TOM POLGAR INTERVIEW 12-19-80

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Oral History interview with Tom Polgar

December 19, 1980. Washington, D.C.

By Pete Daniel

POLGAR: My name is Tom Polgar. This is the second interview I have taped. On this one, we are going to start talking about the proposed Federal Bill of Rights for Mental Health Patients. Whether or not to have them was a legislative battle that took place over the course of 1979, finally being resolved towards the end of July 1980 when the Senate voted against it. Morgan's opposition to this proposal was an outgrowth of his opposition to the Civil Rights of the Institutionalized Bill which he had spent three years opposing until it was finally enacted in May of 1980. What happened was that in the fall of 1979 the Senate Human Resources Committee started to work on the bill to renew the various federal mental health programs which were due to expire in October of 1980. The White House, which was crucially interested in this bill because Rosslyn Carter has a very strong personal interest in helping the mentally ill, sent down a reauthorization bill about late summer of 1979.

The committee got to work on it a couple of months later. Excuse me, the subcommittee started to work on it a few months later. It was the Health and Scientific Research Subcommittee, which is chaired by Senator Kennedy. In October of 1979 a draft of a proposed federal Mental Health Bill of Rights appeared. I found out about it because a couple of psychiatrists, who were teachers at ECU, wrote a letter to Morgan complaining about it.

They had heard of the draft, and they were very upset. It goes to show that sometimes we do read our constituent's mail. Anyway, I checked into it and found out it was just a draft and that basically what it did, it established a series of statutory rights that all mentally ill persons receiving inpatient mental health services were entitled to. It also provided a very detailed series of enforcement provisions with enforcement being possible both by the federal government suing and bringing actions in court.

The thing just sort of dropped out of sight for a while. I was sort of vaguely paying attention to it. It turned out later they were going through a series of drafts of the thing, trying to work it out in a way that various parties, which includes advocates of the mentally ill, the Justice Department, the committee staff, and the big medical lobbies--primarily the American Hospital Association and the American Psychiatric Association, which I'll call AHA and APA from now on--would find acceptable. This went on until about January when I got a second letter, this time from the APA, which was a letter that was sent to all Senators complaining about the proposed bill of rights. But it was still in subcommittee; the subcommittee hand't met to consider the bill or anything, so I just kept following it. I hadn't done very much,hadn't even mentioned it to Senator Morgan yet.

In early May of 1980, the subcommittee met. There was no proposed bill of rights in the bill as it came to subcommittee for mark-up. Towards the end of the mark-up, Senator Javits came in and said, "Oh, I've got this little amendment here," and got it approved without any debate, any real discussion--and no furthur amendment. The bill promptly sailed through the subcommittee, it sailed through full committee, and was reported out in time for the May 15th deadline for all reauthorization bills.

At that point, I was starting to get real serious, and I went to Morgan and asked him what he was prepared to do. After some thought, he said, "It's a very sensitive issue. I'm very much opposed to it, and I am prepared to get into it--but only if I am going to win." So I took that as a license to do as much work to do as needed on it. Starting about mid-June, which is when I got the decision out of Morgan, for the next five or six weeks, I literally did nothing else except answer a few letters from constituents.

The first question was, since the bill was going to come to the floor, what kind of amendment was going to be offered to knock it out, and also whether we could do this peacefully through negotiation or whether we were going to have to fight.

So, I started by going to meet with the subcommittee staff, by which I really should say, representatives of Senator Kennedy's people and a guy who worked for Senator Javits, since he was the

original sponsor of the measure, to try to work something out. Well, it became clear that their bottom line and my bottom line were nowhere close, and there wasn't going to be any agreement reached easily. Essentually, what they offered was a one-year delay in the implementation of the bill of rights which I just rejected out of hand. Then they said, we'll give you two years and if the states have enacted equivalent laws before then, then they won't come under the federal bill because they'll have their own state law which will be just as tough.

I took that to Morgan knowing full well that he would reject it. It was unacceptable because it was simply the same as the unacceptable federal law which was essentially saying well, states you are going to be coerced into doing it yourself or we'll do it for you and we'll just give you two years. Morgan said that was just ridiculous. If there is going to be a federal bill of rights, we just might as well go out and mandate it and not bother with this two year delay stuff. At that point, our bottom line was that there would be a study.

I would like to do two things at this point. The proposed Bill of Rights at this point had gone through ten drafts. The eleventh draft is what was attached to the bill. First, I would like to point out what the Bill of Rights actually provided for. There were fifteen specified rights for all mentally ill patients, things like right to treatment, the right to refuse treatment, the right to informed voluntary and written consent to treatment, good conditions and things like that, very clearly specified. A number of them were potentially in conflict with each other.

