

## A RETURN TO REGULAR ORDER

### Interview #7

Wednesday, July 22, 2008

**RITCHIE:** I understand that Senator Hatfield had a reunion recently.

**KENNEDY:** Oh yes, he did.

**RITCHIE:** Did you have a chance to go to that?

**KENNEDY:** I did go, and it was a very nice occasion. There were about eighty of us, I guess. One fellow came all the way from Geneva. But most of the folks were Oregonians who went back to Oregon or never left Oregon. There were a few of us who went out from Washington. A good friend of mine, who also worked for Senator Hatfield, and I had lunch with him on a Saturday. It was somewhat disconcerting because he has gotten older. He just turned eighty-six July 12 and he's physically frail. But he's still quite alert, and attentive, and funny.

When we finished lunch, he—gracious as ever—said to my friend Tom Imeson and me, “Well, it's awfully nice of you to come and have lunch. I think back often on all the wonderful years we had together and all the things we did.” He just went on and on, it was sort of a blessing. I said, “Well, thank you, Mr. Chairman. That's very nice of you to say.” And he said, “Well, that was the nicest thing I could think of to say.”

Then at the reunion itself on Monday evening, frankly, I didn't think he would come. But, by golly, he did. Both he and Antoinette were there. He greeted everybody and when the time came, he was asked to say a few words. Of course, this whole thing had been organized by his personal office chief of staff, Gerry Frank. Gerry was very proud of himself for having gotten this many people together. So when it came time for Senator Hatfield to say something, he took the microphone and said, “I want to thank all of you for coming out for Gerry's party.” I mean, he still definitely rises to the occasion and it was grand to see him.

**RITCHIE:** Well, he was quite a figure here in his years.

**KENNEDY:** Yes, he was. I'm sure I've said elsewhere in this interview that since he retired and went back to Oregon in '96, in my various endeavors since then, I still benefit from my association with him. People remember Mark Hatfield and they remember him fondly, so people that were associated with him get a little break. It's nice.

**RITCHIE:** I think in the Senate there's a certain pedigree. When people say, "Who is the new Sergeant at Arms? Or who is the new Secretary of the Senate?" And the answer is, "He used to work for Mark Hatfield. Or he used to work for Howard Baker, or she used to work for Charles Mathias," you say, "Oh, they'll be okay then."

**KENNEDY:** That's right. I wonder, as I imagine you do, what the next generation of those folks will be. You look around the Senate chamber now and, for me at least, it's somewhat hard to discern who those folks will be. But I'm sure they will emerge.

**RITCHIE:** When you were talking to Senator Hatfield, did he express any interest in the way the Senate's operating these days?

**KENNEDY:** Well, the very first thing he asked me was how's Senator Byrd? So we talked about that for a little bit. We talked a little bit about how the Senate was working. We actually talked a lot more about politics both in Oregon and nationally and how the various campaigns were going. But he was curious about his old committee and it had not escaped his notice that things were not working as smoothly as they once had.

**RITCHIE:** It's hard to say they're working at all, actually.

**KENNEDY:** Well, yes, currently they're not working at all. Of course, that's something that I wanted part of this conversation to be about, because I find it just appalling that the Congress of the United States is just not performing what I always thought was its fundamental obligation. I've heard myself saying in recent days that this is just a dereliction of duty. For the Congress not to act on annual appropriations bills is just really hard for me to fathom. All in the name, as far as I can tell, of avoiding difficult votes, of avoiding confrontation with the president. I mean, they're separate branches of government. These confrontations were built in. These things are supposed to happen.

I remember, I believe it was 1981 when President Reagan vetoed, I believe it was a continuing resolution. After the conference on that continuing resolution, the House passed the conference report and it came to the Senate and there was a meeting in Senator Baker's office with, among others, Senator Hatfield and Jim Baker, then Reagan's chief of staff, and Dave Stockman, then OMB director, and Senator Paul Laxalt was there, who was known as President Reagan's best friend in the Senate. The meeting was to discuss: Okay, what are we going to do? Stockman and Baker were there to say: "Well, we're going to recommend to President Reagan that he veto this thing and we're confident that he will. We think it spends too much money." And Senator Hatfield said, "Well, we went to conference with the House and negotiated a conference report which I signed and I support. The House has passed it. It's come to the Senate. It is incumbent upon the Senate to play its constitutional role and act on this measure. We can vote it up or vote it down. I'm going to vote for it, but we need to act and we should not decide to simply not move forward just on the strength of the representation that the President's going to veto the bill. Let's send it to him. We'll do our constitutional duty and he can do his."

