

## Walter Dellinger Interview

01:00:31:14 01:05:41:20 24 Dellinger-meetings w/ Byrd  
(Tell us about your association with Senator Byrd.)

The first time I had a conversation with Senator Byrd I was head of the Office of Legal Counsel at the Department of Justice. That's the office provides legal advice to the President and the Attorney General. Uh, it was...19..93..1994 and the balanced budget Constitutional amendment was coming to the floor of the Senate and Senator Byrd was leading the opposition. He didn't like the idea of taking control over appropriations out the hands of the elected representatives through a Constitutional amendment and he did not like tinkering with the Constitution in novel ways.

And I went to his baronial suite that he has as Chairman of the Appropriations committee and to spend an afternoon. His idea of getting prepared for a major debate on a Constitutional issue was to sit down for a whole afternoon and just discuss Constitutional law with a Constitutional law professor.

So, we spent, oh, 2-3 hours alone just discussing the nature of the Constitution, what kinds of amendments had been thought appropriate in the past, what kinds of amendments were not thought appropriate. And that really got him prepared for the argument. And I was, I was struck when I discussed the constitutional issues with Senator Byrd as to the depth of his knowledge about the constitution. Robert Byrd reminded of the justice for whom I was a law clerk, Hugo Black of Alabama. I mean they grew up in similar settings- West Virginia and, Justice Black, Clay County, Alabama. Neither had the kind of formal education that many of their colleagues did. And they were self taught.

As a senator, Hugo Black would go to the Library of Congress and read at night. And Robert Byrd read on his own and I was just extraordinarily struck by the depth of the knowledge that he had acquired about the constitution and the freshness of which he brought to it because he had taught it to himself. Umm..and his devotion to Constitutionalism was striking as well as his knowledge. And was a truly delightful afternoon.

The second time I talked to Senator Byrd the circumstances were, were different. The first time Senator Byrd and I talked about the Balanced Budget Constitutional Amendment debate his party had been in the majority, but after the 1994 election 10 new republicans, all of them committed to supporting the Balanced Budget Amendment, had been elected and this now was a real challenge because added to the senators who had previously supported the Balanced Budget, there was clearly a sufficient 2/3 vote to send the amendment to the states for ratification. So, Senator Byrd really felt like he was that last soldier on the bridge trying to stop the Constitution from being amended in a way that he thought fundamentally incompatible with its nature and inconsistent from good government. And now we were serious. And the intensity of his preparation of the second Balanced Budget debate, where he literally had to come from behind to persuade senators who had previously voted for it in prior congresses to change their votes in order to defeat it. It was

really extraordinary.

And I remember the difference in his circumstances where he had gone from being Majority Leader to...I'm sorry (slips up)...

I was also struck by the fact, of the grace and humor with which Senator Byrd took the demotion that occurred when his party lost control of the Senate and I went from being the Chair of the Appropriations Committee to being the mere ranking member. I, I arrived late for our meeting and rushing, I rushed into the great estate that is the suite of the office of the Chair of the Committee, not realizing it his Republican counterpart that was now the Chair. So when I found out where he was and that his demoted status as ranking member and I went there and apologized for being late and stupidly said him I went to the old office 'cause, where the Chair is.

And he was crowded and he liked the office in the Capitol, he liked to stay in the Capitol where he had a special office, but now he had all his staff sharing an office with him. And he said, "Yes, professor you come upon me diminished a circumstance," he says looking around. "Reduced in retinue. Exiled to this metaphorical elba," he said. "But recall," he said, "Napoleon came back and so may I."

01:05:54:03 01:07:43:05 24 shorter version of impression

Senator Byrd is sometimes caricatured as someone who is pompous or bombastic. I think those skeptics are missing the trace of irony that he brings to the role. I think he is a smarter man than many assume. When I went back to see him, to spend an afternoon discussing the issues for the second great debate of whether to have a Balanced Budget Amendment of the Constitution which he so fiercely opposed, I made the mistake of thinking that he was still Chair of the Appropriations Committee and I rushed into the wrong office and went into the baronial estate of the Chair. His party had lost control and he was now reduced to being the, the ranking member of the Committee. And I went in and apologized for being late. And, stupidly, I said I was in the office of the Chair and didn't know to come here. And he was in a much smaller place with staff sort of crowded around him in the Capitol which he loved. (impression) And he says, "Yes, professor you come upon me, you do come upon me diminished in circumstance, reduced in retinue, exiled to this metaphorical elba; but recall Napoleon escaped and so may I, so may I." And he said it with a twinkle. Showing the sense of irony. He understood the importance of his position, his role. Umm..but he also, he also had a little bit of a sense of whims about it, which I think often went unappreciated.

01:07:50:25 01:11:07:20 24 Impeachment views

I think the most dramatic conversation I had with Senator Byrd, uh I don't believe I've ever discussed this before, came during the battle over the impeachment of President Clinton. Um...I think that the outcome of that may have been closer than people understood at the time. And Senator Byrd appeared to be deeply torn about what the right outcome would be. He actually did believe that the uh, the charges made against the President might reach the level of impeachable offenses, but neither did he want to see the duly elected President run out of office.

