DRAFTING LEGISLATION
Interview #4
Thursday, May 8, 2003

RITCHIE: Earlier we talked about the Panama Canal Treaties, the SALT agreement, and other events during the Carter administration. In 1980, there was a huge change when Ronald Reagan got elected president and the Republicans won the majority in the Senate for the first time in twenty-six years. I wondered whether that historic moment affected in any way the type of work that you were doing and the work of the Legislative Counsel's Office?

RYNEARSON: Well, it did have an impact in terms of foreign aid legislation, which we had been considering on an annual basis at both the authorizing and the appropriations levels. With the Reagan administration's emphasis on providing tax cuts and the mounting deficit, it apparently became politically less doable to do an annual foreign aid authorization bill. After 1981, we did not have another foreign aid authorization bill until 1986, so throughout all of the Reagan years, there were only two foreign aid economic-related comprehensive authorization bills enacted into law. That did have a direct impact on my work.

There was also a general tendency, because the budget became such a hot political item, to let the appropriations bills slide to the end of the Congress and do an omnibus law at the end of the Congress. That had very significant ramifications for the work or our office. It meant primarily that, at the very end of the session, Congress was cobbling together what otherwise would have been a number of separately enacted or considered pieces of legislation into one mega piece of legislation running hundreds of pages in length. We would be drawn into that, of course, and in addition, it meant that many of the issues that had budgetary ramifications during the course of the year would be considered at one time so that, in effect, all of those issues remained on the table for further amendment late into the session.

This was an enormous strain on our staff and it also created difficulties in preparing a law that was properly usable as a reference work. In other words, when you start to stitch all of these laws together, it becomes difficult after enactment to locate a specific provision because the whole thing has not been properly restructured for that purpose. This created enormous legal citation problems and these laws were very difficult to use. Of course, we were some of the users of those very same laws. In subsequent years, it would make our

work even more difficult. Also the Appropriations Committee had a very established style and wanted to maintain the maximum level of control over the preparation of the documents. Our office was frequently frustrated by the final product. We felt they were not as good products as we normally produced doing authorization laws.

RITCHIE: An administrative question about this: in the structure of things, who does the Legislative Counsel report to? They're not under the Secretary of the Senate. Do they report directly to the majority leader?

RYNEARSON: The Legislative Counsel of the Senate is appointed by the President Pro Tempore of the Senate without regard to party affiliation or political opinion. The Legislative Counsel, in turn, hires the legal and administrative staff of the office based on the same considerations but subject to the approval of the President Pro Tempore. As a matter of custom, over the years, the President Pro Tem has deferred to these selections to make sure that they are made on the basis of merit alone. Although the head of the office is appointed by the President Pro Tem, there is a long tradition of nonpartisanship within the office. I stress that it's nonpartisanship. It's not bipartisanship. We do not have a Republican staff and a Democratic staff within the office.

This has worked out very well because the function of the office is legal and very technical. There is not a Republican way or a Democratic way to write a law beautifully. The content would certainly vary, but the drafting techniques employed are without regard to any party ideology. We're very proud of our record there. I don't remember any situation in our office where any member of the office tried to aid one party over another.

RITCHIE: So when the parties changed, and Strom Thurmond became President Pro Tempore and Howard Baker majority leader, they went along with the nonpartisan nature of the office? There were no efforts to make any changes?

RYNEARSON: Absolutely. In that sense, the office did not change at all with the 1980 elections. During my tenure in the Senate, I believe there were five changes of party control in the Senate and none of them had any impact on the personnel or the type of function performed by the office. What I was referring to earlier, with the appropriations bills, was the effect of the Reagan agenda on the Senate and certainly every president's agenda affected the type of matters that would come across my desk.