Well, that's what happened. President Reagan did indeed veto the bill and we started over. But the point is obviously that the Congress acted. I'm sure there is some political calculus in all this. I mean, Speaker [Nancy] Pelosi and David Obey and Harry Reid are all smart people, but it just absolutely astounds me that the Congress is not acting. It is particularly astounding that all of these folks are or were members of the two Appropriations Committees. The leadership of both houses is well populated with folks who've grown up in the Appropriations Committee. The members of the committee are supposed to be the cheerleaders for the process, not those who put the brakes on it. Now here in the Senate, Senator Byrd and Senator Cochran, God bless them, are moving forward. They are reporting the annual appropriations bills. They're going to do two more this Thursday. It looks like Defense and Legislative are going to get put off until September, but by this Thursday they will have reported ten of the twelve appropriations bills. Not one of them has gone to the Senate floor. They just sit there on the Senate Calendar. But at least the committee is doing what it is supposed to do.

I worry that if the House committee doesn't act and if this Congress just postpones all the federal government's fiscal business into next year, that increasingly there will be people in both bodies who say: "Well, what is this process? Why do we need it? Clearly, it's not working." The Democratic majorities in both houses are gambling

that the next administration—well, they’re certainly hoping that the next administration is going to be an Obama administration and then they can get things going again. But it may not be an Obama administration and once people lose a sense of what is the regular order, it’s hard to relearn that.

**RITCHIE:** It’s interesting that you mentioned that the Senate is actually ahead of the House at this stage.

**KENNEDY:** Right.

**RITCHIE:** The House has always argued that it’s supposed to come first when it comes to appropriations. There’s been sort of a long-running feud about it between the two bodies. Is that something that needs to be hammered out more—whether or not the Senate can take the lead if the House isn’t acting?

**KENNEDY:** Well, that would be interesting. If taken all the way down that path, what you’re saying is, could the Senate actually pass appropriations bills through the body and send them to the House? Historically, as you say, the House has blue-slipped those bills and refused to accept the message that the Senate has passed it on the grounds that appropriations bills are at least akin to revenue bills and the Constitution requires that revenue bills originate in the House. I frankly think that might aggravate the situation more than help it right now, because you do have Democratic majorities in both houses and if Senator Reid were to elect to pass bills in the Senate and send them to the House, that would complicate Ms. Pelosi’s life and annoy David Obey.

**RITCHIE:** Usually, it’s the House that’s supposed to be able to act more expeditiously. The House majority can act when it wants to.

**KENNEDY:** Right.

**RITCHIE:** And appropriations bills are privileged bills, right? Don’t they go right to the House floor when they’re reported out?

**KENNEDY:** Indeed, and they don’t even need to have a rule. For many, many, many years, at least when I was growing up in the process in the ‘70’s, House

subcommittee chairmen, people like Bill Natcher, and Eddie Boland, and Neal Smith, prided themselves on going to the floor without a rule, because they didn't need a rule to protect them from any points of order, because there was nothing out of order in the bill. But yes, you're right, sure the House could be passing these bills. As far as I can see, the only reason why— well, there are a couple of reasons, I guess. One of the reasons why the House committee has stopped acting is because the Republicans tried to force Mr. Obey's hand on the matter of offshore drilling. He didn't like that and perhaps with some justice said he's the chairman and he'll set the agenda. One would think that tempers would subside after that one little episode and they could get back to business and have an understanding how they were going to proceed. Well, they haven't and the larger issue that Mr. Obey has announced is he feels it foolish for his committee to be, as he puts it, "wasting time," reporting bills that are never going to get signed into law because he believes that the president is adamant and would veto anything that was sent to him.

