

WAR POWERS AND SEPTEMBER 11, 2001

Interview #9

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RITCHIE: The Constitution itself is ambiguous and open to great interpretation as to what it means on various issues. One of the most ambiguous is the question of war powers. A lot of that has to do with definitions as to what is the role of the Senate specifically and the Congress in general versus the President in the war powers of the United States. Could you talk about that in light of what we discussed earlier?

RYNEARSON: I certainly would be glad to talk about it. It was one of the areas that I was most interested in. As I mentioned in an earlier interview, my interest in it can be traced back at least as far back as my internship in the House of Representatives during the Vietnam War. The War Powers legislation that I was involved in came after the famous War Powers Resolution of 1973, as that slightly antedated my tenure in the Legislative Counsel's Office. However, that resolution became a constant source of dispute between the President and Congress. President Nixon had vetoed the joint resolution, and it was enacted over his veto. So the executive branch view of the Resolution was not favorable initially and it continued to be unfavorable.

Specifically, no President since the enactment of the Resolution ever acknowledged that all of the provisions of the Resolution were constitutional. The requirements in the resolution for reports upon the introduction of U.S. armed forces into hostilities were always evaded by Presidents. In other words, Presidents would submit the report required by the War Powers Resolution, but they would not acknowledge that they were submitting the report under a legal obligation. Rather, they would take the position that they were submitting the reports as a courtesy to Congress. The way they would do this is, in the message of transmittal of the report, the president would state that he was submitting the report "consistent with" the section in the War Powers Resolution requiring it. I believe it was section 4(a).

Congress and the President did this dance around the War Powers Resolution from the very beginning of its enactment and throughout my tenure. This became most obvious during the times where Congress did specifically authorize hostilities at the time of the first Persian Gulf War and at the time of the war on terrorism and the war against Iraq, what we

may call the second Persian Gulf War. On all three occasions, Congress specifically enacted a joint resolution authorizing the hostilities, but the President would never acknowledge that he was bound by the War Powers Resolution to comply with its provisions.

Several Senators in the '80s and '90s sought draft legislation to amend or repeal the War Powers Resolution and, in the case of repeal, usually to replace it with something different. Two of the common areas of reform that were suggested were to first, strengthen the requirement for consultation between the President and Congress and, second, to try to make the War Powers Resolution enforceable through the use of the power of the purse or through expediting litigation in the Federal courts.

RITCHIE: Considering the war powers controversy between the executive and the legislative branches from your experiences, do you think it will ever get resolved? There seem to be strong differences of opinion, despite the War Powers Resolution, as to what the Congress' role should be in terms of military operations overseas.

RYNEARSON: Well, I tend to be an optimist on this subject. Although the struggle between the executive and legislative branches over war powers emanates from the Constitution and, thus, is built into our system of government, I do believe that the War Powers Resolution can be improved upon to take account of some of the concerns that have arisen over the years. Specifically, people have questioned the enforceability of the War Powers Resolution, especially in the aftermath of the Supreme Court case of *INS v. Chadda*, which invalidated the concurrent resolution mechanism of disapproval that existed in a number of laws, including the War Powers Resolution. Although attorneys are quick to point out that *INS v. Chadda* was only a one-house veto case, the reasoning of the case is so broad as to strike down all congressional veto procedures that are written in terms of simple or concurrent resolutions.

I was part of efforts over the years to amend the War Powers Resolution. They seemed to gain some momentum in the 1980s and the early '90s. What comes to my mind is the situation that occurred in the Persian Gulf in 1987, where Kuwaiti oil tankers were being damaged by mines placed in international waters and the United States began to convoy oil tankers in the Gulf. Several senators expressed concern about whether that would involve us in the war between Iran and Iraq. Then in the early '90s, with the policy of the Bush administration to go to war to restore the independence of Kuwait, there was a major

vote in the Senate on whether to authorize the President to engage in hostilities.

I was involved in drafting a number of pieces of legislation in both situations. In the earlier situation, the upshot of our efforts was a bill that was the product of Senator Byrd's thinking on how to improve the War Powers Resolution. I did a considerable amount of drafting to assist Senator Byrd in his work on that. In the case of the first Persian Gulf War in 1991, I assisted Senator Nunn's staff in developing an alternative to a flat-out authorization of hostilities. That amendment was not adopted by the Senate, but it was a very close vote. In each case, I'm not indicating what my policy view was on the matters, but I felt very privileged to be handling matters of such importance and urgency. The Byrd bill was never enacted into law, and it does deal with several of the nagging legal questions that have been raised against the War Powers Resolution, and is a good resource for other reformers in the future.

Later on in the 1990s, we had the air war against Serbia, in order to expel Serbia from Kosovo. The Senate and the House did not enact any legislation authorizing hostilities in that case. Instead there were non-binding resolutions that were adopted. I felt that Congress had missed a major opportunity to be a player in that situation and had abdicated its Constitutional responsibilities.

