

**DEDICATION OF BIRCH BAYH
UNITED STATES COURTHOUSE
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Congressman Hamilton, both Senators Bayh, Governor Kernan, Lieutenant Governor Davis, members of Congress, and many honored guests and fellow citizens, thank you very much. It is truly an honor and privilege to address you on this happy occasion.

My role here is to review briefly Birch Bayh's career in the United States Senate, and to explain, for the record, as it were, why it is so fitting that this magnificent United States Courthouse has been named for him. The task is comparable to an assignment to preach a rousing sermon to the proverbial choir. The challenge is to stick to only the highest of the highlights.

We'll see that Birch Bayh has made a difference. He has made a difference for constitutional law and the stability of our government in times of crisis. He has made a difference for the rights of women and for the rights of racial and ethnic minorities. He has made a difference for young people.

Consider the United States in 1962, when Birch Bayh was first elected to the Senate—a time that some fondly remember as the good old days.

- Racial discrimination, no matter how blatant, was legal in private employment.
- Women were often on the fringes of employment and schools and universities.
- Discrimination on the basis of sex or pregnancy was legally permitted.
- Voting rights were denied to African American citizens by means both blatant and subtle.
- Health care for the elderly was expensive, and insurance for them almost non-existent, forcing families to make painful choices about care for their parents.
- Young men could be drafted and required to serve, and even to die for, their country before they could even vote for the leaders who could order them into combat.
- And the Constitution's answers to problems of presidential succession and disability were completely inadequate—especially in a nuclear age. Just weeks before Birch Bayh was first elected in 1962, the nation had come to the brink of thermonuclear war.

Now consider the picture after Birch Bayh had completed his service in the Senate. Let's start with the Constitution. Judge S. Hugh Dillin of this court has said that part of our job here as judges is to write a series of footnotes to the Constitution. We all do that every year in cases large and small.

Senator Birch Bayh, however, did not write mere footnotes to the Constitution. He played a role unique since this nation's founding and the ratification of the Bill of Rights. In his role as chairman of the Judiciary

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Committee's Subcommittee on Constitutional Amendments, he authored two Amendments that became part of the Constitution itself. These Amendments were vital contributions to the stability and fairness of our system of government.

The 25th Amendment deals with succession to the offices of president and vice president, and with the temporary disability of a president. The Amendment is familiar to all who recall the resignations of Vice President Agnew in 1973 and President Nixon in 1974. On a lighter note, the Amendment is also familiar to those who have watched "The West Wing" this year.

The 25th Amendment did two principal things. First, it established a mechanism to fill a vacancy in the office of vice president. The president nominates a person, subject to confirmation by a majority vote of both the House and the Senate. Second, the Amendment provided a mechanism to address the temporary disability of the president, to restore to the president the powers of office after the disability has ended, and to resolve quickly any disputes on such a delicate matter. Senator Birch Bayh drafted the 25th Amendment, led its adoption by Congress, and pushed for its ratification by the states.

How did Birch Bayh make a difference? The problems posed by succession and disability had been well known, at least since President Garfield's slow death in 1881 and President Wilson's disability after the Treaty of Versailles in 1919. In 1962, there were plenty of good solutions available. The political problem was that there were *too many* solutions. Each had its own supporters and its own problems. The result of too many good ideas had been decades of stalemate. The problems had not seemed urgent, yet they could present a national crisis on a moment's notice—if there were any doubt about who had the power of the presidency.

After President Kennedy's assassination, freshman Senator Birch Bayh studied the problem quickly and thoroughly, and he decided it was time to act. He decided that the best solution lay in the general framework of what became the 25th Amendment. Then he went about the patient work of persuading other Senators, and then persuading the House, state legislatures, and the American public that his solution should be adopted and ratified.

Through his skill as a legislator, he was able to overcome obstacles posed by ego and pride of authorship. He succeeded in persuading other giants of the Senate—men who knew constitutional issues thoroughly—and who were not necessarily modest about the virtues of their own solutions—men such as Senator Kenneth Keating of New York, Senator Everett Dirksen of Illinois, and Senator Sam Ervin of North Carolina—that they should put aside their own preferences and build a consensus around one very good solution to the problems.

The story is one that shows the hallmarks of the legislative process, and the skill of an extraordinary legislator: Birch Bayh stayed focused on the big picture. He showed reasonable flexibility about details, and he found common ground. I cannot improve on the words of Senator Bartlett on the floor of the Senate in 1965: "The Senator from Indiana . . . has done an astounding thing: In his first term, he has studied one of the most delicate and troubling problems of our day, and has found for it, here in the Senate, a well nigh unanimously supported solution."

That solution has been tested, and it has passed its tests, with Vice President

Agnew and President Nixon, and when other presidents have been temporarily disabled. For this, we can all thank Birch Bayh. He has made a difference.

And for those of us in Indiana, he has made a difference indirectly, but very recently. In 1978, Indiana amended its own constitutional provisions dealing with succession and disability. The Indiana legislature consciously modeled the amendment on the 25th Amendment to the Federal Constitution. Sadly, after the late Governor O'Bannon suffered his stroke last month, the disability provisions had to be used for the first time. After Governor O'Bannon died, the succession provisions took effect, and were completed this week with the confirmation of Governor Kernan's nomination of Lieutenant Governor Davis. Those events, in which the Constitution worked well, remind us all how important it is that the governing law be clear and well adapted to its purpose for guiding us in times of crisis.

Birch Bayh also has made a difference with the adoption of the 26th Amendment to the Constitution, which guarantees the right to vote to persons 18 years or older. The 26th Amendment was adopted and ratified in 1971, as the Vietnam War was raging.