Again, I don't personally believe that that's a valid reason for Congress not to act, for the regular order not to move along. And it seems to me that the Democratic majorities could make some political hay in demonstrating what they stand for, this is what they think the funding levels ought to be. In the reports accompanying these bills, this is the direction they would give to executive agencies and not just let them sail along with no direction from them at all, which is the situation they're currently in.

**RITCHIE:** It seems to me for the last decade, at least, there have been problems with appropriations.

**KENNEDY:** Yes.

**RITCHIE:** Both parties have encountered this and it does seem like it's frozen up the system. We talked earlier about Senator Domenici's comments when Senator Frist stepped down as majority leader, that he was a wonderful man, who can't pass an appropriations bill. Nobody seems to be able to pass appropriations bills these days.

**KENNEDY:** Well, nobody tries. It would be tempting to draw the conclusion that the appropriations process came apart when Mark Hatfield left. That was about a decade ago, but we shouldn't do that because it did continue to function in the regular order for some years after his departure. But certainly in recent years it has gotten just

horribly entangled. I have a lot of sympathy for—if that’s the right word—respect for the Senate leadership. They have a terrible job and lots of different demands to try to deal with, but I do wish that they would just plow ahead and try to force the issue a little more than they do and not be so skittish about bringing legislation to the floor, because the debate is going to be difficult or long or partisan or political. So be it.

**RITCHIE:** I’ve talked with some staff who work for senators and who deal with appropriations issues. They say that it consumes so much of everybody’s time, first the budget and then the appropriations, that maybe the way out is to think of a biennial appropriations, a budget process and a appropriations process that stretches over the two years of a Congress. Do you think that there’s any possibility of something like that?

**KENNEDY:** I think there’s an increasing possibility if folks walk away from the annual process as they are now doing, that there will be more people wondering if we can essentially not legislate on this matter for eighteen months, which is what they’re on the brink of doing, well then, why not go to a biennial? The annual appropriations process is rooted in the beginnings of the republic and certainly the federal budget has changed a whole heck of a lot and has gotten a lot larger, a lot more complicated. All the fiscal management of government is much more intricate than when the annual process was conceived. It has the potential of “saving time,” but it also has the great potential of eroding congressional power because the annual appropriations process remains the best tool that Congress has to get the executive branch agencies of our government to do what the law tells them to do.

I also think that if you went to a two-year appropriations process, you would see a lot more supplementals. Things will occur. You will have hurricanes. You will have floods. You cannot say, “Sorry, you have to wait for two years before we address that problem.” So you’re still going to have appropriations bills moving across the floor. If the concern is you can’t take an appropriations bill to the Senate floor because of amendments on other issues and difficult votes and all, that situation pertains with the supplemental just as much as it does with a regular appropriations bill. So I can see why the idea is tempting to people, but I’m not sure that it solves the problem they’re trying to address. I think it would definitely create other serious problems.

**RITCHIE:** Some of it may be taken care of if the earmark reforms go through,

because much of what the individual senator spends a lot of time on is listening to mayors from their states and others who are looking for specific grants. That consumes a big chunk of staff time—

**KENNEDY:** Sure, it does.

**RITCHIE:** —going through that. At the end of the year, when they finish the process, there's a sigh of relief, and then they start all over again.

**KENNEDY:** Right, yes, that is definitely one of the problems in recent years with the appropriations process, that it's choking on earmarks and there have gotten to be far too many of them and consuming way too much staff and senatorial time.

**RITCHIE:** I read one statistic that earmarks have tripled since the days when Mark Hatfield was chairman of the committee.

**KENNEDY:** That could well be.

**RITCHIE:** But now they've become much more publicized, and there's some reaction against them. The House and Senate seem to be pulling back on those.

**KENNEDY:** And perhaps appropriately so. I mean the great thing about increased transparency, if indeed it has increased, is that folks are more likely to see if some request passes the laugh test. Senators don't want to be embarrassed. But it's somewhat puzzling to me to hear various comments about how earmarks are slipped in and it's done in the dark of night and nobody knew. It's obscured and you can't find them. You know, the committee produces a report that identifies all these things and it's a public document. And it's by rule of the Senate that it has to be available for forty-eight hours before the Senate can consider an appropriations bill. It's there to be read. Why folks say that they're hidden escapes me.