I also might mention another story in regard to the '80 elections and the new administration coming in in '81. Senate Baker was minority leader at the time and then assumed the position of majority leader. It just so happened that his administrative assistant, Rob Mosbacher, was engaged to be married to an attorney in my office, Catherine Clark. I had the honor of being invited to Senator Baker's house for the wedding reception, which also coincidently occurred, I believe, the Saturday following the November 1980 elections. I recall at that wedding reception that Senator Baker had a very big smile on his face. In fact, I think it's fair to say that most independent observers had not expected that the Republicans would take control of the Senate and that he would, therefore, become majority leader. I do recall that Senator Baker looked very pleased by the whole situation.

RITCHIE: There have been several party changes in the Senate since you've been here. When there is a party change, suddenly people who used to be on the minority staff are the majority staff on committees, and new people are brought in. Is there a period in which you have to break in new committee staff and explain to them the types of services you do, and how do you go about doing it? Did you find that you need to do more instructional work at that stage, or did people come in with built-in savvy so that they hit the ground running?

RYNEARSON: As a general proposition, they do not come with the built-in savvy. I think it's one of the very regrettable things about the Senate. I believe it's becoming worse as time goes on. We do have to do a lot of educating at the beginning. I enjoy that aspect of it. The difficulty is not doing the education. The difficulty is really having people wanting to be educated. We find that there is a period of a number of months, maybe going into the second year, in which new staff are just trying to find us and know that they need further education in the legislative process and in legislation. I don't believe the Senate handles this very well. In terms of the committees, some committees do it better than others, and some committees have less turnover than others. You have to examine that committee by committee. In terms of the Foreign Relations Committee, even when I retired after more than a quarter of a century, there were a half dozen individuals on the committee staff with whom I had worked for all or most of my tenure. There is some stability within committees.

In terms of the personal offices, however, I found that legislative directors were not good at getting their new legislative assistants instructed, as a general rule. Of course, when the legislative director himself or herself would change, it was almost as if the senator had lost all institutional memory within the office on how to deal with legislation. Frequently

I found that successive LAs would not be instructed by their predecessors on how to relate to the Legislative Counsel's Office. This definitely caused problems because drafting legislation requires that the drafters have a base familiarity with the legislative process in order to avoid spinning wheels. Frequently, when new staff would come to us for drafting, they would be somewhat insecure and would not want to admit the areas in which they needed instruction. Also, they would tend to be very inflexible in terms of our interaction. The attorneys would ask questions to obtain a more refined understanding of what the legislative intent would be and the LAs would either not be responsive to those questions or would promise to take the questions back to the LDs and then not follow through. Or simply the LA would insist on a literal direction from the office and, basically, stiff the attorneys in attempting to fill in the details of the legislation. This, probably, was a source of more frustration and lost time by our legal staff than any other single thing. Changes in party control of the Senate would just exacerbate that situation.

RITCHIE: What kinds of mistakes would people make? What were the typical errors? You say they wanted to keep the details in. What did you find, in general, were the types of blunders, perhaps, that LAs and LDs made.

RYNEARSON: Well, how many hours do you have? [laughs] It ranged the gamut. New legislative staff in members' offices frequently would not know the difference between the various legislative vehicles in the Senate, the difference between a bill and a joint resolution and a concurrent resolution and a simple resolution, or even a floor amendment. This was something that had to be explained repeatedly. I guess I didn't mind doing that. I guess I was just amazed that individuals having the title of legislative assistant and legislative director did not know such basic information. Then, of course, there was a more complicated problem that most attorneys graduating from law school are not familiar with. That is, the difference between the titles in the U.S. Code that are positive law of the United States and can be directly amended and those titles which have not been reenacted by Congress as positive law and, therefore, are not properly subject to amendment. Rather, the United States *Statutes at Large* are the documents that are amended in those cases. This was something that had to be explained and discussed repeatedly.

More fundamentally, the errors that the legislative staff would make would be in not knowing how to relate to our office, not knowing that we worked basically on a first come, first serve basis. Everyone wanted to receive special treatment. I think that is part of the

way congressional staff behaves generally, but it is also partly attributable to ignorance of our office and the enormous workload of our office.