Later, of course, with the 9/11 attack and our war in Iraq, the administration felt a need for congressional authorization for hostilities, first for a war against terrorism and then for the invasion of Iraq. I did some drafting in that connection, but not the items that were actually enacted into law, although I gave some legal advice that may have been taken for one or both of those. In any event, I was always very interested in this particular area of drafting and always gave it my highest priority when it would come across my desk, simply because of the nature of the subject matter. It was a subject that had engaged me since the 1960s, so I felt very comfortable with dealing with it.

Also I should mention that Senator Biden had a major piece of legislation in the 1990s, which he labeled the Use of Force Act, which also attempted to make reforms in the war powers area. I provided drafting assistance to Senator Biden's excellent counsel, Brian McKeon, for that legislation, which also has not been enacted into law.

So what I get out of all of this is that there are a number of potential reforms that are possible for the War Powers Resolution, some of which have already been drafted up and introduced as legislation. The question is whether the time will be politically correct for the enactment of these reforms. Since the party that occupies the White House is not too favorably disposed towards making the War Powers Resolution effective and enforceable, there tends to be a substantial number of senators at any one time who do not feel that it is in their party's interest to go ahead with war powers reform. So it may require a situation in the Senate where the party not occupying the White House controls a supermajority of seats in the Senate in order to override a presidential veto and achieve reform in the war powers area.

RITCHIE: The only reason why the War Powers Resolution passed in the first place was because Richard Nixon's popularity had fallen even within his own party, so they were able to enact it over his veto. That requires a two-thirds majority.

RYNEARSON: That's absolutely correct. So we shall see how it plays out. I do believe that Congress has a very important constitutional role to play in this area, and unlike some others I do believe that Congress has the legislative jurisdiction necessary to enact regulation of the exercise of the war power through Congress' Article I, section 8 powers, including the Necessary and Proper Clause power. I do believe that Congress has constitutional authority to enact legislation in this area. The tricky part is getting legislation that is flexible enough that it takes account of the needs of the President in this area.

RITCHIE: You began this discussion by making reference to the Chadha case in the Supreme Court, and I wondered how much do people drafting legislation think about what the courts have already ruled, and what the courts might be likely to rule? How much does the ultimate power of the judiciary play in terms of the strategy when a bill is being written?

RYNEARSON: I think it plays a fairly significant role. The draftsman, I guess, has a bias in favor of drafting constitutionally valid provisions. So if the case appears to be a close one that the Supreme Court has not yet ruled upon, the draftsman may merely point out the legal arguments for and against the constitutionality of the provision, but not express a strong view. In the case where the Supreme Court has already issued some significant rulings, or tipped its hand on how it might rule in the future, I was not reluctant to advise my clients with respect to those cases. I found that my clients, the Senate staff, were very

attentive when I raised constitutional law objections to what I might be asked to draft. Generally, they would withdraw the provision or modify the provision to bring it within constitutionally accepted parameters. Occasionally, they would insist that I draft constitutionally invalid provisions for political reasons.

The *INS v. Chadha* case was a very important case from my Office's standpoint because it was a broad ruling that invalidated one of the major tools that Congress was using at the time to regulate executive action. In its aftermath, what became necessary was to apply so-called "fast-track" or expedited procedures to joint resolutions or bills that would still be subject to presidential veto, but which would at least enable Congress to make a fast up or down decision on something the executive branch had done or was contemplating doing. My Office had a lot of work over the years in developing appropriate fast-track procedures for bills and joint resolutions, but, as a result of *INS v. Chadha*, we could no longer apply those procedures to simple resolutions or concurrent resolutions that never go to the President for review.

Another case that significantly impacted us was the *Buckely v. Valeo* Supreme Court case, which invalidated commissions of mixed executive branch-legislative branch membership where the commission was attempting to exercise executive branch powers. This was a subject about which the Senate staff were perpetually confused and were continually crossing the constitutional line in their drafting proposals. My Office usually was paid attention to when we discussed the implications of that Supreme Court case.

And thirdly and finally what I might mention is that in the foreign relations area the Supreme Court has indicated that the Congress does not have legislative jurisdiction to direct the diplomatic communications of the president. The Supreme Court case that is usually cited in this regard is *United States v. Curtiss-Wright Export Corporation*. Although the discussion by the Court on this subject was only dictum in that case, a number of Supreme Court cases have cited that case favorably. So it is almost a settled matter now that Congress cannot legislate to direct the executive branch regarding its communications with foreign governments. This was a question that arose on almost a daily basis in my drafting requests.

RITCHIE: One of the issues that has come up before the Supreme Court is the question of legislative intent. Justice [Antonin] Scalia has argued that you can't tell what the legislative intent is because there are so many legislators and they have so many reasons. Do

you think that a bill stands on it own in terms of its language or do all of the speeches, and reports, and other materials contribute to our understanding of what the intent of the law was?