One of the reform ideas that's been floated in the Senate Republican Conference is to take all of these so-called "earmarks" out of report language and put them in the bill language and thereby make them more transparent, more visible, and make them more susceptible to change or deletion on the Senate floor. The first problem with that it seems

to me is that if you put these things in the bill language, you've put into black letter law what used to be, in the form of report language, guidance. With report language, an executive agency can call up the committee and say, "Well, we don't really think it will work this way, can we do it another way?" The agency can work with the committee to address the situation. If it's in bill language, the federal agency is going to have to spend that money on the thing identified. This may be taking it to an extreme, but it's not beyond imagining that an executive agency is going to be put in the position of either violating Title 10 of the Budget Act and illegally impounding duly appropriated money, or violating the Antideficiency Act, which carries jail time, and spending it on something that is patently wasteful. I mean, you pick up the Energy and Water committee report and all those Corps of Engineers projects are in report language for the very plain and simple reason that construction schedules can change and you may not be able to spend this much money on that project that year. That's fine. When it's in report language, you have the flexibility to do that. Put it in the bill language, you won't.

**RITCHIE:** So the cure can be worse than the disease.

**KENNEDY:** Sure, and if somebody wants to go after a particular earmark in report language on the Senate floor, it's simple to do. Just write an amendment, "none of the funds in this act will be used to do what this report language says." So I don't understand some of these ideas.

**RITCHIE:** Another thing that you hear people talking about is the problem of legislating on appropriations bills. Historically, the rules of both houses have said that you can't legislate on appropriations bills, but of course both houses legislate on appropriations bills. The question is whether or not it's become more of a tendency to do that over time. Do you think that's become a problem or is that just a fact of nature with appropriations?

**KENNEDY:** Oh, no, I think it's definitely a problem. And I think it's definitely more prevalent than it used to be. In the early '80s, when Senator Hatfield was first chairman, he could say to a senator, "Look that violates Rule 16," and the amendment would go away. Now people just do it all the time. You're right.



**RITCHIE:** Even though if the chair rules against them, they can appeal the ruling of the chair and get a simple majority of senators to support you to insert it back into the appropriations bill.

**KENNEDY:** That's true, but I think they have learned the dangers of that. What was it—in '95, when Senator Hutchison offered an amendment relative to the Endangered Species Act, she was told it violated Rule 16, but the Senate overturned the chair. Then lo and behold, when Trent Lott in subsequent years became leader, he realized that it was the opportunity for great mischief and engineered a reversal of that decision.

**RITCHIE:** I've heard that, in the past at least, occasionally when senators from the authorizing committees had trouble with controversial bills, or controversial provisions, they would ask the Appropriations Committee to insert it into an appropriations bill, because they knew the appropriations bill was going to pass and that was one way to do it. Was that a tactic of use?

**KENNEDY:** That's true. Absolutely.

**RITCHIE:** Did that create problems in the system?

**KENNEDY:** Sure it did, because if it was truly a controversial piece of legislation, the Appropriations Committee that would be carrying this thing to conference did not necessarily have the expertise to argue the matter in conference. Now in earlier days when the Senate carried something like that to conference, the House would sit there and say, "Well, we're not going to do it. You may not care about your rules but we care about ours." Clearly, that has changed. Perhaps the single most arresting thing that could be done to get the appropriations process back to regular order would be to have the House Rules Committee enforce the House rules the way it did some 30 years ago and not allow all this stuff to be added in conference and be protected by rule.

**RITCHIE:** There had been talk about rules that would say that you can't put anything in a conference report that isn't in either the House or the Senate versions of the bill.

**KENNEDY:** Well, that's the rules of both houses now.

**RITCHIE:** Although it's a rule that's violated.

**KENNEDY:** It's a rule that's violated, and in the House they're able to do that by getting a rule that protects the conference report against a point of order. Then when it comes to the Senate, the Senate is afraid to vote the whole thing down and kill the whole deal after the House has already passed it. I don't know. It's a mess.