At any given time during the year, to make a drafting request of the office, you would likely find that the attorney who was able to bring the most expertise to the request would be backlogged. A certain amount of waiting would be required before we could start on your draft. I prided myself greatly on keeping that wait time very short. It was probably the thing that I did best, to make sure that the work got out of the office in a timely manner. But it was not an easy thing to do. Other attorneys had difficulty with that, either because their workload was heavier than mine or perhaps because they received drafting requests which were longer than mine and, therefore, would back up more clients. It would vary from attorney to attorney and from situation to situation on how expeditiously a legislative assistant could get legislation drafted. Nevertheless, in my case, I would say that I did many requests the same day they came in and most other requests took only 48 or 72 hours. Then there would be the occasional request that would require a longer time.

In any event, new legislative staff had difficulty with that. They also had difficulty in knowing what level of detail to provide us. Generally speaking, my clients divided into two camps. There were the staff who would say, and I'm being somewhat facetious here, "Why don't you rewrite all the immigration laws of the United States to reform them?"–something which I actually was requested to do and did. Or, "Why don't you reform the foreign aid laws of the United States to consolidate them?"–with not much further guidance. Those were staffers I called the "big picture" staffers.

Then there were other staffers who would provide me with a draft either written by them or, more likely, from an outside law firm or lobbying firm. They were basically looking for me to put the draft on a Senate form and tell them that it had my seal of approval. These individuals would go so far as to try to tell me where to place commas and semicolons in the sentences. I liked to refer to them to myself as the "micro managers."

Then, of course, there were some dear staff who fell in between, who understood that what our office was looking for was the legislative policy, usually expressed at an intermediate level of detail, that would allow me the opportunity to raise questions with the staff on which legal approach they would like to take. They would allow me some flexibility in organizing and phrasing the language. In fact, they might allow me complete flexibility

in phrasing. But all the time, the policy that I was writing was the policy being directed from the staff. It was just not being micro-managed. The policy was being well thought through so that various items that are essential to implementing policy, such as reporting requirements, consultation requirements, administration within the executive branch, were being thought through by the legislative staff and were not merely blanks for which I would have to elicit the policy. It is that third category that best suited my ability to serve legislative staff and it was that third category that I would least likely find with new legislative staff, especially after party changes of control of the Senate.

RITCHIE: But people were more likely to develop that kind of a style or approach the longer they were here, and appreciate what it was that your office could actually do?

RYNEARSON: That's right. Generally speaking, I preferred to work with long-time staff rather than new staff simply because it enabled me to do a better job. They were better prepared and because they were better prepared, I could produce a more sophisticated piece of legislative drafting. The difficulty that arose over the years, however, was that it appeared that the Senate legislative staff were turning over at an increasing rate. At the time when I retired, I thought that it was more or less typical to find that LAs were leaving the Senate after a year, a year and a half, two years. The frustration was that just at the point where I was establishing a comfortable working relationship with the staffer, where the staffer knew what sort of information I needed to do my A+ job for them, it was at that point that they were departing, and as I said before, frequently not passing on any of things they had learned from their interaction with me to their successor. With each senatorial office, it appeared that one was starting over with the legislative staff roughly every two years.

In any event, the 1980 change in party control in the Senate, although it did not affect the makeup and function of my office, it did have the same consequences as any change in party control would have. In addition, it had the changed emphasis in the agenda, which I mentioned earlier. And I would say it had one other effect. It ushered in an era of very close party ratios within the Senate. I believe that this was very significant for what followed in the remainder of the 22 years of my tenure. I believe in 1980, Republicans won control of 55 seats in the Senate. Of course, not all of the seats were up for election, but the ratio was 55 Republicans to 45 Democrats as a result of the '80 elections. Thereafter, the ratio between the two parties, as I recall, never exceeded that. No party had more than 55 senators and for part of the time, the majority party had fewer seats, 53 seats for quite a while and then

there was the famous 50-50 Senate.