For enforcement, the bill required all facilities that provided inpatient mental services to establish inhouse grievance procedures. The grievance procedures could not be under the control of anybody who had a role in providing services. So you are talking about hiring extra people at every facility. There was also a private right of action, which means that any individual who was mentally ill or any of his representatives could bring suit in the federal courts against the institution in question, because it applied equally to private hospitals, to get their rights enforced and to seek equitable relief. Thirdly, of course, the federal government could enforce the rights. Finally, the proposed bill of rights established an advocacy program run by HEW to advocate on behalf of all mentally ill people.

Now, Morgan's objections to the bill were many. All the objections that Morgan had to the rights of the institutionalized bill, which I discussed on the last tape, applied equally to this one. He thought it was an improper usurpation of state powers. He thought the approach wasn't going to work, and he didn't like to see litigation over social policy in the courts. In addition, in the case of this specific bill of rights, there had been no hearings, little debate, no discussion, you know, which rights exactly, what the rights should say, the kind of details you have to go into when you are drafting very complex and especially unprecedented legislation. At least on S 10,

which was the right to the institutionalized bill, literally every last comma in the bill had been subject to pretty through going over. Finally, he was concerned about the private right of action in the sense that it would lead to case by case judicial determinations over what are medical decisions. In other words, a psychiatrist may have a good sound medical reason for going left instead of right. If it doesn't work, he's liable for a lawsuit under this bill. I really haven't talked about this issue in six months, and it's a little hard to remember all our reasons for doing things.

The medical lobbies, the big medical groups, they really were only concerned about the private right of action. They were worried about lots of lawsuits against them by individuals. They weren't so worried about the federal government itself bringing suits. Most of these are private facilities, and to the extent that the government worries about rights enforcement, they tend to worry more about public institutions, particularly in the cases of mental health and mental retardation where the public institutions really are in many respects, somewhat deplorable.

When Morgan and I started talking about what kind of an amendment to do, our initial theory was to just strike everything, but we figured we couldn't sell that to a majority. So after playing around for a while what we finally came up with was that we take the rights, the actual fifteen specified rights,

and put the sense of the Congress language in front of it. So you would have something that will say in the effect, said, it's the sense of Congress that each state should provide adequate protection for the mentally ill, and a statute like this might be a possibility. In other words, with that kind of a preface you've really eliminated the rights. Then the rest of the amendment just wiped out the advocacy program and all the enforcement procedures and everything else.

Theoretically our allies in trying to block this thing were the private medical groups, since they were included in this bill. They were not included in previous rights efforts, and various state associations, like the National Association of State Mental Health Program Directors, National Association of Attorney Generals, National Governors Association, etc. The state groups are worried about the state's rights issues essentially and being harassed by the federal government, which is Morgan's primary concern. The private groups are worried about getting themselves off the hook from lawsuits.

I had a lot of trouble getting everybody in behind one amendment, even among the private organizations, the APA, AHA, AMA. There were considerable differences how the amendment actually should read. One group wanted to go with an amendment which would just wipe out everything, which was Morgan's original idea. Another group just wanted to get rid of the private right of action. The AMA was somewhere between those

two positions. The state groups really, in this case, were no help at all. The National Association of Attorney Generals, their people in Washington, wanted to help us, but they didn't have any policy directive from their attorney generals and so they couldn't do anything. They said they would have to wait for the next meeting of the attorney generals and that was going to be the following fall which wasn't too helpful. The National Governors Association basically said that they had to follow the lead of the State Mental Health Program Directors. The State Mental Health Program Directors took a position supporting the Mental Health Reauthorization Bill as a whole and opposing any amendment which meant they would be opposed to any changes in the proposed bill of rights.

Now, they made a serious miscalculation here in my opinion. What they did, in the past the mental health programs had had been basically direct federal to local programs, and the states had been bypassed. They got some concessions out of the committee which had the effect of giving the state much greater say in the control of the federally funded programs. In return for that, they had to give on the bill of rights. I think they were getting a lot less than they were giving. They thought differently. In fact, the association was split on the subject. Some of the program directors were very much opposed to the bill of rights. Some of them could live with it. Some of the ones interestingly enough in the states with the worst programs were for the bill of rights, because they figured the federal government would then force the state to upgrade services,

which suited them just fine. Anyway, I finally gave up on the state groups, and we really focused on the private groups and never could get them to agree on an amendment. Morgan and I finally made the decision on what would be offered and just told them that that was it, and they could take it or leave it, but we were going with it. That really got us through the preliminary states of this thing, and then the rest started to get real exciting.