RYNEARSON: Well, this is a very difficult question, and despite my experience over the years it's one that I have not completely resolved to my own satisfaction. I tend to be very sympathetic to Justice Scalia's view on this insofar as I have seen what we might call "bogus legislative history." By that I mean, we have seen committee reports that are sloppily put together and which may actually misstate what the legislation says. I can think of one specific instance in which the Foreign Relations Committee reported out legislation on the reorganization of the State Department and the accompanying committee report in one paragraph actually said the opposite of what the legislation said. I also think that there is a legitimate criticism to be made about an over-reliance on the floor statement of one, two, or three Senators with respect to legislation upon which close to one hundred Senators will have voted. What is the legislative intent of the body when all you are looking at are the statements of a small fraction of the body?

A conference committee report, on the other hand, is I think a very different matter. It is the last stage in the action of the Congress, unless the legislation is returned by the President, but it is still the last stage for the writing of the legislative text. If the conferees say that the text is intended to mean such and such, I would give great weight to that, because the conference report is only subject to an up or down vote. Presumably, approval of the conference report implies approval of the statement of managers accompanying the conference report. So I do believe that legislative history is useful in that case at least, and also I think in the case where the committee report accompanying legislation specifically addresses the meaning of a provision that does not change in the course of the enactment process. I would think that the committee's statement should be given some weight there. But, generally speaking, I believe that legislative histories tend to be incomplete and not conclusive on what Congress intended. And I do believe that legislative histories should never be used to reverse the plain meaning on the face of the statute.

That's basically my view on legislative histories. I should add that, in any event, good legislative histories are becoming increasingly harder to establish because of the propensity of the Senate and the House to enact omnibus legislation at the end of the session, packaging a number of bills into a mega-bill. In the course of doing that, legislative histories

are either non-existent for many of the provisions or are highly suspect because you do not get a statement of managers that specifically reviews each of the provisions in the omnibus bill. Only the statement of managers, in my opinion, is worthy of great weight in the field of legislative history.

RITCHIE: The Supreme Court is the ultimate arbiter of what is constitutional and what is not in terms of legislation. Have there been any instances where you felt that the Court got it wrong? Where you felt badly that something you had worked on was overturned? Or where you thought that the Court might have misinterpreted something?

RYNEARSON: Well, there was one case that bothered me a little bit that I recall. That was a case where I believe it was not the Supreme Court but a lower Federal court that interpreted a statute in which Congress attempted to regulate the PLO observer office in New York City that observes the activities of the United Nations. What the court said in effect was that Congress in the enactment of the legislation had not made it crystal clear that the regulation of the PLO office was to supersede our treaty commitment under the United Nations Headquarters treaty. In other words, the federal courts have developed a rule of statutory construction in which it is necessary to specifically say on the face of the statute that Congress is superseding a treaty in order for it to have that legal effect. In the case of the legislation enacted by Congress, I believe Congress had overridden "any other provision of law," and that was found not to be sufficient by the federal court. Well, since treaties are law of the land, I believe that the Federal courts might have taken an overly formalistic approach to the legislation. That is one case that comes to mind. There might be others when I have more time to mull over it. I was mainly concerned with what the court had soundly decided for purposes of my drafting parameters, and not so much about close cases and controversial cases.

RITCHIE: Did the Legislative Counsel's Office work with the Legal Counsel's Office in the Senate at all, in terms of either asking them for advice or giving them advice when they were defending the Senate in court?

RYNEARSON: Generally, there was little interaction between the two offices because the functions being performed are so different. But occasionally the Legislative Counsel himself would receive a call from the Legal Counsel's Office for some legal advice. This was quite rare. I believe that I received two or three calls over a period of years from

the Legal Counsel's Office to provide legal advice. The spheres of activity of the two offices were just so different that there was not much occasion for interaction.

There was more interaction between our Office and the American Law Division of the Congressional Research Service. We were frequently referring clients over to the American Law Division in order to have some of the legal questions that required extensive research handled over there, because we simply did not have the human resources and the time to do extensive legal research. By "extensive" I mean something that might involve days of work. Also, we had a number of clients who were very confused and we always felt highly constrained not to lead the clients down a particular road. But the Congressional Research Service can handle that more easily because they can talk in terms of what legislative proposals have been made in either House of Congress, with respect to a particular issue. I found that they helped to clarify the thinking of the clients, who would then later come to our office for the actual drafting.

This interaction worked both ways. Congressional staff would go first to the Congressional Research Service on many occasions, and CRS would say: "You are now in a position for drafting and you should go call up Art Rynearson or someone else in the Legislative Counsel's Office to have the actual drafting performed." Or occasionally the congressional staff would raise a technical question or a question of statutory interpretation upon which the CRS employee felt inadequately prepared to deal. In that case, they would suggest that the congressional staffer call someone in the Legislative Counsel's Office. I would say that the interaction between CRS and the Legislative Counsel's Office was a daily occurrence, although not every attorney dealt with CRS every day. But someone in my Office would be interacting with a CRS analyst every day.

RITCHIE: You've had several decades of experience with the Legislative Counsel's Office. Looking back at it, how would you say that office changed the most in the years that you were associated with it?

RYNEARSON: It changed in several ways, but primarily what I think of when I think of the Office is how stable the Office was in what it did and how it performed its job. So in terms of the big picture, the Office changed very little. But in some other ways, there were significant changes that I'll mention. The primary one was that the Office was both the beneficiary and the victim of the information technology revolution.