In light of the Senate cloture rule requiring 60 votes (of course, when I first came to the Senate, it was a two-thirds vote of all the senators voting and then it went to an absolute number of 60 votes), the close party division had a devastating effect on the majority leader's ability to promote an agenda. That might be good and might be bad, but it had a major impact on the way the Senate conducted its business. The majority leader would call up a piece of legislation and find that he could not bring it to a final vote, so then he would put it back on the calender. This might happen several times on the same day, so that on any given day, the legislative staff could be quite at sea as to what the actual agenda would be that day. In terms of my office, that meant that the usual last minute rush to have floor amendments drafted might occur on multiple bills on the same day. This would create difficulties within the office to free up legal staff to help out the legal staff dealing with the immediate legislation on the Senate floor because no one knew what the immediate or pending legislative matters would in fact turn out to be. The 1980 change in parties, I think, marked the beginning of this era of very difficult preparation for Senate legislative business. That persists to this day.

RITCHIE: You mentioned going to draft amendments to bills that were already on the floor. Were there cases in which legislative assistants and others drafted amendments that they hadn't run through your office, and the legislation had to be improved upon somehow while the bill was actually being debated on the floor?

RYNEARSON: When a bill would come to the floor, several scenarios might unfold or all of the scenarios might unfold. One scenario would be that the opponents of the legislation would have worked out deals with the floor managers whereby certain legislative language would be found acceptable to be added to the bill. At that point, and this would frequently be late in the consideration of the bill, the opponents, and perhaps the managers also, would come to our office to have the compromise amendments drafted. Of course, they were in an enormous hurry because they wanted to seal the deal and get the bill passed.

In another scenario, the opponents of the bill would attempt to filibuster the bill by amendment. For that purpose, they would require the drafting of scores of amendments for the purpose of killing the legislation, either because the adoption of any of the amendments would then make the bill unpalatable to the proponents of the bill, but more likely because

they would consume unlimited amount of time and frustrate the will of the proponents to endure the onslaught of amendments. In that latter case, the amendments were frequently not very "serious." They were serious in delaying the legislation but the actual changes they were proposing to make to the bill were not intended seriously to be adopted.

A third scenario might be where both proponents and opponents of the legislation had draft amendments, either drafted by lobbyists or by themselves, which they intended to offer when the bill would come up for consideration, but for reasons of paranoia, they did not want the Legislative Counsel's Office to see the draft until the bill was actually on the Senate floor. These individuals, I guess, were under the mistaken belief that once they showed the document to us the cat would be out of the bag and their adversaries would know what they were up to. That was and is totally a mistaken tactic because we never shared that kind of information among adversaries or outside the proposing office at all. There was always total client confidentiality in our office.

I might forgive some of those individuals because they might have believed that once it was drafted that, although our office would not divulge the information, that they could not keep the information totally confidential outside our office once they had a finalized draft. There was a tendency that once something was drafted, even if the person who was behind the draft was not serious about it, the draft would assume a life of its own, that lobbyists would line up in favor of it, and a piece of legislation that a senator expected to go nowhere might start to have some traction. So there was that third scenario.

Then there was the "Oh, my God" scenario, where the bill comes up on the floor, either by surprise or well known with adequate notice. The legislative staff, since they were often involved in crisis management, would only focus on the bill once it had arrived on the floor. They would then call my office frantically for floor amendments. I was largely disgusted with the people who had adequate notice. It really showed which staff were well organized and which were not. It also highlighted which staff were newer. I just never could reconcile myself to why a legislative assistant with advanced notice that a bill would come up on the floor would then come to our office in the last hour or two of the bill's consideration, unless of course, the staffer fell within one of the other scenarios that I described. Frequently, a staffer just had not done his or her homework to get the floor amendment drafted in advance. Whichever attorney in my office was the attorney primarily responsible for drafting work on a bill that was before the Senate, that attorney could expect

to be in a very frantic, hectic mode throughout the consideration of the legislation on the Senate floor.

RITCHIE: Would you ever get any rivalry between the staff of a senator's staff as opposed to the committee staff on the same bill? Were people coming from different angles who were worried about what was being done on the other side in the process?