At this point, I think, we're at June 23rd,or the 21st, that we actually filed the amendment to negotiate--after we had been given that first and last offer by Kennedy. At this point, we sat down for a second round of talks, in fact, but they weren't budging off their position, and so I wouldn't consider making any concessions either.

The next step was to start building up support for our amendment which we started to do. The various big medical lobbies who were quite a big help on this, put out the word to their people that this amendment was coming up, and they should line up behind it and start writing, calling, and otherwise harassing their Congressmen. But it takes, from a practical standpoint, it takes about three weeks to get a constituent-based campaign like that going. The word comes out from Washington, gets there, it takes a couple of days for the people at home to do anything, and then a couple more days to get some impact felt back here. You really need about three weeks.

But three days or four days after Morgan filed the amendment, Kennedy and the Senate leadership tried to bring the bill to the floor. At that point, Morgan took the position that he wasn't ready to go yet. He hadn't had enough time. This thing had only been in front of the Senate for a month, a month since the bill had come out of the committee, and he needed more time. The leadership said no. This is priority legislation as far as the President is concerned. Kennedy is here now, we got to move it now. To which Morgan responded, that if we don't have the time to educate the members of the Senate on this matter by talking to them individually, we would have to take the time of the Senate on the floor and spend three days discussing it. The Senate wanted to adjourn for two weeks at the end of June for the Republican Convention. We had to adjourn; that was prescheduled. So three days and we are back off to July, mid-July, and so the leadership caved, and they said, fine, we'll do it sometime after the Republican Convention, which was acceptable to Morgan.

For the next three weeks, I literally spent my life on the phone, as did other people. We contacted every office, and when we got a response we didn't like from a legislative assistant in another office, we went to the legislative director. If we didn't like what the legislative director said, we went to the AA. Insofar as possible, we tried to work it out that people on the Senate staffs were only contacted by people they knew.

If we didn't know anybody, we tried to find somebody back in the Senator's state to make the contact. On several offices, about a half-dozen offices, we went around the legislative assistants and got the decisions reversed. That's something you can't do too often; you make enemies if you do it. But you know, we were going to throw everything into this and try to beat it. Our initial vote count, which we took about two weeks after the leadership tried to bring it to the floor, showed us running ahead by about 16-10, with the rest undecided. We were very optimistic at that point. Of the ten that we knew were against us, nine were off the committee and had supported the thing in committee. So in other words, of the first seventeen people who told how they were going to vote, sixteen came down on our side.

We kept owrking at it. It was about mid-July. I saw that we were going to have the votes. At that point, it was about 40-20. We kept going. The following week, on July 24th, Morgan made a very nasty statement in the Record, and I really should have thrown it in. I really need to backtrack a little.

One thing the Kennedy people started doing after they saw they had a serious fight on their hands, they started telling everybody that they would kill the whole rest of the bill if they couldn't have their way on our amendment, which that if Morgan didn't lose, they would kill the whole bill. Morgan's position was that they were bluffing, but if that is what they really wanted to do, he could live with it. This rumor was not only aimed at the constituents to get pressure put on Senator

Morgan to back off and not offer his amendment, it was also aimed at the administration. We were in a struggle, if you will, for the hearts and minds of the administration on this with the Kennedy people trying very hard to get them to come out and support us.

We didn't think there was much hope that the administration would come out against any part of this bill because they were so strongly committed to the bill as a whole. Well, I was pretty determined to keep them out of it. Initially, the administration sided with us, but the mental health people ran around and got to Rosslyn Carter and persuaded her of the importance of this thing, and she applied a lot of pressure, I guess, where it counts, and pretty soon the word came down that the administration was going to support Kennedy. That got the second level people mad. Some of them actually agreed with Morgan; others were actually really neutral on the subject but had made the commitment to Morgan that they would stay out of it. So in the final analysis, they chose a way of showing support which did show very strong support. All that happened was that there was a letter from Patricia Harris, which was sent to Robert Byrd, which said that they thought that the Senate bill should be passed without amendment and that the bill of rights was fine, which in Washington terms was not a strong statement of support.

The bill finally did come to the floor on Thursday, July 24, and at that point, we knew on the Monday before, we hit our fiftieth; we knew we were going to win it. One of the things interesting about this fight was that we counted our votes

much better than Kennedy and his allies counted their votes, because they were persuaded they had the votes to win. I said they were crazy. They in fact made an offer to us one week before the bill came to the floor to let us have a face-saving way out.

In the week before the bill came up, however, some pressure started to build up on us that we had to reach a compromise, that it was silly less than a month before the Democratic Convention that two Democratic Senators to have a blood letting on the floor of the Senate. Because of things like those rumors and what we considered literally bordering on lies that were being put out by Kennedy's people, Morgan and I were pretty hot at this point, and tempers had heated up. There's a statement in the Record of July 22, the speech Morgan gave which was pretty vicious, not dirty, but it was nasty.

