennedy Oral History Project, Miller Center, University of Virginia, 09/25/2007.

## DAVID BOIES TIMELINE

*Prepared by Bryan Craig*

*Miller Center, University of Virginia, 09/12/2008*

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- 1964** David Boies reportedly works on Robert F. Kennedy's senate campaign. (*Chicago Tribune*, 01/05/1979)
- 1966** Boies graduates from Yale Law School. After law school, Boies goes to work for the law firm of Cravath, Swaine & Moore. (<http://www.martindale.com>)
- 1968** Boies reportedly works on Robert F. Kennedy's presidential campaign. (*Chicago Tribune*, 01/05/1979)
- 1977**
- January* EMK becomes chairman of the Senate Antitrust Subcommittee.
- February* EMK and Senator Howard Cannon (D-NV) introduce airline deregulation legislation (S 689) but it is not passed in 1977. President Jimmy Carter, who had supported airline deregulation in his campaign, appoints Alfred Kahn as the Civil Aeronautics Board (CAB) chairman. The Carter Administration does not submit an airline deregulation bill in 1977, but Kahn's support later helps EMK to pass legislation the following year. (Adam Clymer interview with Edward Kennedy, 6/2/1997, pp. 9; *1978 Congressional Quarterly Almanac*, Washington, D.C.: Congressional Quarterly Inc., pp. 496, 498, 500; Derthick and Quick, *The Politics of Deregulation*, Washington, DC: The Brookings Institute, 1985, pp. 55)
- 1978**
- January* The Senate passes EMK's Criminal Code Reform Act (S 1437) 72-15. EMK works with Senators by dropping more controversial aspects of the bill to gain passage. The House does not report on the bill. (*1978 CQ Almanac*, pp. 165-173)
- Early 1978* Boies takes a sabbatical from Cravath, Swaine & Moore to become chief counsel and staff director of the Senate Antitrust Subcommittee. Boies replaces Ken Feinberg, who becomes EMK's administrative assistant. (Clymer interview with Kenneth Feinberg, JFK Presidential Library, 03/13/1995, pp. 2)
- March* Senator James Eastland (D-MS) announces that he will retire from the Senate at the end of his term, clearing the way for EMK to succeed Eastland as chairman of the Judiciary Committee next January. (*The New York Times*, 3/22/1978)
- April* EMK is named to a new presidential study commission on antitrust. The commission lasts for six months. It recommends trucking deregulation and

greater weight to competitive considerations in mergers. (*The Washington Post*, 04/06/1979, 11/16/1978, 12/08/1978)

- June* On the 14<sup>th</sup>, the Judiciary Committee reports on EMK's Antitrust Enforcement Act (S 1874). It overturns various Supreme Court rulings including *Illinois Brick v. Illinois* to allow individuals or groups to sue for damages resulting from price fixing, monopolies, or rigged bids even if they were not directly affected. Business groups reportedly oppose the bill. EMK has to add an amendment to the bill to get it out of the committee. The amendment provides certain limitations on foreign governments to bring antitrust suits to U.S. courts. However, the bill still does not reach the Senate floor. (*1978 CQ Almanac*, pp. 194-195; *The Wall Street Journal*, 04/25/1979)
- September* Boies investigates Standard Oil of California's bid for Amax Inc. to see if it breaches current anti-trust legislation. Large scale mergers will be a major legislative initiative in 1979 for EMK. (*The Washington Post*, 09/16/1978)
- October* Congress passes the Airline Deregulation Bill, which gradually increases market competition in the passenger airline industry by phasing out federal controls and the CAB over seven years. In the end, the Carter Administration gets the bill it wants, which includes an automatic route entry program, a program to grant unused route authority to air carriers willing to serve those routes, price flexibility, and competition seen to be in the public interest. The bill includes an amendment from EMK's and Cannon's 1977 proposal to shift the burden of proof to make it easier for new applicants for air service to enter the market. EMK goes on to praise the "close executive-congressional cooperation on the bill." (*1978 CQ Almanac*, pp. 496-504)
- Oct./Nov.* Faced with an overburdened federal docket, the Omnibus Judgeship Act creates 117 new district court positions and 35 new positions on the circuit court of appeals. The act also calls for the president to issue merit-based judicial selection guidelines. EMK had played an important role in the passage of the act and strongly supported the new merit-based reform. As the incoming Judiciary Chairman, EMK works with the White House to draft the executive order providing the new guidelines. ("Committee of the Judiciary, Program for the First Session," Committee on the Judiciary, United States Senate, April 1979; Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan*, New Haven: Yale University Press, 1997, pp. 248)

