TREATIES IN THE SENATE
Interview #3
Monday, April 28, 2003

RITCHIE: The last time we met, we talked about the Panama Canal Treaty, and it might be good for the record to go back and to talk about exactly what the Senate's role is in the whole treaty process.

RYNEARSON: Well, I'd certainly be glad to talk to you about it. The key thing to remember is that the Senate has no power to ratify treaties, but the Senate is required to give its advice and consent before the president may ratify a treaty. This derives from the constitutional provision in Article II, Section 2, Clause 2 that states that the president shall have power to make treaties, by and with the advice and consent of the Senate, two-thirds of the senators present concurring. This means, in effect, that the Senate's action is a necessary, but not a sufficient, condition for the president to ratify a treaty. The president retains the discretion not to ratify a treaty to which the Senate has given its advice and consent. Since the Senate may withhold its advice and consent for any reason whatsoever, it is implied that the Senate may condition its advice and consent. It does this through the resolution of advice and consent by saying that its advice and consent is subject to certain conditions. As a legislative drafting matter, this meant that senators and the Foreign Relations Committee, which has jurisdiction over treaties, would come to me to request that I draft conditions to the Senate's advice and consent.

The treaty is drafted in the executive branch through negotiations with the foreign party, and an agent for the United States, a United States diplomat, usually will be the person who initials the negotiated text of the treaty. The president is required to submit the treaty to the Senate before ratification. One of the interesting legal questions is that the president does not have to submit each and every international agreement to the Senate, but only those agreements that the president designates as "treaties." This gives the president, of course, some discretion, and the Senate usually likes to guide the president in his exercise of that discretion. During my tenure, I know of at least one instance in which the chairman of the Foreign Relations Committee threatened to stall on approving diplomatic appointments unless the president would submit a specific agreement to the Senate for its advice and consent. So the Senate does have a nonlegal way of making its wishes known in this regard. There is also an administrative document, Circular 175, which is used by the Department of

State to guide it in determining which agreements are submitted under the treaty power.

In any event, after the president decides to submit a particular agreement to the Senate under the treaty power, the original document of the treaty is submitted to the Senate and, under current practices, is held by the Executive Clerk of the Senate. Meanwhile, jurisdiction for consideration of the treaty is referred to the Committee on Foreign Relations. After the Committee on Foreign Relations acts, if it decides to act favorably or without recommendation, the treaty is placed on the Executive Calender and may be called up under the usual procedures. When it is called up in the Senate, a motion will be made to lift the injunction of secrecy on the treaty, whereupon senators may offer these conditions to the Senate's advice and consent. Sometimes the conditions that are agreed upon by the Foreign Relations Committee are already incorporated in a draft resolution of advice and consent that is laid before the Senate for its further consideration and possible amendment.

If the Senate approves the resolution of advice and consent by the supermajority required by the Constitution, then the actual treaty document and the resolution of advice and consent are transmitted to the executive branch. If the president decides to go ahead with the ratification, he will direct the Secretary of State to prepare an instrument of ratification, which will contain most or all of the Senate's resolution of advice and consent and affix the Great Seal of the United States to that document, the Secretary of State being the custodian of the Great Seal pursuant to United States statute. That instrument of ratification will then be exchanged with the foreign party in the case of a bilateral treaty, or deposited with what is known as the "depositary" in the case of a multilateral treaty, the depositary usually being an international organization such as the United Nations. In the case of a bilateral treaty, the foreign party must find that the United States action on the treaty is conformable or consistent with its own act in ratifying or acceding to the treaty. If the foreign party and the United States find that the two actions are consistent, they will then execute what is known as a protocol of exchange. That represents the point at which the two parties find themselves in agreement. The president will then, usually at a future date, proclaim the effectiveness of the treaty as supreme law of the United States by issuing a proclamation. This document may acknowledge that the treaty has a delayed date of entry into force. So a treaty, in sum, operates on two levels, the point at which the United States and the foreign party are bound under international law and the point at which it becomes effective for United States domestic purposes. Those dates may be very close in time. They may even be the same day, but they do not have to be the same day.