On Wednesday, I found out for sure that Williams would be managing the bill; we had thought he would be, but that was when we found out for sure that he would be managing the bill. Williams is chairman of the full Human Resources Committee. The reason Kennedy, who as subcommittee chairman, should have been managing the bill, was not doing so was because he was too busy in the Presidential campaign and could not spend the time at it. At that point, I approached Williams' people with a compromise. They said, humm. Williams has a thing. If he goes to the floor with a bill on behalf of a committee that his bill

should not be amended if he opposes an amendment, and if the committee gets beaten on the floor he gets a little upset and heads have been known to roll for it.

So Williams' staff people asked me how I thought the vote was, and I said, "We're going to win it." I said, "There's no doubt." They said, well that's what Kennedy's people say. I said, "Fine, let's sit down and go over each Senator, Senator by Senator." They said, okay. So we did, and I showed them where our votes were. Well, that sold them, and they became very interested in a compromise. The compromise talk had gone on very slowly in the last week, but on Wedensday things really started to break. We were up late Wednesday night. Thursday morning, I came in to work early, and the first thing I got was a call from Williams' staff saying that he badly wants a compromise, and they will put some pressure on Kennedy's staff to agree to something and can we would something out. So I said, "Fine."

We got to the floor. The bill was to come up about ten o'clock; we started working on it right away. Kennedy, Javits, Schweiker, and that crowd were all making their opening speeches. A few non-controversial amendments were being offered, and we were sitting around in the back of the room trying to work out an agreement. We finally did. The agreement was essentially that we would have Morgan's amendment. I wasn't in the mood, after what I had been through, I wasn't going to

give up very much, and I don't think that Morgan was going to give very much because we had the votes. We had gone to all the trouble of rounding up all the votes, so it was too late to make major concessions. What we agreed was to have Morgan's amendment, but instead of no advocacy program, there was to be an advocacy program which was federally funded but run by the states, that would be in the control of the governors instead of the Secretary of Health and Human Services. That was finally agreed to. We rangled about that a little, and it was about an hour and a half to two hours of solid negotiating before we reached something. The Senate spent an hour of that in quorum call.

Finally, we reached our agreement. Morgan offered the amendment. It was Morgan-Williams; Williams cosponsored it, signifying that it had his support. Everybody gave a little speech about how great the amendment was because it satisfied all parties. Morgan gets up there and says how great the compromise is because it gave him everything he wanted. When Morgan was saying this, I'm sitting there saying, "Oh my God." It's tradition in the Senate that when you reach a compromise everybody tells everybody how wonderful they are and how great the amendment is because it satisfies everybody's concerns, which this amendment really didn't because it did have everything that Morgan wanted. It did create a new advocacy program which

we thought was a waste of money, but it created it in such a way that wasn't going to be able to do any of the things that Morgan was worried about it doing, so it was no threat.

Morgan asked for a roll call vote. Morgan was really proud of himself. He had won a real big victory against some high powered Senators, and he won it and won it going away and he really asked for a roll call vote just more so to enshrine the thing than anything else. The amendment carried 91-1. The one being Proxmire for some unfathomable reason. There was an interesting little spat, almost, following the 91-1 vote and before Morgan went through the necessary Parliamentary motions to make sure that the outcome couldn't be changed. Javits, after he voted for the compromise amendment, read it. When he read it, he blew his stack on the grounds that it was all Morgan and nothing of the original amendment that he had offered way back in subcommittee way back in early May. He got up and started. One, he publicly berated his staff person for accepting the amendment on his behalf without clearing it with him, and two, he started to complain on substance how awful he thought the compromise was. To which Morgan got up and said there was really no way that he and Senator Javits were ever going to be able to agree on this subject because he had a completely different philosophy for dealing with problems like this. In a sort of round about manner, he basically said if you want to dump the compromise and go back, we can have a vote on the original amendment; that's fine, we can do that.

I thought Javits was going to accept that. In fact, Javits did move to reconsider the vote. At this point, there were quite a few Senators on the floor who heard the exchange between Javits and Morgan, and they just shouted. They voice voted the move to reconsider, and it was clear from their attitude that they didn't want to have the vote on the controversial Morgan amendment as opposed to the "noncontroversial" substitute.

In the end the bill passed the Senate 93-3, went through the House, and the Morgan amendment survived conference substantially unchanged and was signed into law by the President. So we won it, and it was a very good victory in terms of a highly controversial fight over a major national issue. It may have been Morgan's biggest win in the Senate.