RYNEARSON: There were considerable rivalries. In terms of Senate floor amendments, people would come to me and say, "We expect Senator X to offer a first-degree amendment to this bill. We want a second-degree amendment drafted for our boss, Senator Y, in order to make sure we have the first vote on this issue and in order to counter Senator X's policy with which we strongly disagree." This got to be quite a drafting feat because I might very well not be aware of Senator X's first-degree amendment and even if I were aware of it, I couldn't make that document available to Senator Y's staff. I had to prepare Senator Y's second-degree amendment as if I had no knowledge whatsoever of Senator X's first-degree amendment. So things could get very dicey, but I maintained that wall of confidentiality successfully, I believe.

Also, there were quite a few rivalries between the committee staff and the staff of members who were not chairman or ranking minority member of the committee. These rivalries could be with members who were not on the committee who were attempting to undo the committee's work, or it could be rivalries of sorts between the chairmen or ranking minority members' permanent staff of the committee and the personal representative staff of other members on the committee. In other words, the chairman might have one agenda, but the personal representative of a junior member of the chairman's own party might require some floor amendment be drafted in order that the junior member would get more recognition than otherwise. The junior members were frequently not content to just go along with what was referred to as the chairman's "mark," which referred to both the dollar figures that the chairman's staff had come up with and also the chairman's language. So there were rivalries within the committee.

There were also what you might refer to as pseudo rivalries, where a member contests something knowing, because of the member's junior seniority status, that they may not be able to prevail, but because they are facing reelection, they need to have something with their name on it. There were these rivalries in which the chairman and ranking minority member

would attempt to, essentially, throw the members a bone for their reelection campaigns.

There were also, of course, enormous party rivalries. One of the things that surprised me the most about the Senate, and I think was exacerbated with the close party ratios, was the degree of partisanship that I found in the Senate. I had naively thought that with members serving six-year terms, and a number of members coming from large states where the party divisions would be close, that there might be less partisanship than what I found. It was not unusual for our office to receive legislative drafting requests that were clearly designed to embarrass the other party, embarrass the party in control of the White House, or simply to undermine individual senators' agendas. Particularly if it became known that a senator was campaigning for the presidency or about to campaign for the presidency, there would be no end of staffers who would come up with clever legislative drafts to make that senator look bad. Conversely, the staff of the senator seeking the presidency would be attempting to burnish the senator's credentials through draft legislation. So it worked both ways. The Senate had an enormous number of rivalries, and I got to see a good number of them because it was not unusual for me to be drafting on both sides of the rivalry.

RITCHIE: Earlier, you mentioned that one senator would come to you or one staff would say, "We want a first-degree amendment." Another would say, "We want a second-degree amendment." Could you explain what those are and why one would adopt one versus the other as a tactic?

RYNEARSON: All amendments do one of three things. They either strike out text, insert text, or both strike out and insert text. When you do this directly to the text of a bill, that is a first-degree amendment. When you do it to the first-degree amendment, that is a second-degree amendment. But it is not in order under the Senate rules to do it to the second-degree amendment. Furthermore, under the Senate rules, the second-degree amendment gets voted on first. So if the second-degree amendment strikes out almost all of the first-degree amendment and inserts different language, the proponent of the second-degree amendment, if they prevail, will have totally knocked out the proponent of the first-degree amendment from modifying the bill in that place. My office received many requests over the years to prepare that type of second-degree amendment, which looks a lot like a substitute amendment, but is not quite a substitute amendment. It is referred to as a perfecting amendment. But it perfects, in this case, by obliterating the policy expressed in the first-degree amendment. That's the primary tactical advantage to doing it.

RITCHIE: But a substitute amendment, as you suggested, would completely replace the original amendment. What's the difference between a substitute amendment and a second-degree amendment?