RITCHIE: Could you give me a summary of what your general role would be in terms of a treaty? When there was a major treaty coming before the Senate, what types of things would you be consulted on?

RYNEARSON: I would receive two types of requests. The first type of request that I might receive would be from the Committee on Foreign Relations to assist it in preparing the resolution of advice and consent that would be laid before the Senate for its consideration. The resolution might be quite simple, a one or two sentence document, just directing that the Senate give its advice and consent to ratification of the treaty, or it might be quite complicated, subject to multiple conditions that could run for many pages. I would work on that document much the same way that I would work on drafting a bill. We might do many drafts of it until we got the exact language. The difference would be that there would be an international law element to the conditions that I would be called upon to draft. Conditions such as reservations, understandings, treaty amendments, as we discussed earlier, have particular meanings in international law. The one question that would always come up would be how to appropriately denominate these conditions. Under United States law, the labeling of the condition is only some evidence of what the Senate's intent is in the adoption of the condition. So it is not conclusive, but it is an important question. It certainly may have important political ramifications, but it also has legal ramifications in terms of whether the treaty would require renegotiation.

The other type of request that I would get would also pertain to the conditions, but it would be from individual senators. The motives in offering those conditions, as we discussed earlier, could be quite varied. They might be supportive of the treaty by attempting to help the administration achieve a supermajority vote, or they might be intended to embarrass the administration or draft a condition that was politically impossible to vote against but which would act as a "poison pill" if adopted on the resolution of advice and consent. Those are the types of requests I would receive.

RITCHIE: As you mentioned with the Panama Canal, your work with this would actually take you through the committee process, and then down onto the floor of the chamber as well.

RYNEARSON: I did draft some items on the Senate floor, but usually I did it in the office. I was called upon to go to the floor on several occasions in connection with the

Senate's consideration of treaties, but usually while on the Senate floor I served merely as a resource and was not too actively involved on the Senate floor.

RITCHIE: What about in the committee hearings when they were marking-up or considering bills?

RYNEARSON: Until about 1996, I did spend a considerable number of hours in mark-up sessions of the Foreign Relations Committee. My role was to collect all written amendments, note down all verbal amendments, and draft any last minute amendments. In later years, those markup sessions became quite pro forma sessions. They might be quite short because the majority and minority staffs on the committee would have worked out the language through me in great detail before the meeting, and the Members would be voting whether or not to accept the work the staff had done, of course, all at their direction. So the markup sessions could be quite short, but the amount of drafting I did was the same or even greater since the staff would want to make many revisions to the compromise text.

RITCHIE: Well, you bring up an interesting point. We now have majority and minority staffs for all committees including Foreign Relations. Would you have gotten your inquiries essentially from the majority staff or would you get separate ones from the minority staff? Or did the majority and minority staff ever sit down with you jointly on something like this?

RYNEARSON: I guess the correct answer is that both situations occurred, that there would be cooperative activity by the two staffs and there would also be times in which the majority and minority staffs would come to me separately. What was most typical in the mid to late 1990s and into the 21st century is that the majority staff would approach me first and get me going to prepare a rough draft of their optimum language for a bill or resolution of advice and consent. Then they would sit down with the minority staff, usually without my being present, and would take in the feedback of the minority staff, and then the majority staff would revisit me to revise the draft. This might go on several times, so that I could very well have done several versions of a bill or resolution of advice and consent for the Committee before the Committee was ready to hold to a markup session.

RITCHIE: When you had a major treaty coming, what kind of preparation did you have to do? Did you have to follow the background of the treaty? Did you read newspapers

about it? What would you need to know when it came? Or did you just treat each one generically and approach it separately within the Senate's context?