## 1979

- January* EMK becomes Chairman of the Judiciary Committee, replacing Senator James Eastland (D-MS), who had served as Chairman since 1955. EMK names Boies as Chief Counsel and Staff Director. Boies' two chief aides are Thomas Susman, a longtime EMK counsel on the Judiciary, who becomes general counsel, and Edward Merlis, who serves as deputy staff director. One of EMK's priorities as

Chairman is to implement the new merit-based procedures to reform the judicial selection process for lower court judges. This includes EMK's plan to modify the tradition of senatorial courtesy afforded to the senator from the nominee's home state, as well as emphasizing the appointment of women and minorities. Some of EMK's other priorities as Chairman reportedly include trucking deregulation, federal criminal code reform, opposition to the death penalty, rewriting the FBI charter, the Law Enforcement Assistance Administration reform, antitrust reform, giving consumers the right to file antitrust cases, setting new standards for permissible mergers and takeovers, and immigration and refugee law reform. (Goldman, pp. 263; *The Washington Post*, 01/25/1979; *1979 CQ Almanac*, pp. 361)

On the 29<sup>th</sup>, EMK introduces legislation (S 241) to reorganize the Law Enforcement Assistance Administration (LEAA). It creates a new office of Justice Assistance, Research and Statistics to administer two new agencies: the Bureau of Justice Statistics and the National Institute of Justice to handle research and statistical work. The LEAA continues to operate grant programs. (*1979 CQ Almanac*, pp. 370; THOMAS on S 241)

#### *March*

On the 8<sup>th</sup>, EMK introduces the Small and Independent Business Protection Act of 1979 (S 600). It aims at conglomerates who acquire another company in a different line of business. It bans mergers of companies worth more than \$350 million to \$2 billion each, and companies that have 20 percent or more market share in a market exceeding \$100 million in any section of the country. It allows exceptions, but the company must prove the merger will result in a substantial efficiency and competition. There must be a social advantage, not just an economic one. Carter does not support the bill, while hearings begin in March. Two days earlier, EMK and Boies attended a dinner with the policy committee of the Business Roundtable where they announced revisions of the bill, mainly raising the market share to 20 percent and increasing a company's assets by \$150 million. The bill never gets to the Senate floor. (THOMAS on S 600; *Business Week*, 04/09/1979; *The Wall Street Journal*, 03/08/1979; *The Washington Post*, 09/19/1979)

On the 14<sup>th</sup>, the Judiciary Committee reports on a Supreme Court jurisdiction bill (S 450). It gives the court complete discretion to decide which cases it reviews. On the Senate floor, EMK successfully fights a Senator Jesse Helms (R-NC) school prayer amendment that stops federal courts from hearing such cases. The Senate passes the bill, but the House does vote on it. (*1979 CQ Almanac*, pp. 396-398)

On the 15<sup>th</sup>, EMK introduces the Federal Courts Improvement Act of 1979 (S 678). It sets rules governing the appointment, terms, and retirement ages for judges on the district and appellate courts. The bill sets up a judicial council to hear complaints, establishes tax and patent appellate courts, and other reforms in the U.S. Court of Appeals. (THOMAS on S 678)

