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Personal Insights and Experiences regarding the Passage of Title IX

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PERSONAL INSIGHTS AND EXPERIENCES REGARDING THE PASSAGE OF TITLE IX*

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I. INTRODUCTION

My purpose here today is to look at some of the legislative history of Title IX, and perhaps some of the details that never made it into the Congressional Record, and also to include my personal involvement in it. I do that with some fear and trepidation because it sounds like one is puffing himself up.

It is fair to ask, “How can a kid who grew up on a corn and soybean farm, raising pigs and hogs and cattle and calves, chickens, how in the world could he ever get to be a United States Senator, let alone become involved in a piece of legislation that’s had such a tremendous impact?” I would like to believe it is possible for all of us, even today with a complex world and some of the financial restraints put on public service; it is possible for all of us to find a niche in society where we can make our world a little bit better, our community a little bit better, our state, our nation a little bit better because we were there. We cared, and we did more than complain. We rolled up our sleeves and said, “Okay, I’m going to work at it.”

II. EARLY INFLUENCES

I lost my mother when I was twelve. Dad had coached four sports at Indiana State, and had been asked to be the director of physical education for the public school system in Washington, D.C. Before World War II broke out, the army asked him to return (he had served in World War I) to establish physical fitness programs for all of the young aviators who were soon to be trained across the country. That was in April of 1941. It was not longer after that our country experienced Pearl Harbor and later dad ended up in China with the Army Air Corps.

My sister and I, young teenagers, were taken in by two maternal grandparents, both in their late 70s, early 80s. They were true pioneers. They had a wonderful

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farm over in western Indiana. Granddad had come over the Allegheny Mountains in a covered wagon when he was one-year old right after the Civil War. My grandmother, who was just about six months older than he was, had been a schoolmarm back in the days when they had one-room schools and the teachers lived with the students in their homes. She was about five-feet tall when she was standing straight with a long lock of hair that went to the back of her knees that was carefully put into a bun behind her head every morning. I don't suppose she weighed more than eighty-five pounds. But, she was a woman that had a profound impact on me.

Over fifty years, my grandparents put together a wonderful farm operation. There were times when granddad had as many as fifteen or sixteen teams of horses plowing those fields. When I arrived years later, I fell in love with the farm. I loved to farm. I loved the hard work. I liked to get in one extra shovel of corn when two of us were shoveling corn or wheat. I liked to throw one extra bail and throw it a little higher. There is just something about competition that I loved.

I also loved to see things grow. I loved to see young piglets, young calves, young chicks. To me, this was sort of the Almighty speaking. When I got a little older and was running that farm myself, before we had combines, I remember looking back at the corn picker and seeing the corn come into the wagon. I thought I was in heaven because, here, the old man upstairs and I had been responsible for what was going in that wagon. I was just so blessed to have that farm experience and especially to see those two, my grandparents.

Uncle John Hollingsworth ran the farm operations; he was in charge of the physical aspect of the farm. Aunt Kate did the cooking, the sewing, the canning; she ran the collection-of-eggs operation, and she churned butter and took some of it along with the eggs into the store every other weekend. The two of them were quite a team. There was no discussion about equality or women's rights. It was obvious that Aunt Kate Hollingsworth was as important to the success of that operation as Uncle John was. She had a profound impact on my life.

Campbell Soup located a tomato factory in our county seat of Terre Haute, Indiana and they were looking for farmers to grow tomatoes. They knew that if they could get John Hollingsworth to grow tomatoes on his farm that other farmers probably would follow suit. So, they came and they made the pitch to him, "Why not let young Birch have this, as a 4-H project." Well, granddad listened. He said, "I appreciate you thinking about me, but after all these years, I think I better just stick to growing corn and soybeans. I'm too old to change."

I was in a little alcove and nobody knew I was there. I heard all this and my heart when right down to my socks. After the gentlemen had left, I heard the following dialogue: "John, the boy wants tomatoes, and he's going to have them." "Yes Kate," he said. That six acres of tomatoes grew over one hundred tons of tomatoes and won the state championship all because of my grandmother. There was no question about it being *her* or *him*; they were together as a team. That is the environment that I grew up in.