When I first came to the Office, the Office was using typewriters and had a typing pool. The Legislative Counsel assured me that as an attorney I would never actually have to type myself, that the typing pool would be more than adequate to take care of my needs. And they were excellent. We would draft a preliminary draft on a yellow, plain piece of paper and mark it up to the point where we were satisfied with it, and then it would be retyped onto a white Senate bill, resolution, or amendment form, which we stockpiled in the Office. It was rare—or I should say infrequent—that we would do more than those two drafts on any piece of legislation. But beginning in the late 1970s, we started going to a computer system of word processing, resulting in the attorneys doing a great amount of word processing themselves. This changed the way in which we did our work quite significantly. It became a lot easier to edit our work and this was a two-edged sword. It both enabled us to do a higher quality of work and to do a greater quantity of work in the same period of time. In other words, we got a lot more productive. Statistically, the number of drafts that we did increased each year on almost an exponential basis.

The downside to it was that the word processor relieved the Senate staff of some of its pressure to fully think through what was being drafted. There became a great temptation to draft first and ask questions second. This was very bad from the draftsman's standpoint, because we were in the business of crossing the "t"s and dotting the "i"s. For us to produce a draft that is only half thought through is an unprofessional undertaking. The attorneys were constantly pressing the Senate staff to try to think through the matters, but it was like butting your head against the wall. Some of the Senate staff were dealing with us at such an early stage in the legislative process that in many instances they just didn't know what they wanted. And there were other developments on their end which promoted this lack of certainty. The upshot was that by the time I retired it was not unusual for a draftsman to do ten, fifteen, twenty, thirty documents on the same piece of legislation at the same stage in the legislative process. In other words, before the bill would be introduced, the draftsman might have done that many revisions of the draft. Or before the bill was reported from committee, the draftsman might have done that many revisions. Or before the conference report was filed, the draftsman might have done that number of revised documents.

This put a great deal of stress on the Office, because there was this sense that one was never done with a client, that not long after the draft left the office it would be returned. The draftsmen felt that we should not be monopolized by a single client because of our obligation to serve the entire Senate, that at some point we must move on to another client. But the

clients never understood this and they felt that we owed them a "drop-of-the-hat" response, so this did put a great deal of pressure on the attorneys in the office.

In addition, there was one development in information technology that particularly affected my Office. In 1986, a decision was made to have my Office use "Xywrite," the same computer word processing software as was being used by the Government Printing Office (GPO). The use of Xywrite by the office had two advantages. First, draft bills, resolutions, and amendments printed from Office printers would look exactly the same as if they had been printed by GPO. In other words, they appeared to be the finished product. The second advantage was that GPO was no longer needed to key in the text of draft legislation produced by my Office. Until that time, GPO was needed to re-key the text of each of the drafts. This resulted in countless numbers of clerical and typographical errors being made after the legislation was drafted by our Office. It also meant that my Office was continually involved in "cleaning up" the typos made by GPO when we next encountered the legislation.

So the switch to Xywrite saved us all this trouble, but it had one major drawback. Now there was an incentive for every piece of legislation drafted for the Senate to be printed on our printers. The other Senate offices did not use Xywrite software, yet they desired their draft legislation to look as authoritative and as aesthetically pleasing as the drafts printed in my Office. The result was that we started to receive many requests that were little more than printing requests. In handling these requests, we were frequently told not to improve the phrasing of the drafts. It seemed to these Senate clients that if the drafts were "pretty" enough then they must be drafted properly. This was a great waste of our drafting skills and was very shortsighted. It also gave the Office an enormous amount of work that in earlier years would never have come to the Office.

You raise the question of what were the changes, and I've only spoken about the information technology revolution. There were other changes. The Office grew somewhat in size. Not drastically, but with some significance. When I started, the Office had a legal staff of fifteen attorneys, and currently it has a legal staff of approximately twenty-seven or twenty-eight attorneys. This was not a large increase in terms of the corresponding increase in the workload. But it was a significant enough increase in the personnel of the Office to change somewhat the "family" atmosphere that we had in the Office to a little bit more of a bureaucratic atmosphere or a somewhat more impersonal setting. That was very regrettable. It simply became logistically impossible to assemble everyone in the Office and

their significant others in a social setting. And it was the social setting in the early years that I think helped to form the collegial atmosphere of the Office.

Another change that occurred in the Office was that we adopted a uniform style in drafting and this improved the overall quality of the work that we were doing. That was generally promoted by our Legislative Counsel, Frank Burk. It was a very good development for the attorneys. Previously, the attorneys adopted the style of the law which they were amending, but with the uniform style we routinely put in provisions that reflected that style. The style was a more transparent style. It was replete with headings that made our work more easy to use. So it was a good development in the drafting area.