- April* On the 24<sup>th</sup>, the Judiciary Committee reports on a bill expanding the authority of federal magistrates (S 237). In the past magistrates could only try non-jury federal misdemeanor cases and make recommendations in certain civil and criminal cases. The bill allows magistrates to decide civil cases, expand their powers over criminal cases, and handle jury trials. The bill passes the Senate and the House and Carter signs into law. (1979 CQ Almanac, pp. 375)
- Spring* Having completed his academic obligations to Harvard, Breyer returns to work for EMK, taking over as chief counsel on the Judiciary Committee. It is unclear how much longer Boies remains on the Judiciary staff and in what capacity. Some articles suggest Boies leaves the Judiciary staff a few months later during the summer. (The Washington Post, 07/29/1979)
- Carter and EMK clash over the vacancy on the First Circuit Court of Appeals. EMK as well as Carter's eleven member merit commission support the nomination of former Watergate prosecutor Archibald Cox, whereas Attorney General Griffin Bell argues he is too old. EMK accuses Carter of rejecting Cox simply because Cox had supported Representative Morris Udall (D-AZ) in the 1976 Democratic presidential race and that the President is using the age limit as an excuse. According to Clymer, the relationship between the staffs of Carter and EMK are icy and worn out with suspicion. (Adam Clymer, *Edward M. Kennedy*, New York: William Morrow and Company, Inc., 1999, pp. 281)
- May* On the 8<sup>th</sup>, the Judiciary Committee reports on S 300 to overturn *Illinois Brick v. Illinois*. A key member of the committee, Charles Mathias (R-MD), wanted to revise the bill, so EMK delayed the committee vote from April to May 8. Boies states, "The likelihood that the bill will be passed without modifications is small." (Wall Street Journal, 04/24/1979) EMK agrees to make certain changes for Mathias that includes deleting class action lawsuits, authorizing a court to set the amount of the plaintiff's attorney's fee, change the bill enactment date from the Illinois case to just pending cases, and overturn the 1978 Supreme Court ruling that foreign governments could sue triple damages in price-fixing cases in the U.S. The bill never reaches the Senate floor due to a filibuster threat. (1979 CQ Almanac, pp. 385-387; The New York Times, 05/06/1979)
- On the 15<sup>th</sup>, the Judiciary Committee reports on the FY 1980 Justice Department authorization bill (S 1157). EMK states the original \$16.1 million for the civil rights division the committee passes is "barebones." (1979 CQ Almanac, pp. 379) Once on the Senate floor, EMK votes against Helms' failed amendment to cut the division budget by \$2 million dollars. The bill passes the Senate. (1979 CQ Almanac, pp. 378-379)
- June* EMK introduces the Trucking Competition and Safety Act of 1979 (S 1400) to deregulate the trucking industry. Since 1978 the legislation gets bogged down over jurisdiction (Cannon and his Commerce Committee reportedly oppose

deregulation) and reportedly members in the trucking industry and unions also oppose deregulation. The bill is sent to the Commerce Committee and never reaches the Senate floor. (1979 *CQ Almanac*, pp. 341)

*July* On the 9<sup>th</sup>, the Judiciary Committee reports on a bill to expand the authority of the Justice Department and judges in antitrust suits. It passes the Senate but the House does not act. (1979 *CQ Almanac*, pp. 387)

On the 23<sup>rd</sup>, the Judiciary Committee reports on a refugee entry bill (S 643). It increases the number of immigrants and refugees permitted to enter the U.S. from 290,000 to 320,000 with the number of annual refugees allowed entry from any single nation raised from 17,400 to 50,000. On September 6<sup>th</sup>, the Senate passes the bill, 85-0. (1979 *CQ Almanac*, pp. 392-393).