RYNEARSON: In the case of the Panama Canal Treaties, since I was not initially very knowledgeable on treaty law, I took that occasion to do quite a bit of reading and I even read a book by, I believe, a Mr. Miller, who summarized the Senate's treaty actions in the 1800s, to get a better idea of what the practice was in the area. I also sat down with the assistant parliamentarian, Bob Dove, to acquaint myself with the Senate rules on consideration of treaties. I believe I read some from Professor Louis Henkin, at Columbia Law School, on treaty law. I delved into a number of sources and I examined resolutions of advice and consent that my office had prepared previously to try to arrive at a drafting style that was as technically accurate as I could achieve.

When I would be requested to work on a given treaty, the first thing I always requested was to look at the president's message of transmittal of the treaty. I wanted to look at that for two reasons: the president's message actually reprinted verbatim the text of the treaty and the president's message would also give useful background information and article-by-article interpretation of the treaty. I felt that I needed to read that before working on any given treaty. Then, depending on what I would be requested to draft, I might need to delve into other sources. That was my practice in drafting.

RITCHIE: What kinds of problems would come up when you were dealing with a treaty like this? What were the hardest parts of the assignment?

RYNEARSON: I found, actually, that working on treaties was one of the easier areas for me to work on after I had developed this initial expertise. I looked forward to working on them. The principal question that would arise would be how to appropriately denominate and phrase the Senate's conditions. Another way of saying this would be, how far could the Senate go in laying down a condition without killing the treaty completely? This did involve some careful wording. That part was not easy, but it was a challenge that I enjoyed and, of course, it had huge political consequences and did require a clear understanding of what the client's intent was. Treaty amendments were rare but it was interesting for me to decide where I would place new wording in a treaty. I knew that any treaty amendment I drafted would not likely be approved by the Senate because of its consequence of requiring renegotiation of the treaty, but they were interesting to do. The real challenge came with

whether or not to state a condition in the form of a reservation and whether that would necessitate renegotiation of the treaty. That would be a closer call.

RITCHIE: All treaties seem to be controversial one way or the other, but the Senate has only actually rejected twenty-one treaties outright over the last two hundred years, which is pretty remarkable. Actually, that doesn't tell the whole story. I know that the Montreal Protocol in '82 on airline safety was rejected. Has there been one since then?

RYNEARSON: Yes. The Comprehensive Nuclear Test-Ban Treaty was rejected by the Senate. Its rejection really split the Senate along party lines. I believe the background to that was that the administration was disappointed that the Senate had not approved the treaty after many years and attempted to use that inaction by the Senate as a campaign issue, whereupon the chairman of the Foreign Relations Committee, who was opposed to the treaty, decided in effect to call the administration's bluff. Since the treaty, as we established earlier, was physically in the custody of the Senate, the Senate could call it up. So the unusual situation occurred where the opponents to the treaty were the members who initiated the calling up of the treaty for the very purpose of definitively rejecting it. That is my recollection of the Comprehensive Nuclear Test-Ban Treaty.

RITCHIE: That's right. Were you involved in that?

RYNEARSON: My involvement in that was very minimal. Because the administration did not appear to have the votes, I seem to recall that I did not have many conditions to draft. But I'm a little uncertain on how much drafting I did there.

RITCHIE: One reason why more treaties aren't defeated is that presidents don't send the treaty to the Senate, like the Kyoto Treaty that the Clinton Administration negotiated and signed and then never sent it up. And then the Bush administration declared it dead. Then there are treaties that come down here and as you mentioned would just sit for years; administrations would fuss and fret but nothing happens on them. Another option is that there are treaties that get passed but the Senate has put its own stamp on it in such a way to try to get it through, changing the meaning of what the negotiators had in mind. It is a rare occasion when the Senate flat out votes a treaty down.

RYNEARSON: It is rare. I was very interested to see that that Comprehensive Nuclear Test-Ban Treaty was called up and defeated. But you are quite correct in saying that the record of approval of treaties is misleading. Nevertheless, on major treaties, the Senate appears to be quite loathe to reject the treaty because the president has so fully put the prestige of the country behind the approval of the treaty. The most notable exception is the Treaty of Versailles. As I recall, that was a case where the Senate had approved fourteen conditions that the president found unpalatable and then directed his supporters in the Senate, I believe, to vote against the final passage of the Senate's approval of the treaty.