**RITCHIE:** If you had an ability to reform the system, how would you do it?

**KENNEDY:** I don't think the process needs to be reformed. It just needs to be upheld. As I've said earlier—I'm sure we're repeating ourselves somewhat since we've had this conversation over such a long span of time—but I'm confident that I said in an earlier interview that one of the great joys of working for both Mark Hatfield and then Thad Cochran as chairmen of the Appropriations Committee is that they're both regular order kind of guys and they wanted to just move the process along. Neither one of them was afraid of a vote. If, and I hope to goodness this happens in the next Congress, we can get back to that sense of regular order that appropriations bills move through both chambers in a certain predictable way, then I don't think you need to have any reforms. You just need to tend to business.

**RITCHIE:** So then what's really broken is the political process, not the appropriations process.

**KENNEDY:** That's right. I think that's exactly right.

**RITCHIE:** It seems to me that in the days when Mark Hatfield came to the Senate, the two parties worked together more. Maybe it was because there were people on both sides of the aisle who thought alike, in conservative and liberal factions from both parties. Now it seems like everything is a political issue. I'm not sure that the old systems that worked well under the old political process can survive the partisan instincts that take place.

**KENNEDY:** That's a very good point. By my observation the Senate Appropriations Committee, and for that matter I think the Senate Finance Committee, and the Senate Armed Services Committee, all remain pretty bipartisan in their operations and

in their production of legislation. But the committees can't control what happens on the floor and on the floor, of course, there are a lot of free agents who don't necessarily think that this bipartisan product is a great thing or don't necessarily think that it should not carry with it some other extraneous and potentially very political issue. But if the problem is a political problem, a process reform won't fix it. It has to do with the one hundred members of the body and they need to decide individually and collectively that they need to step back from making every single thing a political battle.

**RITCHIE:** The big question in this congress has been amendments from the floor. In the Senate it has always been easier to amend something on the floor that it has been in the House, which controls the proceedings more. The leadership currently is trying very hard to restrict the number of amendments that are debated. Were amendments much of a problem for the appropriations bills when you were working with the committee? Did you have to worry about what would come up on the floor and how to handle it that way or try to control the amendment process?

**KENNEDY:** No, not really. I mean, clearly there were scads of amendments. There were plenty of amendments, but most of them had to do with appropriations matters. Every now and then, certainly, there would be some big national hot issue that somebody would want to bring to the Senate floor in connection with debate on an appropriations bill and Senator Baker was known to fill up the [amendment] tree when things like that occurred. But then he and Senator Byrd and others would say, "All right now, let's stand down here and let's see if we can address these things, but let's not hold up this appropriations bill to do it." Eventually, the tree would get taken down and we'd move on. That latter part doesn't seem to be happening right now. Again, I can appreciate the challenges that both Senator Reid and Senator McConnell face. I can appreciate the frustrations that they both must feel. Reid doesn't want to have to deal with a lot of the things that the Republicans would like to have the Senate vote on, and Senator McConnell and his fellow Republicans take umbrage at the fact that Senator Reid fills up the tree and then tries to invoke cloture and they never get to do a thing.

**RITCHIE:** It's a great debate as to whether we're actually having any filibusters now or just having cloture motions that fail.

**KENNEDY:** Right, and I would be of the camp that says it's the latter. Again, this sort of goes back to what I said earlier about: just make 'em work. Why not have an honest to God filibuster? If they want to filibuster something, let them stand out there and talk about it.

**RITCHIE:** They're taking time to complain that it's taking a lot of time.

**KENNEDY:** Right.

**RITCHIE:** Someone said that the Senate doesn't so much debate as it debates whether or not to debate.

**KENNEDY:** Exactly right. My older son is working this summer as an intern in the Senate Press Gallery and it's been a very good experience for him and I'm delighted that the Sergeant at Arms saw fit to hire him and put him in that position. But he has said to me and to others when asked about how the experience has been, "Well, I've earned a great deal more respect for the institution and learned a lot more about its history. I'm not as impressed with the individual members." I think he is sitting up there in the Press Gallery and he's hearing just what you said. He's hearing people debate whether or not they should debate.

**RITCHIE:** Of course, he's also surrounded by some of the most cynical people who are watching the process.

**KENNEDY:** Well, there is that, as you well know from your publications and your work with the Press Gallery. But it's a good environment for him.