So, it is certainly reasonable to assume that I would be favorably inclined toward equal rights for women. In fact, it never even entered my mind until I came back to the farm after spending a little time in the army of occupation and graduating from Purdue, granddad and grandma let me run that farm myself. In December, after returning to the farm, I won a state speech contest to be Indiana's representative at the Rural Youth Speech Contest in Chicago, Illinois. As we were waiting for the contest to start, and started getting our instructions, I noticed that there was this very

attractive young lady sort of sitting on a table at a forty-five degree angle from me. And she was talking to some people wearing Michigan name tags. I could tell that that sweet, young lady's voice didn't come from Michigan. I tapped her on the shoulder and I said, "Where are you from?" She said, "Oklahoma." I said, "Well, Oklahoma, spin around here and get to know some people from Indiana." So we started talking. An hour later we were having lunch. We spent three days inseparable, chaperoned by a cigar-chomping wheat farmer father. We both went home and told our loved ones we had found the person we were going to marry. Nine months later we were married and it was the most wonderful thing in the world to join this young woman as a partner.

My wife, Marvella Hern Bayh, was probably the most important thing that had ever happened in my life. When we had started talking over lunch, it was clear that both of us wanted to make a difference with our lives, but we weren't quite sure what. She had been the first girl elected Student Body President of Garfield High School in Enid, Oklahoma. She was a straight-A student. She was elected Governor of Girl's State, President of Girl's Nation, and got Harry Truman's autograph in the Rose Garden between her junior and senior year in high school. Her dream was to be admitted to the University of Virginia. Her request was returned, "Women need not apply."

This was the first time she had been told she could not do something, not because she was not qualified, but because she happened to be a young woman. You can imagine in the twenty-six-and-a-half wonderful years we spent together I got a masters degree in the importance of equality for women, a factor that had never entered my mind before.

III. A LIFE OF POLITICS

A. *The Indiana General Assembly*

Shortly after we were married, we decided we would run for the state legislature. I used a plural pronoun because that is what it was. I will never forget the strange look on the face of the elderly man or woman who opened the door, and there were two young people asking if they could come in and talk to them about getting their support as the precinct committeeman for the state legislature. It was the first time anybody had ever bothered to *ask* the precinct people for their support. Before then, the county chairman simply said, "This is who we're going to vote for." Marvella played a major role. When the votes were counted in the race, we led the entire county ticket. We went to the state legislature.

In my third session, I happened to become Speaker of the House. My first experience with equality for women was when I looked down the roster of my bills we were going to consider and I submitted to the House the Equal Pay for Equal Work. The rules of the House were that you have to have 51 votes to pass. The Speaker never votes unless there's a tie. I looked down when the vote tally had been made. Before announcing the vote, I saw it was 50 to 50. Without giving it a second thought, I came down with the gavel and I said, "The Speaker votes 'Aye.' The bill passes." That was my first experience. It was a *de minimis* kind of thing, but these things fell into place because Marvella had ingrained in me the importance of equality and accomplishment based on ability, not on sex.

B. The United States Senate

In 1962, we ran for the Senate against an 18 year incumbent Republican — and won. Nobody thought we could do it. It was a landslide victory of two votes per precinct. I will tell you, Marvella Bayh won more votes than Birch Bayh did. But, there we were. I was appointed to the Judiciary Committee. In October, I was able to persuade Chairman Eastland, the Chairman of the Committee, to let me be the Chairman of the Constitutional Amendment subcommittee. It was a subcommittee nobody wanted because we so rarely have Constitutional amendments.

I understand that we are gathered here to discuss Title IX, and my mission is to give you legislative history of Title IX and how Birch Bayh got to where he is, and what may be the kind of things other people can do to accomplish similar things. But if we are going to have the history of Title IX, we cannot ignore other steps that were taken as far as movement by women to get equality for women.

I think the first written evidence that we have of an effort to get equality for women was a letter from Abigail Adams to her husband John at the Convention in Philadelphia. The message was short and sweet: “Don’t forget the ladies, John.” Despite Abigail’s pleadings, John and his brethren were too busy doing a lot of other things, and they came up with a document—the most wonderful document that’s ever been written for free people—but that was far from perfect. It was necessary to hold your nose and look the other way to avoid having to come to grips with what some of the folks wanted to do with slavery. It was a compromise to get the South to stay in the Union. But nobody gave a second thought about depriving the rights of the new nation’s women. Women could not vote. They could not hold property. They were relegated to second-class citizenship from the beginning.

The first real success occurred in 1920 with the ratification of the nineteenth amendment, giving women the right to vote. Three years later, under the leadership of Alice Paul, who was the President of the National Women’s Party, the first Equal Rights Amendment was introduced. It was introduced then and every session thereafter, until 1970 when I was asked to support the Equal Rights Amendment (“ERA”). Interestingly enough, when one looks at the history of this, early on after the introduction of the ERA, most of the women’s organizations really were opposed to it. This was something new and different. Women had been led to believe that women would have protections provided under existing law.