Another change that occurred in the Office was the development of teams within the Office. When I first came to the Office, there was one attorney drafting in one large subject area, with no overlap with other attorneys. This had the deficiency that if the attorney were sick or out of town or engaged in a meeting out of the Office, the Office was deprived of the expertise in that area. Frank Burk as Legislative Counsel wanted to remedy that situation. He created teams within the Office that covered even larger subject matter areas, but where the team members had an obligation to pitch in for absent team members. This did not work entirely as it was drawn up because each team was responsible for so many drafting areas that it was very difficult even within a team setting for a single attorney to have the requisite expertise that was represented within the entire team. So the Office to this day still tends to field individual attorneys who are greatly more experienced in a particular area of drafting. But the team system did have the advantages that I noted, and so I would give it a mixed review. Those were the principal changes within the Office over the years.

RITCHIE: How about changes in the institution of the Senate as a whole? What were the most significant changes you saw in those years?

RYNEARSON: Well, let me mention several, and then you can choose any that we should talk about in greater length. The one change I've already discussed involving information technology impacted the entire Senate, not just our Office. Another change was the increasing partisanship within the Senate as the party ratios tightened during my tenure. A third change is generally the weakening of the Senate's informal mechanisms for controlling its membership—the somewhat weakened power of both committee chairmen and Senate leaders. A fourth change I would say was the bloating of the legislative staffs within

the Senate and also the legislative agenda of individual Senators. And I suppose a fifth change would be the greater reliance by the Senators and their staffs on the legislative input of outside groups.

RITCHIE: That gives us a pretty full agenda to discuss. Actually, I think all of those are worthwhile discussing. We could discuss them in the order that you've suggested. You've already mentioned the impact of information technology on your Office, but how did you see it affecting the Senate as a whole?

RYNEARSON: Well, the one point I might make there, in terms of the impact of the information technology revolution on the legislative process, is that it enabled Senate staff to essentially contract out legislation, to e-mail drafts of legislation to special interest groups, to legal advisers' offices in the various federal agencies, to law professors spending sabbaticals in Mongolia. I'm being facetious, but what it did was it made it a lot easier for the Senate staff to seek the input of outside individuals and groups. That of course is something that is not *per se* bad, but it led to some bad practices, I thought. As I mentioned earlier, there was a tendency to draft first and think about what the draft should say later. The ability to attach drafts to e-mails only exacerbated that tendency.

Also, over time, the special interest groups tended to hire their own attorneys to do drafting, and the interaction of the Senate staff with the special interest groups led to almost a contracting out of the legislative function to the special interest groups. Of course, the special interest groups could never achieve the level of technical skill that resides in the House and Senate Legislative Counsels' Offices so that these drafts would usually find their way back to our Office, but in some cases the critical legal questions and even some technical questions had been resolved outside of our Office and we were instructed not to make changes. So this process was a limiting process on the ability of our Office to adequately serve the Senate.

RITCHIE: When you talk about special interests, were the large corporations more likely to have their own draftsmen, or was this across the board with environmental groups and others?

RYNEARSON: I would say generally that it was across the board, that there was such an infusion of money into the lobbying process that most groups were able to hire their

own attorneys to attempt to perform some of these functions. Of course, some of the legislative drafting was attempted by the legal offices within the federal agencies, but their work was automatically suspect when it arrived on the Hill. The Senate staff was not very deferential to that. The Senate staff was much more deferential to the legislative drafting of special groups generally than they were to the federal agencies. They would come to us with the special interest groups' drafts and would be somewhat appalled to learn of the deficiencies in the drafts. Sometimes they would be receptive to our making major changes, and other times not.

I also mentioned the increasing partisanship within the Senate and I do believe that was largely the function of the electoral results during my tenure, that the parties achieved a much greater parity within the Senate and each party entertained reasonable expectations that it might take over control of the Senate after the next elections. So I think this added an element of difficulty in the interaction between the parties. It also came as something of a shock to me to see the amount of partisanship, because I had entertained the thought before my employment in the Senate that there was a greater degree of independence from party pressures within the Senate. The lesson that I learned in the course of my tenure was that, although there might be a degree of intellectual independence from the party positions within the Senate, there is a great desire by Senators to be in the majority, for a variety of reasons but perhaps the most important reason is to control the chairmanships of the committees, and the hiring of staff for the committees, and to direct the agendas of the committees. This not only gives a Senator a greater chance to influence the legislative outcome in the Senate but it also gives the Senator higher visibility within the nation and his or her state. So one lesson I learned was that these chairmanships are highly desirable and the only way they can be obtained is if your party is in the majority in the Senate. It gives every Senator a vested interest in not embarrassing their party by their actions within the Senate.

RITCHIE: You said that they want to be chairmen, but you've also indicated that there was a general weakening of the chairmanships.

RYNEARSON: That's my third point, that although the chairmanships have power and are desirable, perhaps more from a public relations standpoint, the powers of the chair and the Senate leaders are somewhat diminished from what they were years ago. They are diminished politically because freshmen Senators can go on television and achieve a certain degree of stature and it makes it harder for the chairmen and the leaders to enforce discipline

on freshmen Senators. Also I think that the amount of money that is required nowadays to run a campaign means that Senators have to seek private donations to a large degree and they may not be quite as dependent on the party apparatus and they're certainly less dependent on the campaigning assistance that can be provided by the Senate leadership and the committee chairmen on their behalf. So the incentive to defer to the committee chair and to the leadership is not as present as it once was.