RYNEARSON: The problem is that substitute amendments can be amended themselves. So what results is a very complex amendment tree, where one can lay down a substitute amendment to the entire bill, which under Senate rules is treated as original text for further amendment in two degrees. Or one can amend the perfecting amendments. On any given bill, eleven different amendments can be pending at one time. The majority leader in the later years of my tenure attempted to offer all the possibilities in order to fill up the amendment tree to prevent adversaries of the legislation from proposing their amendments. However, that still did not enable the majority leader to shut off debate because each amendment could be debated for an unlimited amount of time unless unanimous consent would be obtained. The majority leader could block amendments but still could not achieve cloture unless it were voted by 60 senators. The amendment process was a process that involved a lot of work, frequently at the last minute, and still did not guarantee passage of the legislation to which the amendments were drawn.

RITCHIE: I recall that Senator Lott was particularly interested in filling the amendment tree. For someone who is not in the Senate, or a new staff person coming in, how would you describe what the amendment tree is?

RYNEARSON: Well, the amendment tree is simply all of the possibilities of amendments that may be pending at the same time to a given piece of legislation that are permitted by the Senate rules. After you have filled the amendment tree, the only thing in order, if any amendment is in order, are those amendments, and they must be taken up for a vote in a certain sequence. For purposes of new staff, the best way to learn about this is to read the definitive work by the former parliamentarian of the Senate, Floyd Riddick, where he describes these possible amendments in great detail and provides charts so that you can learn the sequence of voting and the sequence of laying the amendment down. That's the best that I can do at the moment.

RITCHIE: In the House, when a bill comes up, the Rules Committee issues a rule that spells out the number of amendments it will have. The Senate doesn't have anything like that. Is the amendment tree comparable to what the House Rules Committee is doing

in defining the possible arrangement to a bill?

RYNEARSON: I would not say so, actually. I would say a more apt comparison would be with the unanimous consent agreement. The difference, of course, being that in the Senate you need unanimous consent. In the House, you merely need a majority vote to approve the rule that is laid before the House. The unanimous consent agreement usually deals with the same elements that the House rule deals with, namely how much time for debate is permitted for the overall legislation and for each amendment. The second element is what type of amendment is in order, i.e., must the amendment be germane to the bill or not?

In the House, I believe, as a general rule, nongermane amendments are not permitted in the rule that is adopted, but this is done on an ad hoc basis. In the Senate, what is more typical is, if a unanimous consent agreement is reached, the majority leader will specify the amendments that are in order by the name of the senator who would offer the amendment and by the subject matter. This list might be quite long and it might include amendments that do not pertain to the subject of the legislation. Then the unanimous consent agreement will state that relevant, germane amendments to these first-degree amendments will be in order. That's the way the consent agreement is typically structured. The problem in the Senate, of course, is that it is very difficult to arrive at these unanimous consent agreements that would actually provide for a vote on final passage of the legislation. On major legislation, many days or weeks might go by before the majority leader is able to hammer out a deal that would permit a unanimous consent agreement to be adopted.

RITCHIE: You mentioned the majority leader's role in this. Would you deal with the majority leader's staff or with the majority party secretary on some of these amendments? Or were you only dealing with committee staff and the individual senators' staffs?

RYNEARSON: We would deal with all the offices in the Senate that had legislative responsibilities, and we did a lot of work for the majority and minority leaders of the Senate. We would not draft the actual wording of the unanimous consent agreement. That was viewed as more of a function for the Office of the Parliamentarian. The parliamentarian, if anyone, would be consulted on the language of unanimous consent agreements. However, we would be the office that would be drafting the amendments that would be permitted under the agreement. It was always amusing to draft a hundred amendments to a piece of

legislation and then find a day or two later that a unanimous consent agreement was being adopted which effectively ruled 80 of these amendments out of order and narrowed the field. We often wondered why some of these consultations couldn't have occurred before we did the actual drafting, which is a very labor-intensive process. We try always to cross the t's and dot the i's, and you do that on scores of amendments that are not even being offered or could not be considered in order, and you want to gnash your teeth.

Part of the tactics for floor consideration by individual senators was to develop many amendments and essentially present them to the floor managers with one or two motives at work. Namely, "I've got all of these amendments, couldn't you find just one or two that you could accept?" Or, alternatively, the motive was, "I have the ability to extend debate here for days at end because I am fully prepared with these lovely documents prepared by the Legislative Counsel's Office and I'm willing to talk until the cows come home on these amendments." Whereupon, the floor manager might suggest, "Well, gee, we could accept one or two of these amendments if you withdraw the rest." Frequently, part of the unanimous consent agreement involved several senators agreeing to withdraw amendments that they had laid down before the Senate.