Through the 40s, there were efforts made by the New Dealers to provide some protection for women so that they would not be relegated to workplace conditions that were not desirable for women—particularly not desirable for mothers. Can you imagine Eleanor Roosevelt not being for the Equal Rights Amendment? Or the AFL-CIO or other labor organizations not being willing to support the ERA? In the middle 40s, that’s the way it was.

But suddenly there was a rebirth and people began to realize that all these efforts to protect women were really setting up barriers to prohibit them from succeeding. Marvella continued to whisper in my ear, “Honey, you can’t ignore the brain power of fifty-three percent of the American people.” And she was absolutely right and she continued reminding me when I might say something inadvertently that sounded sexist because I really did not understand. It was a slow learning process in which I was a willing learner and she was a marvelous teacher.

In 1970, I was holding a hearing to support the lowering of the voting age. And, one of the witnesses was testifying. Suddenly, at the back of the room, there were several women who jumped up and started yelling and waving signs saying “N-O-

W” and “E-R-A” and one thing and another. I am a pretty tolerant fellow, but they were destroying the decorum of the hearing. I was ready to turn to my staff and say, “Have them clear the room,” when bell rang for a vote. I told my sidekick counsel, Larry Conrad, “Go talk to these women; find out what they want and tell them ‘Whatever it is, as soon as we get these hearings over, we’ll give them as much time as they want to discuss whatever is on their mind.’”

And that is what happened. I talked to them. I told them that I would introduce the legislation, and we began to determine how we get around what we called the “Hayden Feature.” Carl Hayden, the Senator from Arizona and President Pro Tem of the Senate, would always introduce an amendment to the Equal Rights Amendment, which became a part of it, which essentially said: none of the provisions of this Amendment shall affect or any way abridge the rights and protections guaranteed in other legislation for the women of our country. In essence, you provide equality unless it transgresses on other steps that have been taken for women—very much like excluding education in our acts. So, we supposedly were protecting women but in reality we prohibited their programs in a ‘man’s world’. I had to tackle the “Hayden Feature” and that meant tackling Carl Hayden.

The U.S. Senate is in a body where some people are more equal than others. Since Senator Hayden was Chairman of the Appropriations Committee and President Pro Tem of the Senate, he was one of those who was certainly a lot more equal than the Junior Senator from Indiana. One transgressed upon his legislation with some degree of trepidation. But, it had to be done. So we introduced our legislation, which was the clear, simple Equal Rights Amendment as we came to know it. It passed both Houses. That was in March. Senator Hayden never took part in any action against me for my efforts on the ERA. Of course, I went to great lengths to keep him briefed as we went along.

In April, I was the keynote speaker for the Convention of the Business and Professional Women. I announced that two weeks hence, we were going to have the first hearings. I assumed that that might be an appropriate thing to say to that group since they had been leading the charge for so long. We did have the hearings. We passed it out of my committee. Things became very jumbled after that. It came out of committee all right, but then it went to the Judiciary Committee and it would not go anywhere. We had people like Edith Greene and Martha Griffith and some of the other early-day crusaders in the House that could get the measure passed out of Committee, but had no luck getting it passed out of the House. I was having great difficulty getting it out of the Senate Judiciary Committee. Finally, after a very long period of time, we were able to have an agreement to meet one afternoon in a small committee room adjacent to the Floor of the Senate so Members could meet and pass the ERA out of the Committee. This was in the early 70s. At the same time, because of our difficulty getting any movement whatsoever in the Senate, we had decided as an insurance policy to take the Higher Education bill which had passed the House and was on the floor of the Senate, and add to it the education section from the ERA.

Of all the discrimination that women were being subjected to, the discrimination against women and girls in the area of education would have the most far-reaching negative impact. So when the Higher Education Act reached the floor of the Senate, I moved to amend it by adding the ERA education section. I was immediately challenged that this motion lacked germaneness because the word sex did not appear anywhere in the Higher Education Act. As fate would have it, while this issue was being debated on the floor of the Senate, I had to turn the debate over to Senator

Brooke of Massachusetts and go to the Judiciary Committee hearing to pass out the Equal Rights Amendment.

Step back a step. When we held those hearings, it was amazing what we learned. Why did we want the Equal Rights Amendment? Well, look at all these rules that were in place that hampered women. There were varying state laws involving a variety of areas of life. The following were typical:

Employment. One state said a woman could not hold a job if she had to lift a thirty-five-pound weight. Many of the high-paying industrial jobs required lifting a thirty-five-pound weight. Clearly, it was to prevent women from getting those high-paying jobs. Another state said women couldn't be bartenders. Why would you say women couldn't be bartenders? "Well, women shouldn't be involved in such an environment." That law was there for one reason only, and that was to keep women from having a higher-paying job.