RITCHIE: For some reason, President Wilson didn't seem to understand the necessity of building a coalition. He assumed that the public would push senators into supporting it. He never went the extra mile to make the compromises that would have been necessary.

RYNEARSON: One of the lessons that the Senate seems to have learned institutionally from that, and that the president learned from that, is the usefulness of having senators observe the negotiation process on major treaties. During my tenure in the Senate, I can recall two groups that were institutionalized for observation of the negotiation of a particular treaty. One was called the Arms Control Observer Group. I believe the other one was regarding the Central American Peace Negotiations, but I'm a little hazy on that latter one. (In any event, my office was called upon to draft resolutions establishing these groups, and we were also called upon to revise those resolutions with changing circumstances.) And, of course, I believe the president included senators on an informal basis in other negotiations. This seems to have directly emanated from the country's experience with the Treaty of Versailles.

RITCHIE: During your almost thirty years up here, there were not that many years when the president had a majority of his own party as the majority in the Senate. We've had this divided government, and long periods in which no party has had a commanding lead in the Senate.

RYNEARSON: Well, treaties certainly presented difficult negotiations within the Senate, not only for the reason that you gave, that the Senate majority party at times was different from the party controlling the White House, but also merely because the Constitution requires a supermajority vote for the approval of treaties. I don't believe that

at any time that I worked for the Legislative Counsel's Office in the Senate that any one party had a 67-vote majority.

RITCHIE: Not since the 1960s. When a treaty or an issue like this came along, and the staff came to you, did they come with an idea in mind what they wanted to do? Or did they need to be coached by you? Did they need to get background about what their options were? Given the rapid turnover on the staff of the Senate in recent years, did the staff people coming to see you really need the basics?

RYNEARSON: You raise two questions there. In terms of the ideas that they brought to me, I had to defer completely to those ideas and I was not introducing new ideas into their drafting. However, they did frequently want my legal advice on what I perceived to be the international law ramifications or statutory interpretation of a particular phrasing. My job was always to carry out their legal intent, but in the area of treaty law, there was a great deal of ignorance about the legal effect of the varying conditions. I would give advice on what that legal effect would be in my opinion, and then sometimes the staff would decide that they wanted to change the legal effect by changing the wording. There was always an interaction and a give and take there with staff on conditions to the Senate's advice and consent. My position was purely advisory. If a client wanted to attempt something that would have a drastic legal effect by attempting to directly amend the text of a treaty, I would not dissuade them from that. I would merely advise them as to what I believed the legal effect of that would be. In fact, over the years, I drafted many conditions that would have had the effect of requiring a renegotiation of treaties, conditions that were never approved by the Senate.

Also, I might add that since we're talking about treaties that did not go into effect as law of the United States, in 1979 I worked extensively on the drafting of conditions to the Strategic Arms Limitation Talks Treaty II, the so-called SALT II Treaty. In the course of my drafting, I did literally scores of conditions, but it turned out that, in the course of the Senate's consideration of that treaty, the Senate became aware that the Soviet Union had combat ground troops in Cuba and this became a major controversy that resulted in the Carter administration not taking the treaty to a final vote.

I had done quite a bit of work for both the Foreign Relations Committee and for individual senators on the SALT II Treaty that never saw the light of day except that I do

believe that the committee reprinted the resolution of advice and consent that I helped to prepare. Also, I recall that at the time of the consideration of that treaty, I believe the chairman of the Foreign Relations Committee was Frank Church. Senator Church had either initiated the discussion about the Soviet combat troops in Cuba or he supported those senators who wanted to make that an issue. Ironically, as I recall, Senator Church was favorably disposed toward the SALT II Treaty, but that issue, I believe, was the major issue in killing the treaty.

RITCHIE: The vagaries of international relations!

End of the Third Interview