There was a lot of tactical considerations at work, but it did not ease the job of my office. If anything, it made our work a great deal more difficult. It was reflective, a little bit, of a trend that developed over the years in the Senate. That was, as a general proposition, toward the end of my tenure, senators and Senate staff were in the mode of drafting first and asking questions second. For whatever reason, it served them to have a detailed legislative draft in hand, even though they frequently knew that that draft would never see the light of day, or if it were offered, that it would never be adopted. The draft was serving a political function for negotiation with the senator's adversaries on that political policy issue.

This was something that I found was avoidable in a number of cases and that it was not avoided. That is regrettable. We too much got into the mode of adversaries throwing opposing drafts at each other instead of getting together in meetings and working out the differences before the drafting was actually performed. It involved a great loss of time in our office to prepare drafts that everyone knew were untenable. We did that faithfully. We are servants of the members and the committees, and we did that faithfully. But I believe it could have saved everyone, including the members and their legislative staff, much time if they could have gotten together and dealt with one another directly and developed the policy

jointly rather than developing the policy in isolation in the privacy of their offices and then finding that the drafts had no legs.

RITCHIE: Were there some senators that you found were more cooperative? I wondered about the Foreign Relations Committee. If you had a period when Charles Percy was chairing it, would that be different than a period, say, when a more confrontational senator like Jesse Helms was chairing the committee? Were there some that you would hold up as a model of someone who adopted the cooperative, rather than the confrontational, style?

RYNEARSON: I definitely believe that it did correlate with personalities and who the particular chairman or ranking minority member was at the time. It also correlated with what the overall political situation was between the committee and the White House, that is, whether or not the same political party controlled the White House. I believe the examples that you gave me generally worked out in practice in the opposite way. Chairman Percy had a fairly difficult time within the Committee achieving consensus for whatever reason. Chairman Helms of the Foreign Relations Committee did have a fair amount of success in achieving consensus. I'm not entirely sure why that was. I do recall that Chairman Percy had one markup that went for four or five weeks, where we met two or three days each week on the same piece of major legislation. Then in the later years of my tenure, markup sessions under Chairman Helms and Chairman Biden were frequently no more than a half a day in total on the same type of major legislation.

Clearly, what had happened in the case of Chairman Helms and Senator [Joseph] Biden as ranking minority member, is that they put their staffs to forming a consensus before the markup session would ever occur. The staff would meet for weeks or even months in advance of the markup behind the scenes, attempting to forge a consensus. That had the very beneficial effect that when the committee went public, it was not airing out its dirty linen in front of the public.

RITCHIE: Under the "sunshine rules," they had to do the markup in public, right?

RYNEARSON: That's right. It had a potential for a downside in that, when the staff were meeting in informal settings, people such as Legislative Counsel's staff or stenographers might not be present. I was very fortunate in that I was involved by the staff

either directly or indirectly with their informal meetings. In the case of the State Department authorization bill for fiscal years 1998 and 1999, I attended almost all of the informal staff meetings. In the case of the State Department bill for fiscal year 2003, the staff met and did not insist on my being present but fed me the results of their meetings so that I could be preparing draft legislative language for their further review.

There is this downside that when you go to the informal meetings that are not open to the public, the committee may be tempted not to have the appropriate Legislative Counsel present. That really detracts from the committee's considerations, although it saves the counsel scores of hours of meeting time, which most attorneys appreciate, and I came to appreciate. But I do believe the meetings are very important and that they do enable the staff to develop the legislation jointly without throwing individual, unviable documents at each other. I believe that committees, by and large, are receptive to doing that.