Still another state said that a woman couldn't hold a job that was more than eight hours a day. We all know that some people can work an 8-hour day, but if you're really going to get to the top, you don't have to be on the farm to know, that there's not a time limit. And so, that was limiting women to occupations where they couldn't really work harder and do more. There was no federal equal pay statute. A lot of states didn't have Equal Pay laws.

Inheritance. I found out for the first time that my grandfather could inherit the farm from my grandmother, if she died. But if he had died first, she couldn't inherit it from him. It was an awful thing.

Criminal Justice. In one state in particular, if a man committed a crime, the penalty would be six months. A woman would get three years for the same crime. Why? Well, women shouldn't do that kind of thing. That was the insidious nature of what we were looking at.

But of all the things that I thought needed to be attended to, the most egregious of all, was in the educational area. Some schools, a woman could not get into at all. That, to me, was more important than all the other things, because if women were given the right to educate themselves, the handcuffs would be taken off. If women had the opportunity to receive higher education on equal footing with men, further opportunities would be theirs for the taking. So, to me, if there was one part of that equal rights amendment that was more important than others, it was education. Consequently, we decided to take the component of the Equal Rights Amendment that dealt with education and hook it on to the Higher Education Act — and that's what we intended to do.

One of the brethren of the floor challenged our tactic as being non-germane to the Higher Education Act. Can you imagine, equal rights for education bill not being germane to a higher education bill? The argument was not germane. The Higher Education Bill made no reference to sex. So, we debated that at length. Now, bear with me, because this was a rather busy time. I had been trying to get the Judiciary Committee to move on the Equal Rights Amendment. The day that we brought that, put that amendment on the Higher Education Act, the Judiciary Committee met up on the second floor, right outside the Senate Chamber, and asked me to chair it, to pass out the Equal Rights Amendment. So we did pass it out and it passed unanimously. As we were walking out the door, one of the senators (who will remain nameless) came rushing in, breathless, saying, "Have you passed that woman's thing yet?" I said, "Yes, Senator, we have." He said, "Mark me 'yea.'" I said, "Yes, sir."

But this senator, unfortunately, was not done casting votes for the day. To show you the inability of people to grasp the problem, we went right back down on the floor, and reassumed the role of leading the charge on Title IX—the “germaneness” issue. I noticed that this same senator walked in the back door and listened. And after being there for about an hour, he said, “Will, the Senator from Indiana yield?” I said, “Yes, I yield to my friend from ‘X.’” And he said, “I’ve been listening to this bill . . . this debate . . . are you telling me that if this measure passes you’re going to have to let little girls in my military academy?” I said, “Yes, Senator if they are getting any federal funds,” which, of course, this was a major institution, and it was getting federal funds. This senator was apparently not well-disposed to admitting “little girls” into his military academy. So, this fellow who had been counted “yea” on the Equal Rights Amendment voted “no” on Title IX. We lost that by one vote.

We just weren’t smart enough to anticipate that someone would do something like that, but they caught us with our guard down. A year later, when the bill came over from the House, we made certain that the issue was germane. So, we were able to put it on there and it passed. That was February of 1972.

Now, the progress of enforcement and the establishment of regulations was almost an interminable process. Particularly, when people thought politically they had to be for it, but in their heart of hearts they couldn’t get all enthused about implementing it. President Nixon was forced into signing it but his Administration provided no meaningful regulations for implementation. And that was a long, hard path. In fact, I remember going with Billie Jean King, Patsy Mink, Pat Schroeder, members of Congress, and others down to talk to Fritz Mondale in the fishbowl of the White House about getting the Carter Administration to move faster. So, it’s not all a Republican or Democratic thing. And, I think it’s certainly not necessarily malicious. It’s just that people don’t understand how important the issue is. A little later I remember having to fight John Tower who tried to pass an amendment to the bill after it had been enacted to exempt football. In fact — another personal aside — as soon as I introduced the Equal Rights Amendment, the following week, I was visited by “Moose” Krause who was the athletic director at Notre Dame along with his counterpart Coach Bear Bryant from the University of Alabama. They both said, “We’re here to tell you, Senator, if you don’t get off of that bill, you’re going to kill our football programs.” I said, “Oh, let me ask you a question. Moose, you have eleven players on the field and Alabama has eleven players on the field now. Are you telling me that if this bill passes, Notre Dame going to have ten and Alabama is going to have twelve?”

