

INTELLIGENCE-RELATED LEGISLATION

Interview #8

Tuesday, June 24, 2003

RITCHIE: Since we've looked at your dealings with the Foreign Relations Committee and the Appropriations Committee, I thought we should talk about the Intelligence Committee. About the time you came here, that committee was established as a select committee, a permanent select committee. What kind of relationship did your office have with the Intelligence Committee?

RYNEARSON: Well, we did perform legislative services for the Select Committee on Intelligence, and that means that we did do legislative drafting for that committee. The principal difference was that the committee had a somewhat limited legislative jurisdiction and, of course, it had the absolute need to protect its information from a classified standpoint. In terms of the former, it meant that we generally confined our drafting to helping the committee prepare its annual authorization of appropriations legislation, which also contained some programmatic authorities for the Intelligence Community. That legislation, interestingly, was a little different from other authorizations because the committee never wanted to disclose the dollar amounts involved on the public record. They had a neat little trick of cross referencing from their statute into a classified schedule which contained the actual dollar figures. I never saw any of the classified schedules, although I had a security clearance up to the Top-Secret level. It was not necessary for me to see the dollar figures, and I never sought to see them. But I was always interested by this device that we used to cross reference into the classified document containing the dollar amounts. This was a piece of legislation that I handled annually for about twelve to fifteen years until I transferred my responsibilities on intelligence law drafting to another attorney in the office to free up some of my time.

During that twelve or fifteen-year period, I did meet with the Intelligence Committee staff, usually in my office, to develop their legislation. I never recall attending a markup session in their own offices. The sessions were not open to the public, as I recall. I suppose I could have insinuated myself into one of those sessions, but it never became necessary to do that. The Intelligence Committee, having a smaller legislative workload and operating largely in secret, seemed to be a lot better organized and prepared than the staff I dealt with

on other committees. It was generally a pleasant experience for me to work with staffers who were so well prepared that they could give me well written and well organized documents, from which I would do the legislation.

One of the staff directors with whom I worked, Rob Simmons, later became a Member of the House of Representatives from Connecticut. I had a good working relationship with Rob while he was staff director of the Intelligence Committee. I later worked with the general counsel of the committee, Britt Snider, who was also easy to work with. I had some good working relationships with top staff on the committee. But the drafting demands were relatively limited during the period that I did drafting for them. Of course, that changed after 9/11, but I was no longer having direct responsibility for intelligence law drafting at that time.

The other thing I might mention about drafting for them is that they had a Senate resolution, which was the charter for their committee, which not only established the committee but also provided the procedures under which non-committee members and staff could view classified information through the offices of the committee. That resolution is known as S. Res. 400. It's quite a unique Senate resolution. It is a resolution that occasionally required subsequent amending. So that was part of my drafting responsibilities, as well. That was generally my experience with the Select Committee on Intelligence of the Senate.

RITCHIE: Did you find that committee was more bipartisan in operation than other committees with which you worked?

RYNEARSON: I think so. It is a little bit difficult to judge because while I was drafting their legislation, there was usually just one or two committee staffers with whom I would be dealing. It seemed as if they were speaking on behalf of the entire staff in their representations to me. There was none of this business that I encountered with other committees where I would be approached both on the majority and the minority side. I do seem to recall that there were some staff on the committee there by dint of serving the minority member, but there seemed to be a great deal of consensus within the staff before they would bring up legislative proposals to my office.

The other thing that should be noted about the committee is that by terms of the

Senate rules, the chairmanship of the committee must rotate periodically and in fact the entire membership of the committee rotates. I remember entirely new members of that committee every four or six years, it seemed. I guess this had the advantage that if there was any Members' staff you felt you couldn't work with very well that they would pass off of the committee after a while. But, of course, it could work the other way around, that you would lose staff and Members you thought were quite good in that role. It is the single committee of the Senate on which one will find the most frequent rotation of Members and leadership. Actually, I feel that that is not only appropriate, but it is something that the other committees could learn from.

RITCHIE: Did you detect much difference in the committee depending on who chaired it? They ranged from Barry Goldwater to David Boren, Bob Graham, and Richard Shelby.