On the 31<sup>st</sup>, EMK introduces a bill on the FBI charter (S 1612). It expands the FBI's authority to obtain information held by third parties, and investigate patterns of terrorist acts that violate state laws. The bill also limits the director to one 10-year term. The Judiciary Committee holds hearings on the charter. Some issues come up such as providing civil remedies for injured parties, banning activities designed to discredit individuals, and how far can the FBI advance its new powers. (1979 *CQ Almanac*, pp. 404-405)

*Summer/Fall* Boies meets with board chairmen beginning around June to bolster business support for EMK's run for the Democratic nomination against Carter. (*The Washington Post*, 10/20/1979)

*September* On the 7<sup>th</sup>, EMK informs Carter at a White House lunch that he will run for president. (Clymer, pp. 284; *The New York Times*, 09/12/1979)

*October* On the 10<sup>th</sup>, the Judiciary Committee reports on S 1873, a judicial discipline bill. It is an amalgamation of earlier bills including EMK's Federal Courts Improvement Act of 1979. It authorizes the judicial councils of the 11 federal courts to investigate and rule on judge complaints. The council decision could be appealed to a Court of Judicial Conduct and Disability. S 1873 passes the Senate, but the House fails to act on it. (1979 *CQ Almanac*, pp. 399-400)

On the 30<sup>th</sup>, the Senate passes S 1477 that creates a new federal court of appeals for patent cases and a new trial level court to hear suits involving claims against the U.S. government. EMK opposes an amendment by Senator Dale Bumpers (D-AR) that puts the burden of proof required for challenging federal regulations from the plaintiff to the government, but the amendment passes. The House fails to pass the bill. (1979 *CQ Almanac*, pp. 400-401)

*November* EMK announces he will challenge Carter for the Democratic presidential nomination.

The Judiciary Committee clears a bill to make it a crime to use a computer for a fraudulent scheme. (1979 CQ Almanac, pp. 384)

The Judiciary Committee clears a bill to protect the rights of institutionalized individuals by allowing the Justice Department to file suits against states. EMK cosponsors the Senate bill, which clears Congress and is signed by Carter in May 1980. (1980 CQ Almanac, pp. 383)

*December* On the 4<sup>th</sup>, the Judiciary Committee reports on EMK's criminal code bill (S 1722) by a 14-1 vote. To pass the bill, nearly 200 amendments are adopted. The Justice Department agrees to support the bill, but they reportedly consider the bill weaker on white collar and organized crime. (1979 CQ Almanac, pp. 363-365)

On the 4<sup>th</sup>, the Judiciary Committee reports on S 114 to restore the death penalty for treason, espionage and other felonies. EMK votes against the bill. (1979 CQ Almanac, pp. 369)

In a 9-8 party-line vote, the Judiciary Committee reports on EMK's Energy Anti-monopoly Act (S 1246) to block 18 major U.S. oil companies from acquiring or merging with other large corporations in the energy industry worth more than \$100 million, unless the companies can prove "substantially enhanced competition." It never reaches the Senate floor. (1979 CQ Almanac, pp. 405-407)

On the 18<sup>th</sup>, the Judiciary Committee passes by a 14-2 vote S 598, which protects certain exclusive soft drink bottling franchises from antitrust challenges. EMK votes against the bill. A legal case is pending on the legality of exclusive franchises and anti-trust at the time the bill goes through Congress. Bayh wins passage of the bill in May 1980, but EMK's vote is unknown. Carter signs it into law on July 9, 1980. (1980 CQ Almanac, pp. 381, 22-S, 23-S)

On the 19<sup>th</sup>, the Judiciary's AdPrac Subcommittee reports on a federal regulatory overhaul bill (S 2147) co-sponsored by EMK. The bill is designed to streamline the federal regulatory process. (1979 CQ Almanac, pp. 581)

Carter signs compromise legislation to restructure the "embattled" Law Enforcement Assistance Administration (LEAA). (1979 CQ Almanac, pp. 370)

## **1980**

*August* EMK withdraws his bid for the presidency in a powerful speech to the Democratic National Convention.



