

REMARKS BY JASON BERMAN*

I was incredibly fortunate to have worked for Senator Birch Bayh for twelve years, from 1965 through 1976—the golden years of a remarkable U.S. Senate career that spanned three terms. He was a practical, liberal Democrat in a conservative Republican state, yet the force of his personality and his love of retail campaigning led to statewide victories in 1962, 1968, and 1974, all against formidable Republican opponents—Homer Capewhart, Bill Ruckelshaus, and Dick Lugar. The one obstacle Senator Bayh could not overcome by the force of his personality was the Reagan landslide in 1980. He ran well ahead of President Jimmy Carter but not well enough.¹ In fact, 1980 marked the end of an era of bipartisanship and senatorial comity in the Senate.

On this great journey with Senator Bayh, I experienced firsthand some of the most momentous events in recent American political history, playing a small role in a number of major legislative victories and, yes, some significant defeats as well. Birch Bayh, above all else, was a legislator, and his legislative interests ranged from constitutional amendments to disaster relief and juvenile justice reform.

Two defeats in particular still sting today because they continue to be relevant nearly fifty years later.

The first and foremost is the failure to secure ratification of the Equal Rights Amendment² (ERA), which is, once again, a major political and constitutional issue nearly fifty years after it was first passed and one hundred years after women won the right to vote.³

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1. Senator Bayh lost to Dan Quayle in the 1980 election by approximately 7 percent; Ronald Reagan surpassed President Carter in Indiana by nearly 20 percent. See THOMAS E. LADD, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 4, 1980, at 20 (1981) (detailing that Reagan won 56.0 percent of Indiana's vote compared to Carter's 37.6 percent and that Quayle won 53.8 percent to Bayh's 46.2 percent).

2. ROBERT A. BRADY, THE CONSTITUTION OF THE UNITED STATES OF AMERICA AS AMENDED: UNRATIFIED AMENDMENTS & ANALYTICAL INDEX, H.R. DOC. No. 110-50, at 30–31 (2007).

3. See Bill Chappell, *Virginia Ratifies the Equal Rights Amendment, Decades After the Deadline*, NPR (Jan. 15, 2020, 3:36 PM), <https://www.npr.org/2020/01/15/796754345/>

The second is the narrow failure, on two occasions in 1970, to break a filibuster so that the Senate could vote directly on the proposed Bayh-Celler Amendment,⁴ which sought to abolish the Electoral College and provide for a direct popular vote.⁵ The failure to fix a broken system that has produced two recent presidents who have lost the popular vote was Birch's biggest regret. At the same time, it was a testament to his legislative skills that he overcame a "Southern strategy" to keep the amendment bottled up in the Senate Committee on the Judiciary and was able to bring it to the floor of the Senate.⁶

The "wins" I was privileged to share with him included:

- Senate passage of three constitutional amendments—the Twenty-Fifth,⁷ on presidential inability and succession; the Twenty-Sixth,⁸ granting eighteen-year-olds the right to vote; and the ERA.
- The reelection campaigns of 1968 and 1974.
- Our trip to Vietnam in December and January of 1968, where we learned from American intelligence officers outside of Saigon that there was no path to victory and that we needed to end the war quickly.
- The turmoil of the "Saturday Night Massacre," when President Richard Nixon's edict to fire the special prosecutor led the attorney general and the deputy attorney general to resign.⁹ The deputy attorney general, ironically, was Bill Ruckelshaus, our 1968 opponent.
- Birch's legislative leadership that led to the passage of Title IX,¹⁰ even though he was not a member of the Senate Committee on Health, Education, Labor, and Pensions—an accomplishment he considered his most lasting and impactful legacy. He would have so thoroughly enjoyed the U.S. Women's National Team's World Cup victory and it would not have gone unnoticed that twenty-one of the twenty-three talented women on that team had earned athletic scholarships to college—thanks to Title IX.¹¹ He is rightfully described as "the father of Title IX."¹²

virginia-ratifies-the-equal-rights-amendment-decades-after-deadline [https://perma.cc/87Y3-FL6N].

4. H.R.J. Res. 681, 91st Cong. (1969).

5. See Lily Rothman, *The Electoral College Votes Today. But Politicians Have Been Trying to Reform It for Decades*, TIME (Dec. 19, 2016, 9:00 AM), <https://time.com/4597833/electoral-college-donald-trump-challenge/> [https://perma.cc/DJ9G-TEM8].

6. See *id.*

7. U.S. CONST. amend. XXV.

8. U.S. CONST. amend. XXVI.

9. See Carroll Kilpatrick, *Nixon Forces Firing of Cox; Richardson, Ruckelshaus Quit*, WASH. POST (Oct. 21, 1973), <https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/102173-2.htm> [https://perma.cc/E7KF-JFN5].

10. 20 U.S.C. §§ 1681–1688.