**RITCHIE:** Earlier on you were talking about the leaders who were here when you came and those who were here while Hatfield was here, and you wondered if there are still any people like that on the floor. Have you spotted any senators that you think are potential leaders, or some of the newer senators who look like they'll stand tall in the future?

**KENNEDY:** Well, that sort of puts me on the spot. I don't know that I want to venture an opinion on that, because it's telling that no one leaps immediately to mind.

But then again, let's remember that some of it is just a product of age. If you were asking someone, you know, a young Senate staffer twenty-eight years old, I'm sure they could tell you. Either I'm older and jaundiced and more cynical or they're newer, fresh-faced, and inspired.

**RITCHIE:** They also haven't had time to really demonstrate what they're capable of—and some of them do change. Some of them come in as bomb throwers and wind up as pragmatists. If you went back a generation and asked people how some senators would have shaped up, they'd be surprised at which ones really established stature and which ones didn't survive their reelection.

**KENNEDY:** That's right. That's exactly right. I'm sure there were folks in say 1968 who looked across the aisle at this young guy who was a two-term governor from Oregon and thought, "Who is this fella? He's not going to amount to much." Senator Stennis used to have a great phrase that is sort of pertinent to this. He would say, "Some people grow and others just swell." So you never really know. But I'm sure those people are there. I just can't readily identify them for you right now.

**RITCHIE:** Very good. Well, is there something else that we should be reviewing or discussing?

**KENNEDY:** No, I don't think so. I've gotten my opinions off of my chest about the current state of affairs and I thank you very much for this opportunity. It's been a real pleasure to have this conversation and reflect on these years up here.

**RITCHIE:** It's been fascinating for me. It's also been somewhat reassuring to hear from you that the processes actually work if people have the political will to work them.

**KENNEDY:** Oh, most definitely. But I do worry about the absence of the political will.

**RITCHIE:** I note in the *Congressional Record* a lot of senators these days talking about "regular order," as something they'd like to see resumed. They'd like to go back to where bills were shaped in the more bipartisan activity in the committees than on

the floor. The passage of the agriculture bill this year was sort of a triumph of regular order over partisanship.

**KENNEDY:** Right.

**RITCHIE:** It was passed over a presidential veto after a hugely complicated process. But there was a lot of talk about regular order while that was going on. Senator Spector talks about regular order in the Judiciary Committee pretty regularly and you hear almost a sort of nostalgia when they request it. It also reflects a sense of dissatisfaction with the efforts to go around regular order. And yet the leadership in both parties, beginning with Newt Gingrich in the House and on to Nancy Pelosi, and going back to probably Trent Lott and Bill Frist as well as to Harry Reid, the leaders have tried to go around the regular order a lot more to expedite matters for one reason or another. Skipping conference committees—

**KENNEDY:** Right.

**RITCHIE:** —by amending the bills to make them conform. Passing over senior members to be chairmen of the committees.

**KENNEDY:** Right.

**RITCHIE:** Trying to get the leadership rather than the committee chairs running the show. That seems to be the trend of at least fifteen years in development, and both parties seem to have embraced that.

**KENNEDY:** Yes, but you're the historian. You know that in Congress these things have ebbed and flowed. You've had Speaker [Joseph] Cannon ruling the House with an iron hand and then you'd have the revolt of the committee chairs. You had Woodrow Wilson writing about all the work of Congress occurs in committee. So these things go back and forth. My concern is you used the word "nostalgia." People are calling for the regular order with a sense of nostalgia. Okay, but those are the people who remember regular order. My concern is that the more recent members of the Senate have never seen regular order, so they feel no sense of nostalgia. They don't know what they would be returning to and they may not think that regular order is a good idea because

they don't know what it is.

**RITCHIE:** And that it worked.

**KENNEDY:** And that it worked, right. Well, thank you sir.

**RITCHIE:** Thank you. This has been a really very panoramic view of the institution.

**KENNEDY:** Well, you're kind to say so. As I say, I've enjoyed it. All of this is very near and dear to my heart and I like talking about it.

**End of the Seventh Interview**