RYNEARSON: I did not have that much of a closeup view of the way the Members operated to say with any great assurance. I do believe the fact that the information with which they were dealing was classified put a certain stricture on all of the them and modified all of their behaviors so that there was a little bit more uniformity in their conduct and behavior than you might find on other committees. I do know that they were more or less assertive with respect to the Intelligence Community and that there were differences among them in how assertive they wanted to be or how critical, I should say, they wanted to be of the operations of the Intelligence Community. In that respect, they differed.

RITCHIE: Some of the leaders in the intelligence community started out on the staff of the Intelligence Committee.

RYNEARSON: That's true. In fact, one of my clients is now the head of the Intelligence Community, the Director of Central Intelligence, the DCI, George Tenet. I did not work a great deal with George, but I do remember that some of my earlier drafting efforts were for him on the Intelligence Committee.

RITCHIE: Probably the biggest intelligence flap of the time that you were here was the Iran-Contra scandal. Were you involved in drafting legislation for that investigation?

RYNEARSON: Yes. This was in the winter of 1986 after the Democratic party had

won control of the Senate, and Senator Byrd was now, I believe, the majority leader again of the Senate. He had the desire to establish an Iran-Contra Investigation Committee that would look into the way the Iran-Contra transactions had been conducted. To refresh everyone's memories, there was a sale of missiles to Iran and the proceeds of that sale ended up in the hands of the insurrectionists in Nicaragua, the so-called Contras, whom the United States government was prohibited from funding by virtue of the Boland Amendment in statute. Congress wanted to get to the bottom of how the money ended up in the Contra hands and why we were selling armaments to a state sponsor of international terrorism, Iran. It was ostensibly for the release of certain hostages, but it raised legal and policy questions that Congress wanted to investigate.

Senator Byrd asked my office if it would provide an attorney to assist Senator Byrd in developing that legislation. The Legislative Counsel asked me and a somewhat more junior attorney, Bill Jensen, to attend meetings for the drafting of the Iran-Contra Investigatory Committee. I thought that the way Senator Byrd handled the drafting sessions was quite exemplary. He also invited one or two attorneys from the Congressional Research Service to be present and also one or two attorneys who had been involved in the Watergate Committee. Specifically, there was a James Hamilton present who at that time was an attorney in private practice. And Senator Byrd assembled part or all of the membership or the proposed membership for this investigatory committee. I remember Senator [Paul] Sarbanes and Senator [Howell] Heflin being present and also Senator [Daniel] Inouye, who later was the chair of the committee, as I recall.

All of the staff I mentioned and the Members assembled in a big conference room. We went through the various technical and legal issues that had to be addressed in establishing such a committee. We were not discussing the merits of the investigation or what the investigation might uncover or what the position of Congress should be regarding the activities being investigated. We were concerned with the scope of the investigatory committee and some of the administrative and technical issues that always need to be addressed when a committee is established. Besides the fact that Senator Byrd had cast his net broadly to have the benefit of the expertise of many different individuals, what I thought he did especially well was that he basically locked us up together, brought in sandwiches when they were required for lunch, and effectively told us that we were not to leave until we had made progress on the legislation. As I recall, that required two very long meetings.

My role was to lead the discussion by putting before the group the various drafting options and by having the Members provide us draftsmen with their policy decisions. I took a fairly prominent role in leading the discussion, but I had no role in making any policy decision. Nevertheless, I was pleased in my role and remember being complimented on it by some of the attorneys present. It's one of my drafting products of which I'm most proud, completely without regard to the substantive matters at hand. I'm not making an endorsement of the investigation or how the investigation was actually conducted. But I'm proud of the drafting product in establishing the committee. Later, I did get to attend just one session of the investigation at which Oliver North happened to be testifying in the old Caucus Room in the Russell Building, so I have a very vivid memory of that investigation.

RITCHIE: Congress investigates all the time through standing committees or special committees. Why did it take so much effort to get that resolution started to do the Iran-Contra? What were the problems that you were facing?

RYNEARSON: Well, they were not so much my problems. I'm sure there was the political problem that the administration did not want to be investigated regarding its activities. I imagine that the Republican party in the Senate was reluctant to have an investigation at least initially. But it was such a publicly discussed issue, such a controversial issue, that I imagine that even though the Republican party could have blocked the investigation through normal filibuster techniques, that they saw that it was not in their interest to do that. The resolution establishing the Iran-Contra Investigatory Committee was adopted early on in the new session of Congress. That would have been most probably in January of 1987.