Stymied, they responded, “Well, you know, we won’t be able to recruit, and all this kind of thing.” Well, a lot of the athletic directors felt that way, and felt very strongly that way. And, unfortunately, I think some of them continue to feel that way today.

IV. WHERE WE NEED TO GO

Let me conclude my remarks by saying I think we’ve come a long way, but we’re not where we should be. Academically, we had made major inroads. Only in a few of the more technical disciplines are women not provided equal access. The real problem I think is that some of the programs relative to tenure really discriminate against women. Most all the people are men. That’s a place we need to direct some fire.

Now, sports, is where we're way far behind. Unfortunately, there has not been a whole lot of creativity on some of the campuses. The best example of creativity I can think of was at the University of Washington, whose athletic director had been smart enough to put enough women out on skulls in a rowing program that had as many women rowing as there were men throwing and tackling in football. Now, not all universities are able to do that, but they're making some progress. I don't think we're in a position of ever telling a university how much money they should devote to their athletic program. I think those are decisions that need to be made by each university. But they need to be made equally. We can't continue to permit a system where you have two dollars spent on men for every one dollar for women. And the business of football, as much as I love to watch it, as a money-raising sport, is somewhat disingenuous. It is true that a select group at the top in the major conferences make lots of money, but all the others, the large majority of the football programs in the country, are big money losers.

So, it's a problem. I don't understand why, but we've gone through a couple of hard times, here. In 2003, the Secretary of Education, Rod Paige, announced the formulation of The Secretary's Commission on Opportunities in Athletics ("Commission") to study Title IX. Not surprisingly, most of the members of that Commission were the athletic directors who felt very strongly about their programs and were not sympathetic to women. In response, we put together a task force, so that wherever that Commission met, there would be groups of girls and young women in athletic gear and messages coming in.

Surprisingly, one of the Commission's greatest defenders happened to be a woman. She wanted to amend Title IX to say that equality would be met with a seven percent tolerance rate. In other words, if women were at forty-three percent and men at fifty-seven percent, that would be equality. Ridiculous. It was intolerable, but we had created such a firestorm. I think we were able to harness the political process that the people in the White House were looking down at in 2004. When the letter came out from Rod Paige, it was if those of us who had been working for equality had actually written that letter. We were able to back them off.

One of the highlights, I think, more recently is the Cedric Jackson/Birmingham School Board case. I was privileged to write a brief, with the help of a couple of my wonderful partners. That case involved a man who'd been a coach for a woman's basketball team in a high school in Birmingham, who complained to his principal that his girls were not being treated equally with his boys and they ended up firing him. And so, the suit was against him. And, by a 5-4 vote, Coach Jackson was supported and reestablished as coach.

If you really believe in home rule or let the people make decisions for themselves, then the way Coach Jackson approached it, the coaches on the ground and in the high schools, are the best scouts we have to determine when we have equality and when we have discrimination. That's the way it ought to work. You shouldn't have to sue somebody to make it work.

Let me just leave you with one last thought because out of the clear blue, one Friday night early last year, the Secretary of Education sent a letter to the athletic directors of the country saying that henceforth they could use e-mails to determine under Prong Three of Title IX, that interest had been met. Those who did not respond to the e-mails could be counted as not interested. In other words, there was a message coming from the Secretary of the Department of Education, who had been in charge of the Texas Department of Education when President Bush was the

Governor, saying that we're going to backdoor equality as far as Title IX is concerned. We're still fighting that, of course. I would like to leave this on a personal, positive note. We now have leaders in the House and Senate who are well-disposed to Title IX and its positive effect on the women of this country. We are in a position now to continue to move forward with positive change.

I don't need to tell this to you here, and I know you know all sorts of quotes. But this quote often attributed to Thomas Jefferson is particularly poignant today: "Eternal vigilance is the price of liberty." Sometimes you may feel alone, and you may think, that it's not worth taking the heat to stand up and object. I'm reminded of a quote of Martin Niemoeller, who was a pastor and Protestant leader in pre-war Germany and through German-Nazi rule. He was asked how it was possible for a civilized nation, as educated as Germany, could be taken over by a handful of people in black armbands. He said, in essence:

When they came after the Jews, I was not a Jew; therefore, I did not object. When they came after the Catholics, I was not a Catholic, and therefore, I did not object. And when they attacked the unions, I was not a member of the unions and I did not object. Then they came after me . . . and there was nobody left to object.

Well, I, at the age of 79 — for one — object. And I'm sure each of one of you here will object, and that we will continue to object until the job of equality for all women is completed.