11. See, e.g., Mark Zeigler, Column, *Celebrate the US Women's Soccer Team, But Also Celebrate Title IX*, SAN DIEGO UNION-TRIB. (July 8, 2019, 6:51 PM), <https://www.sandiegouniontribune.com/story/2019-07-08/soccer-womens-world-cup-title-ix-usa-uswnt-college-football-scholarships> [https://perma.cc/VA83-EMDZ].

12. See Akeem Glaspie, *'Father of Title IX' Birch Bayh Leaves Lasting Legacy for Women's Sports*, INDYSTAR (Mar. 19, 2019, 10:16 AM), <https://www.indystar.com/story/>

- His extraordinary political and legislative skill in leading the successful opposition to two Nixon nominations to the U.S. Supreme Court.¹³
- Witnessing the seamless transition—under the Twenty-Fifth Amendment—from the resignation of Vice President Spiro Agnew to the appointment of Vice President Gerald Ford, from the resignation of President Nixon to the appointment of President Ford, and from Vice President Ford to Vice President Nelson Rockefeller—all without missing a beat. The Twenty-Fifth Amendment—the “Bayh Amendment”—had done its job and done it well.
- And, finally, the satisfaction of learning he had earned a place on Nixon’s enemies list.¹⁴

It is hard to imagine that, in today’s Senate, there is a senator who will leave as lasting a legislative legacy as Senator Bayh. Birch Bayh was a great senator in what Ira Shapiro has described in his book as “the last great Senate.”¹⁵

There are aspects of Senator Bayh’s legacy that are often overlooked—the other side of the ledger, the terrible ideas he kept out of the Constitution, and the segregationist judges he kept off the Supreme Court. He should be remembered and honored for these as well.

The constitutional fights, all of which he had to confront directly as the chairman of the Subcommittee on Constitutional Amendments, included prayer in public schools,¹⁶ amendments to outlaw busing,¹⁷ and abortion.¹⁸ These were the hot button political issues of the day and supporting all of them would have played well in Indiana in the 1968 and 1974 campaigns. But as subcommittee chairman, he found ways to defeat all three.

As for the Court fights, Birch was the Senate floor manager and most vocal opponent of two Nixon nominees to the Supreme Court, Judge Clement Haynsworth and Judge G. Harrold Carswell—both part of Nixon’s “Southern

sports/2019/03/14/father-title-ix-birch-bayh-leaves-lasting-legacy-womens-sports/3160476002/ [https://perma.cc/7968-DG9C].

13. See Fred P. Graham, *Bayh Says Nixon Errs on His Role*, N.Y. TIMES (Apr. 3, 1970), <https://www.nytimes.com/1970/04/03/archives/bayh-says-nixon-errs-on-his-role-scores-view-of-presidential-power.html> [https://perma.cc/R6RP-T99C]; Robert Sherill, *Birch Bayh Isn’t a Household Word—Yet*, N.Y. TIMES (Feb. 15, 1970), <https://www.nytimes.com/1970/02/15/archives/birch-bayh-isnt-a-household-wordyet-senator-birch-bayh.html> [https://perma.cc/7J8T-BTXY].

14. See James M. Naughton, *A Memo for Panel*, N.Y. TIMES (June 28, 1973), <https://www.nytimes.com/1973/06/28/archives/a-memo-for-panel-it-suggests-mitchell-responsibility-for.html> [https://perma.cc/HND3-V52F].

15. IRA S. SHAPIRO, *THE LAST GREAT SENATE: COURAGE AND STATESMANSHIP IN TIMES OF CRISIS* (2012).

16. See, e.g., *Sen. Byrd Introduces Amendment Allowing School Prayer*, FIRST AMEND. CTR. (Apr. 30, 2006), <https://swap.stanford.edu/20090125041326/http%3A//www.firstamendmentcenter.org/news.aspx?id%3D16832> [https://perma.cc/WA7L-6J2V].

17. See Richard D. Lyons, *Busing of Pupils Upheld in a Senate Vote of 47-46*, N.Y. TIMES (May 16, 1974), <https://www.nytimes.com/1974/05/16/archives/busing-of-pupils-upheld-in-a-senate-vote-of-4746-ban-urged-by.html> [https://perma.cc/JU5C-3L2T].

18. See, e.g., S.J. Res. 91, 94th Cong. (1975).

strategy” and both strong opponents of civil rights.¹⁹ It is a major accomplishment to defeat one nominee; it is a qualitative leap to defeat two in succession. What made this achievement so notable politically is that no other Democratic senator on the Senate Committee on the Judiciary would take the job of managing the Carswell opposition, thinking it was a lost cause to try to defeat two nominees. He did, just as he had done when none of the more senior Democrats had come forward to oppose Haynsworth. He accepted the challenge and he won against all odds.