Also, as each committee went to a bipartisan staffing arrangement, what you tended to have, in terms of the minority party, was a committee within a committee. This to some extent undermines the chairmen's power. The reforms that were enacted in 1970 and 1977 do give the minority some additional rights within the committees that they did not have. So I would say that there has been an overall weakening of the committees and the Senate leadership. It's really a very involved question that we could spend a long time discussing. There have been more filibusters over the years and that has thwarted the power of the majority leader. Also, the inability of the authorizing committees to get their legislation enacted during the course of the year because of the budget disputes within the Senate has weakened the chairmen of the authorizing committees.

So I do believe that there has been a weakening, and I'll mention that just the other day, in my retirement, a Senate committee chairman said to me: "I waited years to become chairman of the committee, only to find that the chairman's powers are not what they once were." That's a paraphrase but it's very close to what he said to me.

The next thing I mentioned in terms of change was I believe that the Senate has generally gotten a bloated legislative staff and bloated legislative agendas. When I interned in the House in 1969, there was one legislative assistant who handled almost all of the legislative work for the Congressman. Nowadays I understand there tend to be three or four legislative assistants in a typical House office. In a typical Senate office there may be six or eight legislative assistants, with a legislative director supervising the legislative assistants. This became necessary, I suppose, because there was some pressure on each Member of Congress to have a more expansive legislative agenda. There could be a variety of reasons for that. It could relate to the interaction of the Member of Congress with the special interest groups, or there may be other reasons. It may simply be that in this information age Members feel more obliged to have their own legislation in each of the major issue areas.

In any event, the Members began to hire more legislative staff. This had the negative result that each legislative assistant tended to have less authority to make decisions on legislation. In fact, I found that many legislative assistants seemed to have no authority to make decisions on legislation. They were acting merely as messengers or spear carriers, and doing some of the grunt work for the office in the legislative process, but not having the authority to make major decisions. Of course, the Member of Congress has to have the ultimate authority, but years ago administrative assistants and legislative assistants felt so familiar with the Members' thinking that they could make technical decisions without an immediate need to refer the matter up the chain of command. Now there is a longer chain of command and the legislative assistants are farther down it.

This is an unfortunate development, I think, for the Senate. It makes the Senate more bureaucratic to less effect. The legislative staff having less authority feel as if they need to know less about the legislative process. I believe this slows down the ability of the Senate to act.

Finally, I guess I mentioned that I believe to some extent the legislative function of the Senate is in jeopardy of being contracted out, and that the Members are losing their ability to act as trustees and to apply an independent review of the legislation the way I believe the Founding Fathers intended. The Senate feels a greater need to be responsive to special interest groups than previously because the Senate is much more in the spotlight, much more on the hot seat regarding its actions. Although the Senate retains the ability to check the House and to act as the saucer, cooling down the cup, it does not seem to be adequately performing the function that the Founding Fathers intended, that it apply an independent eye to the legislation. The irony is that the Senate probably reflected the polity of the country better than the House over my years of service, because the country has been very closely divided on major issues. These divisions go back a number of years and continue to this day, and to some extent were reflected in the presidential election of 2000 and the 50-50 Senate of 2001. So, on the one hand, the Senate has become a more representative body than the House, but, on the other hand, by that very nature it has become less of what the Founding Fathers intended, and less independent and able to serve as a trustee for all of the American people.

RITCHIE: To what do you attribute these changes? What were the major forces that have caused this?

RYEARSON: Well, unfortunately, I do believe that the demands of electoral politics have been a cause of it. There is a need while campaigning to go on television. Television is very expensive. A Senator's campaign for reelection must begin soon after the Senator's last election in order to raise the amount of funds necessary. So I do believe that the fact that Senators feel that they are constantly in a campaign mode is one of the reasons why they feel they cannot exercise as much independence in the legislative process as they might like.

Another factor is simply the way the political landscape has unfolded over my tenure. The Republican party has become a stronger force politically within the country, both at the presidential and the congressional level, so there is a closer divide within Congress than you found in the late '50s, all of the '60s, and early '70s. There was a period there for about twenty years in which the Democratic party dominated with supermajorities in the House and the Senate. The fact that that has changed has meant that there's more pressure to win every seat for the party to either retain control of the Senate or capture control of the Senate.

Finally, I guess, the information age, generally, with the televising of the Senate and the easy access of constituents to their members by e-mail has made the Senate a more accessible institution. And by making it more accessible, it has broken down some of the Senate's capacity to achieve an independent look on the legislative process.

RITCHIE: This is still a body that depends largely on individuals, some of them larger than others. I wondered, looking back over your decades up here, who were the most memorable people that you've worked with?