Where it breaks down is largely with the individual members who want to have their own piece of legislation drafted and are aware that the legislation is merely a talking piece, that it will not be enacted as is. This is an area where there might be some room for the members to get together with opposing members and have more staff consultations in advance of drafting. It might save them some headaches later on. Although it's great to have your name on a piece of legislation on which you are a big believer, it can also be a source of embarrassment if that legislation is not enacted or is later drastically changed. I believe that the members could do well by having their staffs meet more in advance to develop legislation.

RITCHIE: There is that old saying, "You can get a lot done as long you're willing to give somebody else the credit for it."

RYNEARSON: That may be too high a price to pay for some of the members. You asked about the Foreign Relations Committee. The periods where the Committee seemed best able to form a consensus among the staff and the members to present a public front seemed to be the periods when Senator [Richard] Lugar first chaired the Committee and also during the Helms and Biden chairmanships. When each of them chaired the Committee, they were able to work out a consensus, but the other chairmen during my tenure had a great deal of difficulty with that. A number of the markups were contentious when the other members were chairing the Committee.

RITCHIE: The markups went public in the early '70s, and since then they've been in pubic session. Some of the old timers regret that they don't do markups in closed session anymore. Do you think that doing markups out in the open with lobbyists being able to sit in the room, or the press being able to sit in the room, is a detriment, or can the markup work adequately under the gaze of publicity?

RYNEARSON: This is a tough question. Speaking selfishly as a draftsman, I believe things could go more expeditiously in one of the old executive session markups. The public does have a right to know, though. I don't believe there is any going back to the old executive session markups. I suppose that some sort of a mix could be employed where a matter of particular contentiousness might be discussed in executive session prior to an open session, but to have the amendments voted on in executive session, I think that day has passed.

The one thing I really found grating in the open sessions, and it might not entirely be solved in the executive sessions, is that in the open sessions there is a tendency for the chairman or ranking minority member to call upon the administration's highest ranking representative, who is sitting in the audience, to stand up and give a view of an amendment that is being proposed. I always found this offensive to the Senate's legislative function. I believe that the administration should have its opportunity to be heard in the hearing context, but when the actual markup would come, that would be time exclusively reserved for the members to speak. I suppose my concern is more a matter of form than substance because the administration could certainly phone in input and draw members away from an open markup to be chewed out or supported, as the case may be, by some official in the administration. Nevertheless, I thought it gave a bad appearance to the public to have twenty senators sitting around begging an administration official to give their position on an amendment. It's just the way I felt. But I believe the days of totally closed executive sessions are a thing of the past. We just won't see them again.

RITCHIE: One of the fears when they went to sunshine was that this would just force the discussions further back into the back rooms. The senators would discuss the issues in private before the actual markup. In fact, it appears to be the staffs of the senators now discuss the issues in private before it goes to the actual markups.

RYNEARSON: That's a very good point. It could be that it has deprived the members of a little bit of their opportunity to express themselves and it definitely has shoved things into the back rooms at the staff level. The bottom line is that the intent of having open sessions has been at least partially thwarted. As I said, it has the downside that it gives the staff the impression that they don't need to have appropriate counsel present because they are only talking about it at the staff level. In fact, they are making big decisions.

I guess I should also relate something that occurred to me at one of my early markups in the Foreign Relations Committee. That was that in the course of the markup, members called for a compromise piece of legislation to be drafted, a compromise amendment. The staff came to me to draft that right there in the markup session and the markup session was being televised. The cameraman followed the Foreign Relations Committee staffer around the room until they got to my seat. Thereupon, the cameraman proceeded to film over my shoulder as I drafted this compromise. Well, of course, as a young attorney, I was thrilled to have the attention. I also was mortified. My drafting practice throughout most of my career was to use a pencil and to use a liberal amount of cross outs and erasures. When I look back on it, I'm mortified that this was actually being filmed. I doubt the members of the Committee were terribly amused that I had attracted the attention of the television camera. In any event, that was the only time that that happened in my career. Those are some of the pitfalls of the open sessions.

RITCHIE: [laughs] Thank you. This is wonderful. It's sort of taking us behind the scenes of the open sessions, in a sense.

End of the Fourth Interview