In thinking about Senator Bayh’s legacy, so much of which still impacts us today, I am reminded of the tribute to Birch penned by *The Washington Post* editorial writer Charles Lane. It perfectly captures the Bayh legacy in words that, as an old speechwriter, I wish I had written. It is aptly titled “We’re Living in Birch Bayh’s World. We Just Don’t Know It.”²⁰

Briefly, here are two of Lane’s insights into this remarkable Senate career. Referring to his legislative legacy—Title IX, the Twenty-Fifth and Twenty-Sixth Amendments, the ERA, disaster relief,²¹ juvenile justice reform,²² and the Bayh-Dole Act²³—he said: “In short, Bayh wrote crucial ground rules that contemporary Americans take for granted. You could almost call him a founder of the modern United States.”²⁴ And then, he went on to say:

[T]he United States has a history of accumulating problems before dealing with them in active bursts: the New Deal, the Great Society and—perhaps—whatever might be coming after the Trump years. Much will depend on whether Congress retains any legislative vitality, and whether anyone of Bayh’s stripe is still around to make use of it.²⁵

Based on the Senate’s total abdication of its legislative role on the issue of guns, to take only one example, it is awfully hard to be optimistic that the public interest will once again serve as the defining principle of legislative activity, trumping partisanship and acquiescence to presidential demands. Just as importantly, it is equally as hard to be optimistic that another—or, better yet, more than one—senator in the mold of Birch Bayh might emerge.

19. See Graham, *supra* note 13; Sherill, *supra* note 13.

20. Charles Lane, Opinion, *We’re Living in Birch Bayh’s World. We Just Don’t Know It.*, WASH. POST (Mar. 18, 2019), https://www.washingtonpost.com/opinions/were-living-in-birch-bayhs-world-we-just-dont-know-it/2019/03/18/6cbb1986-498b-11e9-93d0-64dbcf38ba41_story.html [<https://perma.cc/9THD-B8JZ>].

21. See Brandon Smith, *Former Indiana Sen. Birch Bayh—‘a Great Hoosier,’* NPR (Mar. 14, 2019), <https://www.npr.org/2019/03/14/703578607/former-indiana-sen-birch-bayh-a-great-hoosier> [<https://perma.cc/97CJ-B6W5>] (“Bayh wrote relief legislation that became the foundation for the Federal Emergency Management Agency (FEMA).”).

22. See Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended in scattered sections of the U.S.C.).

23. 35 U.S.C. §§ 200–212.

24. Lane, *supra* note 20.

25. *Id.*

In August of 2017, Birch was awarded an American Bar Association Presidential Citation for Public Service.²⁶ I was especially proud to accept that award on his behalf because Birch was, indeed, the epitome of a true public servant.

I would be remiss if I failed to mention, as part of this extraordinary Senate legacy, a number of other Birch Bayh accomplishments: the Disaster Relief Act of 1966,²⁷ which he authored, and his work in creating the Federal Emergency Management Agency;²⁸ the National Alcohol Fuels Commission, on which he served as its first chairman after authoring its enacting legislation;²⁹ his service as both an original member of the Senate Select Committee on Intelligence and as its chairman; his work on improving the Foreign Intelligence Surveillance Act,³⁰ the Juvenile Justice and Delinquency Prevention Act,³¹ and the Privacy Protection Act of 1980;³² the creation and funding of the Washington, D.C., metro system;³³ and the Bayh-Dole Act.

His deeds lived up to his words about the public good and most of those deeds have lived on to this day. What a fitting tribute it would be if the ERA would finally be ratified.

There is one more great accomplishment to note—and this has nothing to do with legislation, or the Constitution, or politics. It is a reflection on Birch Bayh, the man, and Birch Bayh, the friend. And that is his heroic action on June 19, 1964, when he pulled both his wife Marvella and his friend and colleague, Senator Ted Kennedy, to safety from a burning plane that had crashed. It was an act of courage, strength, and compassion—all of the qualities that made him not only a great senator but a great guy.

26. See *ABA to Co-host the First 50 Years of the 25th Amendment Anniversary Program on May 10*, AM. BAR ASS'N (May 5, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/05/aba_to_co-host_the_f/ [<https://perma.cc/9EDQ-S6S3>].

27. Pub. L. No. 89-769, 80 Stat. 1316 (codified as amended in scattered sections of the U.S.C.).

28. See Smith, *supra* note 21.

29. Richard D. Lyons, *Putting a Miscellany in the Tank*, N.Y. TIMES (Feb. 25, 1979), <https://www.nytimes.com/1979/02/25/archives/america-is-looking-twice-for-enough-energy-to-burn.html> [<https://perma.cc/3BDP-NRLY>].

30. 50 U.S.C. §§ 1801–1885c.

31. Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended in scattered sections of the U.S.C.).

32. 42 U.S.C. §§ 2000aa–2000aa-12.

33. See Act of Nov. 6, 1966, Pub. L. No. 89-774, 80 Stat. 1324.