From the draftsman standpoint, as with any committee, the question is, "What is the scope of the committee's activities?" This, too, was a controversial question of sorts. You're always trying to strike a balance between on the one hand casting your net broadly enough to include all the activities you want to cover and on the other hand casting it so broadly that you invite criticism for conducting some sort of a witch hunt investigation. So the Members had to decide those issues. The only thing that I could do was raise questions about what activities were to be covered by the scope of the committee.

There was probably also a question about how this temporary committee should interrelate with the permanent standing committees that would normally have jurisdiction over

those matters, the Select Committee on Intelligence, the Foreign Relations Committee, the Armed Services Committee, the Appropriations Committee. I'm sure we found a way to try to assuage the concerns of the permanent standing committees of the Senate. Most likely we did that through the membership of the committee, but my memory is a little bit hazy on how we solved that problem.

RITCHIE: The other part of the equation was the House of Representatives, which wanted to hold its own investigation. They ultimately created a joint committee. How did that factor into your concerns?

RYNEARSON: I'm not sure. Did they create a joint committee or just a parallel committee on the House side?

RITCHIE: They met jointly, but I don't know if it was called a joint committee or not. I remember an enormous dais that was built to hold all the Senators and House Members together.

RYNEARSON: That's right. That does ring a bell now. I only saw this once in person. That may be why I'm a bit hazy on it. I believe what happened is that the House created a similar committee, perhaps even "ripping off" some of the text of the Senate resolution, but doing it as a House resolution, and the joint meetings were either arranged informally or perhaps there was a sentence in the resolutions that recognized the right of the chairman to call joint meetings with the committee from the other body. But I believe as a purely technical matter, it never assumed the status of being a joint committee. That would have required the use of a concurrent resolution to establish the committee, and it would have meant that the committee would not have been established unless both houses had come to a final vote on the concurrent resolution. I don't believe Senator Byrd wanted to delay the establishment of the Senate committee. That's my recollection on that.

RITCHIE: You mentioned that you were drawing on some of the experiences of the Watergate Committee. What lessons did you learn from your experiences on Iran-Contra? In other words, what would you recommend to others involved in setting up investigations in the future?

RYNEARSON: The principal recommendation I have is to copy Senator Byrd's

arrangement for drafting sessions wherever possible. I restrict that not just to the establishment of investigation committees but in terms of any general legislation. I believe to the extent that the Members can bring together the views of one another and the expertise of the staff at a combined meeting or meetings, however many it takes, that you're saving yourself in the long run. A stronger document emerges from these meetings than if you are drafting all alone without the input of other Members. In other words, it was just a more coordinated effort. I do believe that Members shy away from this in part because they feel that they want to start out with the strongest position possible on a subject of legislation. They're hoping that the forcefulness of their position, or what we might call the extremeness of their position, will intimidate the opposition into making concessions.

However, I think that only explains part of the lack of coordination. I think, generally, legislation is not coordinated early on because it involves a lot of work to coordinate. You've got to get the Members available in Washington on the same day, or their staffs with appropriate authority to make decisions together on the same day, at the same place. It is a difficult matter to do that. But I do believe that it pays dividends, usually, in the long run to handle legislation that way. Parenthetically, and not surprisingly, it's easier on the draftsman because the draftsman is not drafting multiple, untenable drafts on the same subject, drafts that would end up in the garbage pail. Although I know that being easy on the draftsman is not a high priority with the Members, it is something that the Members should do in their own selfish interests. To the extent that the legislative draftsman is focusing on a single draft and not six different drafts, all being unviable, the draftsman can produce a more sophisticated piece of drafting, and is less likely to commit technical or clerical errors, simply because there is less paperwork that is being juggled, and the draftsman can concentrate better on the draft at hand. I do think it is a process that pays dividends for the Members, their staffs, and for the legislative draftsmen involved.

RITCHIE: You mentioned that, in setting up an investigative committee, they have to have the freedom to investigate, but there also have to be some restraints so that they don't embarrass the institution in the long run. What kind of restraints can a resolution impose? Does it deal with subpoena power or does it deal with jurisdiction? How do you define what an investigation is going to be in the initial resolution?

