

## REMARKS BY IRA SHAPIRO\*

This has been an extraordinary session in underscoring Senator Birch Bayh's incredible legacy, particularly with respect to the U.S. Constitution but not only with respect to the Constitution. In his spare time, Birch Bayh managed to be the first chairman of the Senate Select Committee on Intelligence. His last piece of legislation, the Bayh-Dole Act,<sup>1</sup> innocuously named, has been described as the most innovative legislation to come out of the U.S. Senate in many, many years.<sup>2</sup> The head of Nasdaq attributed 30 percent of the growth of Nasdaq companies to the commercialization of research that was made possible by the Bayh-Dole legislation,<sup>3</sup> which Senator Bayh got through a lame-duck session after he had been defeated in 1980.<sup>4</sup> This was a person who had a great deal of skill across the board.

As a little autobiography, it occurred to me, as we watched Senator Patrick Leahy's tribute to Senator Bayh, that I started working in the Senate before

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1. 35 U.S. §§ 200–212.

2. See, e.g., STEPHEN EZELL, INFO. TECH. & INNOVATION FOUND., THE BAYH-DOLE ACT'S VITAL IMPORTANCE TO THE U.S. LIFE-SCIENCES INNOVATION SYSTEM 24 (2019), <https://itif.org/sites/default/files/2019-bayh-dole-act.pdf> [<https://perma.cc/EQ8M-ACUH>] (“[T]he 1980 Bayh-Dole Act, which gave universities rights to the intellectual property generated from federal funding, spurred vastly more universities to work more closely with industry, and so created a powerful vehicle for leveraging U.S. investment in basic research into a far stronger engine for commercialization and job creation.”).

3. *The Bayh-Dole Act (P.L. 96-517, Amendments to the Patent and Trademark Act of 1980)—the Next 25 Years: Hearing Before the Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech.*, 110th Cong. 10–11 (2007) (statement of Arundeeep S. Pradhan, Director, Technology and Research Collaborations, Oregon Health & Science University) (“Another impact of Bayh-Dole, according to the former President of the NASDAQ, is that approximately 30 percent of its value is rooted in university-based federally funded research, which might never have been realized but for Bayh-Dole.”).

4. See Carl E. Gulbrandsen, Address, *Bayh-Dole: Wisconsin Roots and Inspired Public Policy*, 2007 *WIS. L. REV.* 1149, 1150 (“In 1980, in the final hours of the lame-duck session held after an election that he lost (after eighteen years in a job at which he excelled), Bayh succeeded in getting one last bill through the 96th Congress.”).

Senator Leahy did, which makes me a certain age. Exactly fifty years ago I became a Senate intern for Senator Jacob Javits. That opportunity shaped my career and changed my life. Most people wanted to become actors or architects or astronauts or athletes, and I basically wanted to become a Senate staffer. That was a way to contribute to the country, and, in fact, it worked out that way. I worked there for twelve years and had a great experience. Later, I looped back to write a book called *The Last Great Senate*.<sup>5</sup> When the book came out in 2012, I invited Senator Bayh to come speak at the first book party because he epitomized a great senator and the last great Senate.

I'll say I invented the "last great Senate." If you Google those words, you'll find nothing but my book. No one had discovered a "great Senate" until I discovered it. The great Senate—different than anything that came before it and different than anything since—ran from exactly 1963 through 1980.<sup>6</sup> It coincided with Birch Bayh's three terms, with George McGovern's three terms, with Gaylord Nelson's three terms, and with Abraham Ribicoff's three terms.<sup>7</sup>

The Senate, prior to Senator Bayh and what I call the class of 1962, had already become somewhat liberal, but it was still floundering. When Senator Bayh, and a thirty-year-old who was riding on his brothers' names, Ted Kennedy, and these other men that I mentioned got to the Senate, it created a liberal Senate that went on for the next eighteen years to achieve extraordinary accomplishments. In his first two years in the Senate, Senator Bayh was part of the Senate that passed the landmark Civil Rights Act of 1964.<sup>8</sup> No one ever had a legislative "rocket ride" the way this group did. They had been infused with the idealism and progressivism of the Kennedy years. Then, as the country darkened over Vietnam, they became the people who stood up against the war and President Richard Nixon's abuses in Watergate. Their actions responded forcefully to the challenging times they lived through: the last constitutional crisis that our country faced.

It does not detract from Senator Bayh's great individual achievements to say that he achieved them because he was part of the great Senate. He would have understood that; he expected that. He loved being a senator. Later, the next Senator Bayh, Evan Bayh, would express enormous frustration about what the Senate was because he didn't benefit from being in the kind of Senate that Birch Bayh was a part of. Birch Bayh helped make it that way, but he also learned from the Senate.

I've come to think of that Senate as "Mansfield's Senate" because Mike Mansfield, laconic professor of Asian history turned politician, placed his stamp on the Senate in a way that was much deeper and longer than the

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

6. *Id.* at x.

7. *Id.* at xi.

8. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2, 28, and 42 U.S.C.).

impact of his better-known predecessor, Lyndon B. Johnson. Mansfield's Senate operated on the basis of bipartisanship, mutual trust, and respect, and those qualities radiated from Mansfield. They infused the place. All the senators understood it and all the staff understood it. Of course the senators were Democrats or they were Republicans, and they were very keenly interested in their states. But that Senate was made up of people who thought the Senate was there to serve the national interest. Country first.

Senator Bayh was a great senator, but he was also typical of that Senate. Mansfield didn't dismantle the seniority system, but he empowered the younger senators like Senator Bayh. When Senator Bayh got there, he started accomplishing things immediately. Chris Dodd, who served later in the Senate and got there after its best years, captured the connection between the individual senators and the Senate. Dodd said, "[T]here has never been a Senator so persuasive, so charismatic, so clever, or so brilliant that they could make a significant difference while refusing to work with other Members of this body. Simply put, senators cannot ultimately be effective alone."<sup>9</sup>

Obviously, we haven't had a great Senate for a long time. We haven't had a respectable Senate for a long time. Many capable, talented people like Evan Bayh grew frustrated with the Senate that they were in—that bitterly divided, hyperpartisan Senate. Now we approach, as a country, the moment of truth where we find out if the diminished Senate can rise to the fundamental challenge that the founders created it for: checking a corrupt or overreaching or dangerous president.<sup>10</sup> My second book is subtitled *Can the Senate Save Itself and the Country?*<sup>11</sup> We'll know soon enough.

I will say, we know with absolute certainty what Birch Bayh and Mike Mansfield and the other senators of the time would have done with Donald Trump's presidency. They would have dealt very forcefully with a president who abused his power and betrayed his oath of office. I think we can all hope that the current senators find a way to rise to the occasion and serve the way Birch Bayh would have served.

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9. S. DOC. NO. 111-29, at xii (2012).

10. *See generally* THE FEDERALIST NO. 47 (James Madison).

11. IRA SHAPIRO, *BROKEN: CAN THE SENATE SAVE ITSELF AND THE COUNTRY?* (2018).