During the debates over the war, one point we heard again and again was that it was fundamentally unjust for the national government to draft young men to serve in the Army and to fight in Vietnam without allowing those young men to vote to choose the government that would demand such sacrifices. The controversy over the war brought new focus to an issue that had been percolating since at least the Civil War. The response was the 26th Amendment, which drew support from both those who opposed the war and those who supported it. The basic fairness of the idea—those called upon to fight should also be able to vote—drew widespread support. After the Supreme Court ruled that federal legislation could not guarantee the right to vote in state and local elections, the 26th Amendment was ratified faster than any other Amendment.

Birch Bayh also helped push through Congress the Equal Rights Amendment, which almost became the 27th Amendment to the Constitution. The ERA passed Congress with two-thirds majorities in the House and Senate. Its ratification fell three states short within the time allowed. Nevertheless, the ERA helped put women's rights at the center of national debate. And it might fairly be said that the ERA's supporters lost that battle but have won the war. The ERA anticipated the Supreme Court's movement over the last 30 years toward a position very close to that of the ERA. Now, when law or government policy treats people differently because of their sex, the government must provide an "exceedingly persuasive justification," one that does not "create or perpetuate the legal, social, and economic inferiority of women."¹ Again, Birch Bayh has made a difference.

Let us turn to Birch Bayh's role in legislation. He deserves credit as a principal sponsor of Title 9 of the Education Amendments of 1972. That legislation is best known for creating equal opportunities for girls' and women's sports in schools, colleges, and universities. Millions of girls who have played

1. *United States v. Virginia*, 518 U.S. 515, 533-34 (1996).

soccer, basketball, volleyball, or a dozen other sports, and the parents of those millions of girls, can be grateful to Birch Bayh.

Yet athletics were not the principal focus of Title 9. Even more important, the provisions of Title 9 apply much more broadly, to assure equal opportunities in academic and professional programs. The first big test case was about gaining admission to medical school. The opportunities in the classroom have opened the doors to millions of women in traditionally male-dominated careers. Again, Birch Bayh has made a difference.

Birch Bayh also authored the Civil Rights of Institutionalized Persons Act of 1980. The 1970s saw a wave of lawsuits to try to improve the conditions of jails, mental hospitals, and other public institutions that were too often neglected as other, more powerful constituencies obtained funding, and these institutions were left without needed money. Such lawsuits by private parties often fell short, however.

Birch Bayh recognized that the problem was a national one. He recognized that the federal government should not count on private parties to carry the load. He authored this legislation to give the U.S. Department of Justice the authority to investigate and to sue state and local governments to obtain relief from intolerable and unconstitutional conditions.

The Act was an important step to protect the powerless, the disenfranchised—some of the most vulnerable people in our society. And his skill as a legislator was evident, as he struck a careful balance between federal and state and local governments and obtained passage of legislation in this delicate area.

Birch Bayh also co-authored the Bayh-Dole Act of 1980 on patent law. That Act enabled universities to obtain patents on inventions they developed with federal research funds, and to license those patents for commercial use. Before eyes glaze over as I talk about patent law, let's keep in mind that before the Act was adopted, billions of dollars of government funding for research had often led nowhere commercially. The Bayh-Dole Act found a way to balance a number of competing interests and to turn those public investments into a source of economic growth. Last year, *The Economist* magazine gave the Bayh-Dole Act an extraordinary compliment, calling it "probably the most inspired piece of legislation to be enacted in America over the past half-century." In 1980, only 390 patents were awarded to universities. By 2000, that number had increased by 20-fold, to more than 8000. As a result, Americans have had much greater access to the benefits of the research they have funded with their tax dollars. Again, Birch Bayh has made a difference.

When we focus on the constitutional amendments and the major legislation that Birch Bayh authored, we see only some of the highest peaks of a legislative career that grappled with all the most challenging issues of the 1960s and 70s. We should also remember that Birch Bayh was part of the Congresses that enacted the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Medicare Act, the Clean Air Act, and the Clean Water Act—legislation that has improved the lives of every American family and that has touched every corner of America. We should remember his role in authoring and overseeing the Juvenile Justice Act.

We should also remember that one of the most important words in a legislator's vocabulary is "no"—saying no to ill-advised proposals to amend the Constitution, or saying no to poor nominations. We should remember the critical role Birch Bayh played in blocking the Supreme Court nominations of Judge Haynsworth and Judge Carswell. We should also remember the vital oversight role that Birch Bayh played as Chairman of the Intelligence Committee in the late 1970s.

And of course, I cannot even begin to touch Birch Bayh's thousands of other votes, amendments, and meetings for the benefit of Indiana communities, workers, and businesses that made up so much of the work of a Senator who worked every day to improve the lives of Hoosiers and all other Americans.

Finally, on a more personal note, let me add that Birch Bayh is one of a handful of leaders of his generation who helped inspire a generation of younger Americans, and especially younger Hoosiers, to commit themselves, as he did, to public service—to build their lives around the belief that government can be a force to improve the lives of our fellow citizens. As you might guess, there are a few of us present today. Birch Bayh has not only inspired that younger generation, he continues to go out of his way to help them in their careers of service. For that we are all grateful, and that legacy of his Senate career will also echo for many years to come.

In all these ways, Senator Birch Bayh has made a difference. He has made a difference for the stability of our government and for its basic fairness. And he has made a difference for women and minorities, and for some of the most powerless among us.

Ladies and gentlemen, I submit that it is entirely fitting that this magnificent landmark in the heart of Indiana, where we try to do justice every day, should be named in his honor. Thank you, Senator Bayh, and thank you ladies and gentlemen.