RYNEARSON: There were quite a number. I was generally impressed with every Senator that I came in contact with, but I interacted directly with only a fraction of the Senators. As a group of individuals, in terms of their achievements and overall intelligence, I had great respect for Senators. There are several that stand out, I suppose. Senator Byrd is one, not only for his love of the institution and his knowledge of the rules of the institution, but because he took the time to read the legislation that I drafted. In the early years of my tenure, I was struck by Senators Javits and Humphrey. Their abilities and influence within the Foreign Relations Committee were very impressive. Later on, in my career, I was very impressed with Senator Lugar's leadership within the Foreign Relations Committee. I was also impressed by the ability of Senator Helms and Senator Biden to work together to make the Foreign Relations Committee a stronger committee. I thought Senator [Dale] Bumpers

was a marvelous debater and orator who didn't need to use notes. But it's very difficult to single out individual Members.

Interestingly enough, I thought the intellectual abilities of Senator Daniel Evans of Washington were quite great, even though he served only one term in the Senate and I had a relatively short view of his abilities. Also I thought that Senator Nunn was absolutely sharp as a tack and very able. Senator Mitchell as majority leader, I thought, had the type of general temperament that you look for in a leadership Senator of either party. He seemed to have an interesting mix of firmness to the party line and also collegiality within the Senate. Those are the Members that spring to mind, but I'm sure there are others that I have left out inadvertently, and I apologize to them.

RITCHIE: It is hard in a body of so many members, and so many different types, to pick out the best, and for what qualities.

RYNEARSON: Let me also mention that Senator Nancy Kassebaum, perhaps because she had been a former Senate staffer herself, she was just a very good person to interact with from the staff standpoint. She was very appreciative of staff assistance and very friendly with the staff, as I'm sure were others with whom I had no contact. But I remember her especially for being very amiable.

RITCHIE: An increasingly large number of Senators have had some staff experience themselves: Senator Daschle; Senator Lott; Senator Kassebaum as you mentioned; Harry Reid was on the Capitol Police; Susan Collins was a staff person; Mitch McConnell started as a staff person. That's now part of the vitae of a large number of members.

RYNEARSON: I'm giving you a somewhat distorted answer regarding Senators because the only Senators I knew were ones who required a lot of foreign relations or immigration drafting. Senator [Edward] Kennedy, I might mention, throughout my tenure in the Senate seemed to hire a very experienced staff, and that made my job a lot easier. Although I did not interact with him directly but once, I remember having a very good working relationship with his staff, as well as with Senator [Sam] Brownback's.

RITCHIE: Getting closer towards the present and towards your retirement from the Senate, the 21st century opened with a lot of turmoil in the events of September 11 and then

the closure of this building for three months because of the anthrax attack. Did those events affect your Office in any way?

RYNEARSON: Those events affected our Office very profoundly, and affected me very immediately in a business sense besides the obvious personal impact. In terms of the Office, our Office was closed for a week because of the traces of anthrax that were found in the mailroom of the Dirksen Building. The Senate continued to meet during the time that the Dirksen Building was closed, so my Office was obligated to continue to provide drafting services for the Senate while we were out of an office. This was very difficult because of the unique computer technology that we have in our Office for word processing, where we are able to print legislation so that it appears just the same way as if it were printed by the Government Printing Office. We share the same word processing application as GPO. The Office attempted to solve this problem by detailing some of our employees to share the Enrolling Clerk's office over in the Capitol, and also assigning some of our employees down to the Government Printing Office building during that time.

The Office was evacuated on 9/11, about 10 a.m. that morning, as I recall. I could see the smoke from the Pentagon out my office window. So I will never forget that day and how I attempted to walk as far away from the Capitol building as possible initially, because of the fear of additional attacks. Then, just four days later there was a bomb scare in the Senate, and the Senate was evacuated again. So at a personal level, it made all of us in the Office concerned for our personal safety and of course concerned for the country.

In terms of my business activities, the very next morning after September 11 I drafted, on my own initiative, a declaration of war. I had the feeling that I might be asked to draft such a document on an urgent basis. I was about three-quarters of the way through the drafting of that document when an important Senate staffer showed up at my doorstep wanting exactly that type of document. It's about the only occasion that I can think of in my tenure in which I drafted something in advance of a request. Of course, I could not do anything with the draft without the blessing and authorization of a Senate office, but I felt the need to start drafting that. We did not enact a declaration of war, but we did enact an authorization for the President to engage in hostilities against the terrorists responsible for the 9/11 attacks, or countries aiding and abetting the terrorists.

RITCHIE: To whom was the declaration of war addressed? In each of the previous declarations of war, there had been a country that we were going to war with. What did you do when you writing this one, against a group rather than a country?

RYNEARSON: I was pioneering new ground. The only thing that you could do would be to try to declare war against the terrorist organization or countries providing sanctuary to members of that organization. You're absolutely right that this is different. It has different legal implications depending on which statute referring to declaration of war we're attempting to apply. It may be for that reason that a declaration of war was not enacted and that there were many legal implications of this not all of which had been fully explored.

RITCHIE: All of the emergency powers that are invested in the President once you declare war, in particular.

RYNEARSON: We quickly shifted gears to an authorization of the use of force, rather than a declaration of war, so I can't tell you how this would have unfolded totally.