## DAVID BOIES FACT SHEET

*Prepared by Rob Martin and Bryan Craig*

*Miller Center, University of Virginia, 09/12/2008*

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### *Positions w/ EMK:*

- 1978-1979, chief counsel and staff director of EMK's Judiciary Antitrust Subcommittee (on sabbatical from Cravath, Swaine & Moore)
- 1979, chief counsel and staff director of EMK's Senate Judiciary Committee (filling in for Breyer, who cannot leave Harvard to accept the position until after spring semester)
- 1979-1980, informally lobbies big business to support EMK's 1980 presidential bid

### *Issues worked on with EMK:*

- Antitrust Enforcement Act of 1979 (Illinois Brick), which would give consumers the right to file antitrust cases
- Small and Independent Business Protection Act of 1979, which would place greater limits on conglomerate mergers and add a social policy component in their evaluation
- Energy Antimonopoly Act against oil companies
- Criminal law and sentencing reform bills
- Deregulation of airline and trucking industries
- Judicial reform
- Opposition to the death penalty
- FBI charter reform and the Law Enforcement Assistance Administration reform

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

- Merit-based judicial selection reform, including emphasis on women and minorities
- 1979 refugee reform bill
- Three Mile Island

### *Other positions:*

- Worked for RFK's 1964 senate and 1968 presidential campaigns
- Defended IBM against anti-trust cases brought by Justice Department as attorney with Cravath, Swaine & Moore
- 1991-93, counsel to FDIC in litigation to recover losses for failed Savings and Loans
- Represented George Steinbrenner in a suit against Major League Baseball, in which a conflict of interest lead Boies to leave Cravath and form his own firm
- 1998-2000, special trial counsel for Justice Dept. in successful anti-trust suit against Microsoft (worked with Jeff Blatner)
- Defended CBS against libel suit brought by General Westmoreland
- 2000, lead counsel for Gore in Florida recount in 2000 presidential election, *Bush v. Gore* (recruited by Gore through mutual friend, former Solicitor General Walter Dellinger)
- Defended Napster in suit brought by RIAA

## KEY 1970s JUDICIARY AND EMK SENATE OFFICE STAFFERS

*Prepared by Rob Martin*

*Miller Center, University of Virginia, 06/14/2008*

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- 1972-1977     Eddie Martin serves as EMK's administrative assistant (a.a.).
- 1969-73     Jim Flug serves as chief counsel on EMK's AdPrac Subcommittee, as well as EMK's Judiciary chief counsel (Flug notes that in those days, with the Democrats in the majority, the chief counsel of EMK's AdPrac subcommittee was his *de facto* Judiciary chief counsel).
- 1973     Tom Susman replaces Flug as chief counsel on EMK's AdPrac subcommittee.
- 1974-75     Stephen Breyer serves as special counsel to EMK on the AdPrac subcommittee.
- 1975     Ken Feinberg is named special counsel to EMK on the Judiciary Committee.
- 1977-79     EMK chairs the Judiciary Subcommittee on Antitrust and Monopoly.
- 1977     Feinberg serves as counsel to the Antitrust subcommittee.
- 1977-79     Feinberg replaces Martin as EMK's a.a.
- 1978     David Boies serves as chief counsel and staff director of Antitrust Subcommittee.
- 1979-1980     Feinberg serves as special counsel to EMK on the Judiciary Committee.
- 1979-81     Richard Burke serves as EMK's a.a.
- 1979     Boies is named as EMK's Judiciary chief counsel and staff director.
- 1979-1980     Breyer replaces Boies as Judiciary chief counsel.
- 1980     Senate confirms Breyer's nomination to First Circuit Court of Appeals. Ron Brown becomes chief minority counsel.
- 1981-86     Horowitz replaces Rick Burke as EMK's chief of staff. Horowitz had previously served as EMK's staff director on the health subcommittee from 1977-81.