RYNEARSON: Well, you have named two of the grounds of possible constraint on an investigatory committee. The primary one, of course, is jurisdiction. Into which matters

does this committee have power to investigate? A lesser matter is whether the committee will have subpoena power or not. That is a very important tool. The question is really whether you want to confer that tool upon the committee. More often than not, that tool is given to the committee, but it needs to be specifically addressed in the legislation establishing the committee.

I guess there might be some other constraints, as well, on the committee. The next most important one would be, what is the time period of this committee? When does the committee sunset? Of course, they all sunset unless your intention is to establish a permanent, new standing committee of the Senate. That is something that I don't believe I ever established. But an investigatory committee is going to have a sunset. Usually, the sunset date will be a specified number of days after the due date of the final report that the committee is required to submit. So the two operate in tandem.

Also, in terms of constraints, the number of Members that are authorized for the committee and how those Members are to be appointed is a form of potential constraint. Usually, appointments are vested in the President Pro Tem upon the recommendation of the majority and the minority leaders of the Senate. What you end up with is a negotiation between the majority and the minority leaders for a list of Senators who they believe can get along on the committee. Each leader, in essence, can veto the selection of the other leader. Sometimes the way it is drafted, each leader makes a recommendation separately from the other leader, so I don't want to leave the impression that they must always negotiate. The President Pro Tem, in this situation, is acting largely as the appointing agent but not as the person who decides upon the membership.

RITCHIE: You've mentioned that one of the concerns about your office was the readability of statutes. Having just discussed how carefully a statute like this or a resolution would be drafted for very specific purposes, what is the importance of readability and has it changed at all in the drafting of legislation in your time?

RYNEARSON: I took great pride in producing readable drafts. I know the other attorneys in my office did as well. I believe the office has a very good reputation in this regard. It has only gotten better with the adoption of our uniform style, where we try to provide headers for each new paragraph or thought, which makes it easier to locate text within a piece of legislation. What I had mentioned to you earlier about readability was

basically a reaction to two comments that one would occasionally hear in the Senate or in society at large. That was, number one, "Why aren't the laws written in plain English? Why are they written in legalese?" The second comment that one would hear is, "Writing law must be like making sausage." This, of course, is an old maxim or adage that I have heard so many times, I am absolutely sick of it. I'd like to give my reaction to both of these comments, if that is all right.

Regarding the first one, about why can't the laws be written in plain English and why are they written in legalese, I never considered that I wrote legalese. I believe that there is this truth at the core of this criticism, the awareness that legislation is not recreational reading. I never treated either my writing or other attorneys' writing of legislation in a recreational way. I would not read it by my bedside at night before going to sleep. It was not something I read for fun or for a good time. However, I don't think saying that means that the legislation was written poorly or not in acceptable English.

I do think that criticisms can be made of legislation, generally, that it is boring to read and that it is frequently complicated. However, there are very good reasons why that is the case. It is boring largely for two reasons. The first is that Federal courts have a rule of statutory interpretation that different words must be intended to have different meanings. For example, if I'm writing a piece of foreign relations legislation and I use the word "country" or "foreign country" in one sentence, but then in the next sentence, I use "nation" or "foreign nation," it is arguable that a court might construe that I intended a somewhat different meaning in that second sentence from that term I had in the first sentence. It was the practice of my office to adhere throughout a document to the same terminology. This, of course, makes things very boring. You do not get a change of pace in your reading.

The other thing that contributes to the boredom of legislation is that a certain degree of formality is required by virtue of the document being a prospective law in the making. Instead of saying, "The Defense Secretary," I would write, "The Secretary of Defense." That is the individual's title. If you're ever to use a governmental title, I would think you would use it in a statute. So there was a degree of formality that was and is required. Also, we would never use contractions or slang in statutes. One also had to be careful about using colorful words or words that had double meanings or multiple meanings. Avoiding those words made statutes very boring to read.

In terms of the other element, the complexity of statutes, generally speaking, I have to plead guilty that I wrote some very complex statutes. But there are very good reasons, as well. The reasons were largely outside of my control. First off, we have had more than two hundred years of statute writing, and it is somewhat difficult to find a legislative area upon which no statute has ever been drafted. What we are usually doing in the enactment of new law is we are refining earlier law. We may do that by adding additional exceptions or by adding additional requirements or conditions. What I'm getting at here is that policy making has become increasingly complex. The draftsman is stuck with the policy that is being presented for drafting. This does add to the complexity of legislation.