RITCHIE: The Senate Historical Office had calls from a leadership office about declarations of war, and they were initially convinced that there had been a declaration of war against the Barbary Pirates. They thought that would be a model. We had to tell them that even though the U.S. went to war against the Barbary Pirates, we never declared war against them. It wasn't until the War of 1812 that we actually enacted a declaration of war.

RYNEARSON: There have only been five declarations of war I believe: 1812, the Mexican-American War, the Spanish-American War, the First World War, and the Second World War. That is the sum total, and I reviewed all of those declarations of war to see how they were phrased. It was not the first time in my tenure that I had drafted a declaration of war, actually.

RITCHIE: When was the first?

RYNEARSON: Well, I'm actually a little bit hazy on that. I might have done it with respect to Iran at the time of the Iranian hostage crisis. That was probably the first time that I had occasion to look at the phrasing of declarations of war. In any event, when you authorize the use of force with very few strings attached, the wording seems to be closely

coordinated with the executive branch. Since Congress had enacted an authorization of the use of force in the case of the first Persian Gulf War, that, I believe, was used as something of a model for the authorizations of war against the 9/11 terrorists and the war against Iraq. With respect to those authorizations, I had a fairly small role to play, except in both the first Gulf War and the second Gulf War I drafted up alternative language to the authorization of the use of force, for Senators Nunn and [Carl] Levin, respectively, to offer as amendments. I did feel privileged that I was able to participate in some way in the Senate's consideration of those matters, although again I'm not indicating how I would have come out from a policy standpoint. But I do believe that it was appropriate that the Senate and the House consider those matters and have a full debate on it.

I was disappointed that in the case of the 9/11 use of force resolution that there was not a longer debate on that. It's not that I had any doubts that we should respond, but I felt it probably deserved a fuller debate than the amount of time that was expended on it.

RITCHIE: When you think about the amount of debate before the first Persian Gulf War, by comparison to the 9/11 resolution and the second Iraqi war resolution, they didn't spend as much time, and not as many people spoke on the issues.

RYNEARSON: I think the Senate debate on the first Gulf War was one of the Senate's finest moments in my tenure, because all one hundred Senators were present and each one seemed to accord the matter the seriousness which it deserved. My only regret from that debate is that the vote ended up being more or less a party-line vote. On a matter of that grave importance to the country, it is regrettable that it comes down to a party-line vote. But the debate was probably the best debate that I heard in my tenure in terms of the level of preparation of the Members and the issues that were discussed.

Going back to how 9/11 impacted my Office, it impacted me virtually every hour of my working day after 9/11, because virtually every piece of legislation that I drafted after 9/11 until my retirement at the end of January 2003 was 9/11-related. I was involved in drafting legislation to remove the legal barriers to providing aid to Pakistan. I was involved in providing additional aid to Afghanistan. I was involved in a variety of immigration law changes to attempt to tighten our border security, culminating in the enactment of the Border Security and Visa Entry Reform Act of 2002. My Office also provided legal assistance to the Senate regarding what response measures the Senate might take in the event of any future

attack. So after 9/11, the agenda of the Senate changed and as the Senate's agenda changed, my own workload changed to reflect it. It was a very busy time and a very stressful time because I did not want to let anyone down and I felt that everything that was 9/11-related was high priority, which meant that my entire workload was high priority. It was difficult to prioritize within my workload. So it did have a very profound effect on me personally and professionally. I know it will continue to have that effect within the Office for a long time to come.

RITCHIE: Did that contribute to your decision to retire in 2003?

RYNEARSON: It contributed to my decision to stay in the Senate longer than I perhaps was inclined to do. I had given some serious thought about retiring in early 2002, but after 9/11 I immediately rejected that option. My decision to retire was based largely on the feeling that I had served an entire career, that my family has had some health crises that continue, and that I wanted to have more time to spend with my beloved wife, Mary Linda Rynearson, but not particularly the 9/11 matter. Just the opposite.

RITCHIE: What kinds of plans do you have for your retirement? Are you going to continue to do anything relating to the legislative drafting career that you had in the Senate?

RYNEARSON: Well, I told the Foreign Relations Committee in my last week as an employee that I intended to rest, write, and teach, in that order. I got a lot of laughs from the Members. I'm not sure why, maybe it was because I had the audacity to say that I would actually be resting for a while. As it has turned out, I think the sequence may be a little bit different. I've actually done some teaching or training just a week ago involving the legislative process. I hope to do more of that. My Office was the institutional memory of the Senate in the area of legislation and the legislative process. I think it is very important that this knowledge not be lost and that it is passed on. So I hope to continue to have training and teaching opportunities. Somewhere along the line I'd like to do writing, because it was really the writing that attracted me the most to my Office. I love to write and I hope I'll be able to have the discipline in retirement to do some writing, both in the area of legislation and in history, and perhaps some creative writing.

RITCHIE: Well, you have a unique perspective on this institution as you've demonstrated in these interviews, so I hope you will write. I know we'll have your books on

our shelves when you do.

RYNEARSON: It's been my privilege to talk to you about my career, and I hope that others will be able to get some little insight that will be of benefit as a result of the interviews. Thank you for listening to me.

End of the Ninth Interview