The other reason for the complexity is that there are always two ways of making changes in law when an earlier law addresses a similar subject. That is, one can rewrite the entire law from scratch to incorporate the new changes. This is called restating the law. Or one can refer back to the law in individual sentences and provisions and strike out, insert, or strike out and insert, new language. Our office was trained to take the latter course in most instances. The reason is simply that there is a political imperative in doing it that way. If one had ten changes to make to the 300-page Immigration and Nationality Act, one would not rewrite the entire Immigration and Nationality Act to incorporate the ten changes even though that would be a more readable approach to take. The reason one wouldn't do that is that it would reopen every provision in the Immigration and Nationality Act that had been subject to a political squabble earlier. The Members themselves would not want to reopen provisions that are not being amended. So I find that, with respect to the criticism by some Members that amendments to existing law are difficult to read, the Members have dirty hands in making that sort of criticism. They would be the last individuals who would want to reopen unamended provisions.

I believe that our office made great strides in making the legislative language as readable as possible. One of the things that I spent a great deal of time with in my writing was to eliminate the various terms of jargon that my political scientist clients kept trying to get into statute. Many of my clients were either trained in political science or they were lawyers. Both groups were guilty of providing me with memoranda for drafting that were highly unreadable. This was typical of the experience that my colleagues had in the office. I believe the office played a very important role in making the statutes more readable and more transparent.

One of the common errors that our clients would make is that they would never want to pin accountability on federal officials. We would receive drafting proposals that were addressed to the government at large, that the government would have the obligation to do, "x, y, or z." Well, that sort of language would make it possible for the entire government to escape accountability. So one of the common things that we did in the office was to shift the accountability from a bureaucracy to the head of a federal department or agency. This is the appropriate thing to do in law because when you bring a lawsuit against the government, you are not suing the government at large, but you are suing an agency head in his or her capacity as a head of that agency with the appropriate jurisdiction. To make a long story even longer, I believe the criticism that we could write better was unfounded. We never used Latinisms or the common legalisms that are taught in law school. We put a great deal of emphasis in creating definitions wherever possible whenever a term was used in a specialized way. In short, we wrote in plain English.

Let me say something about the comment that, "Legislation writing is like sausage making." I believe that has some applicability at the policy level, but not much applicability at the drafting level. I certainly understand that when you compromise the policies of Senator A with Senator B that you run a real risk that the policy is diluted or that it is a bit of a patch work item. But I found that, generally speaking, these compromises occurred on a limited number of provisions so that there would be numerous legislative provisions of an administrative or technical cast that did not require compromise. They might constitute the bulk of the text that was being enacted into law.

Secondly, even on those controversial provisions that required compromise, a good draftsman could find ways to present the final product in a coherent and readable text. Now, the policy might not make any sense. Or it might just be deferring to a later day a true resolution of the dispute. But it did not mean that the statute had to be written poorly or clumsily, and I believe the record of our office was very good and that we did not create that much sausage in our writing.

There were occasions where the compromises were occurring late at night, and we had limited time or authority to make technical changes in the compromise that was being arrived at. So there were some provisions that we were party to that I'm sure we wish we could have written differently. Also, as I mentioned in an earlier interview, the Appropriations Committee staffs of both the House and the Senate were very firm in the way

they wanted provisions written, even so far as to direct that the provision be written in a non-transparent way. As the agent of these staffers, we were obliged to comply. However, in the course of my career, the provisions that I'm mentioning are a relatively small percentage of the ones I drafted.

Generally speaking, I think that I drafted very readable legislation. Now, some individuals say, "We want legislation that can be read by Mom and Pop down at the drugstore when they're getting their coffee in the morning." Well, Mom and Pop may very well have trouble reading some of the legislation that I wrote, but I believe that they could read it if they wanted to study it. The words that I used were plain English, basic words. I studiously avoided highfaluting words or words that smacked of jargon. Having said that, Mom and Pop down at the drugstore were not the primary audience to which the document was addressed. It was most likely that a statute would be used by a judge, by an administrator of a federal agency, or by an attorney in private practice. Or used by an attorney for a federal agency, but I count them as administrators. It is that readership to whom we were primarily addressing our statutory writing. I believe that there was the irony that, in order to get to that specialized readership, it had to be approved by non-lawyers and non-administrators, as well as some lawyers in the Senate and the House.

RITCHIE: Well, you as a draftsman were involved in the initial stages. It goes through the committees, it goes through the floor, it goes through the conference committees. The sausage can get added as it's going along. You talked about the internal consistency in a bill. Did you monitor bills to make sure that the language was consistent, "countries" and "nations" and other issues? As amendments were added, did you have any role in making sure that the bill wasn't internally inconsistent?

RYNEARSON: I did monitoring and more. My office was involved in every stage in the legislative process up to and including the preparation of conference reports. If I prepared a bill for introduction where the word "country" was used by me throughout, and then someone offered a committee amendment introducing the term "nation," I would be involved in reporting that piece of legislation out from the committee and I had authority to make the technical correction of changing the word "nation" back to "country." Similarly, in conference, I could examine what the Senate had passed and if someone had offered and gotten adopted an amendment on the Senate floor that used the word "nation" in the preparation of the conference report, I could change it to "country."

Of course, I was drafting many of those amendments in committee and on the Senate floor, so I could make sure that the word "nation" was not used. But I did not have total control of the amendment process from a technical standpoint the way I did at the point of introduction, reporting, and in conference. So the amendment process introduced a wild card where technical errors could be made and were frequently made. My job was constantly to be cleaning up the legislation as it advanced through the legislative process. My job also involved a little bit of deconstruction of the legislation. In other words, you would draft a bill and go to committee, and the amendments that were offered, even the amendments written by me, might change the policy so significantly as to produce a different bill. I was in the process of constructing and deconstructing or reconstructing the legislation at three stages, at the committee stage, on the Senate floor, and at the level of compromise in conference committee.

Of course, the greatest pressure of all three was at conference committee because I knew that this was the last chance to get the legislation in a clean text before it became law. The President had only two choices, to approve or disapprove the legislation. This is something that most people may not realize, but the President has no clerical correction authority. If Congress submits the legislation to the President with the text printed upside down or with words misspelled, the President has to make the decision whether to approve or disapprove the entire text, but he cannot make a correction to the text.

The only recourse we had after conference, if the legislation had not yet been enrolled for submission to the President, was we could adopt what was known as an "enrollment correction resolution," which was always a concurrent resolution to direct the Enrolling Clerk of whichever House of Congress that was doing the enrollment to put the text right side up or correct the spelling or indentation or punctuation of the conference report. After the Enrolling Clerk did the enrollment and the president signed it into law, the only recourse would be to enact a whole new law to make corrections in the law just enacted. No one wanted to do that. It became harder to enact technical corrections to previously enacted laws as the years went on because the staff were so overworked and so bitterly divided on party lines that they did not want to revisit the technical errors of earlier written statutes. Even concurrent resolutions for enrollment correction are somewhat infrequent because there is a certain embarrassment factor that an enrollment correction resolution is needed.

If the correction required was merely clerical, I would simply alert the Enrolling

Clerk, who has authority to make those types of corrections.

RITCHIE: Did you also have any kind of peer review inside your shop? You were making these corrections, sometimes it was late at night under a lot of pressure. Did anybody else read over the bill or were you alone responsible for a particular piece of legislation you were on?

RYNEARSON: In the last few years my office, especially under the current Legislative Counsel, Jim Fransen, has encouraged peer review on every document that is amenable to having another attorney read it. However, there were and are circumstances, late at night or under severe deadlines, where peer review is impractical, and we have to rely on the attorney having a sharp eye and being very professional and methodical to eliminate errors. We also have the great advantage that with computer word processing, we can spell check documents, we can search for certain commonly made errors and eliminate all of those errors pretty quickly and consistently. For example, if I knew I had a document in which the terms "country" and "nation" were used interchangeably, and it was a long document, I could just search for one term or the other and direct the term to be changed throughout the entire document.

I would say that, generally speaking, the documents produced by the office contained fewer technical and clerical errors now than ever before. This is particularly amazing because the documents are, on average, longer documents. Our office has a very good record in producing either mistake-free documents or documents that are largely mistake free. The legislative process has as one of its benefits the fact that we can go back and correct mistakes until we get to the point where we are producing a conference report.

End of the Eighth Interview