The phone rang one day and it was Senator Byrd in the midst of this and he got me on the phone and he said, "Professor get out your Constitution. We have a serious issue to discuss." So, I got out the Constitution (getting it out of my pocket). He always had his with him, just like the justice whom I was law clerk Hugo Black, and he had me look at the clause about the punishment upon a conviction for impeachment. And the, the clause says (reading it) judgment in cases of impeachment shall not extend further than to removal from office...and a disqualification to future office holding.

And he wanted to know whether it was possible to vote for conviction, but stipulate that the President was not to be removed from office. He says, "Everyone has always assumed that when someone is convicted of impeachment charges they are automatically removed from office, but it actually says is, if you read it carefully, it says-judgment in cases of impeachment shall not extend further than to removal from office. And he was therefore considering whether to offer a resolution convicting the President on impeachment charges, but specifying that he not be removed from office.

Umm...and we discussed it at great length and I think the conclusion we came to was that it was a very close and difficult question. And one reason you couldn't do it, I think he concluded at the end, that he couldn't offer this because the outcome would be uncertain and if they did convict the President on impeachment charges, specifically that he not be removed, some would argue that he was actually automatically removed and that in that moment Al Gore had actually become President. So that to take that step on a debatable construction of the constitution would mean that you were possibly left with a situation of creating doubt of who was legitimately president at that moment. For that reason he, he couldn't do it. But he was really struggling to find his own constitutional way and he even seriously considered voting to convict, but not remove the President if that were a possible constitutional vote.

01:11:17:17 01:12:58:14 24 short-balance budget

When the Senator would ask me to come over and discuss constitutional issues before debating a constitutional debate like the balanced budget constitutional amendment, he would really want to explore the nature of the constitution. I mean, as Chair of the appropriations committee, he didn't like the fact that a balanced budget amendment would take away his discretion, his authority over

spending and would lock that into the constitution. He also genuinely thought that it was a very bad idea to start putting in the constitution very specific amendments instructing Congress on what to do. That this... He wanted to discuss the fact that in his view a balanced budget amendment was not, was not on the same level of generality as the great amendments to the constitution. Uh, it didn't guarantee any rights. It told elected officials how to do their jobs, constrain them in a particular way, was likely to be unenforceable, would bring the constitution in contempt if it were not enforced. Uh...he said to me that there's nothing in the balanced budget amendment that raises one dollar of revenue or cuts one dollar of spending. So, it doesn't help balance the budget. It could be in the constitution as an unfulfilled promise, which would then begin to make the constitution a less serious document. And he was really able to marshal arguments from history. And I was amazed at what he could recall from his writings about different moments in American constitutional history and debates at the Constitutional Convention. He really is actually a very serious (emphatically) student of the constitution.

01:14:40:12 24 line item veto (line item veto)

Oh yes...ummm...One place on which we parted company was on the line-item veto. Um, the President for whom I served, President Clinton, supported the president having the ability to exile or cut particular items from an appropriation's measure after it had been sent to him for its approval. Uh, Senator Byrd thought the idea of the executive having the authority to eliminate particular measures was not just bad budget policy, not just something that would take power away from the Chair of the appropriations committee, but that it was also um, a step towards tyranny. And he actually had a very good policy point he made to me, knowing that I was supporting and arguing for the validity of the line-item veto. He wasn't worried about the fact that the president could exercise that influence on the budget. He was worried that the president would be able to tell senators unless you vote for this treaty or for this supreme court nominee, you won't see that vital important facility built in your district or your state. And that that would give the president a power over the legislative process, the president shouldn't have. The power could be...presidents could leverage that power from budget matters to a number of other matters.

01:14:44:16 24 Byrd jovial w/ opponents

Senator Byrd was always jovial with his opponents. Because when I defended the line item veto, the case was Senator Robert F. Byrd et al versus Budget Director Raines, et al. So, it was Byrd v. Raines. By the time it got to the Supreme Court, Byrd had won below. So it was Raines v. Byrd. Umm...I think

was, um, hard on him that I argued forcefully and successfully, I might add, the senators did not have standing to go before the federal courts and did not have standing in the United States Supreme Court to challenge an act of Congress, just because they passed it or because it affected had they did their job. And we prevailed on that. But whenever we spoke about it, he always spoke about it in good humor. He knew that I had a job to do. I was in the executive branch to defend the executive branch prerogatives, but he was certainly there to defend the prerogatives of the senate.

01:15:45:23 01:17:22:28 24 painful past-civil rights act

I saw a lot of resemblance between Senator Byrd and the justice for whom I was a law clerk, Justice Hugo Black. Black was from Clay County, Alabama. An area not unlike Senator Byrd's part of West Virginia. Um, each of them had a limited form of education as compared to what their colleagues um, with advanced degrees. Each of them taught themselves a lot and Justice Black became one of the dominant supreme court justices because of what he started teaching himself in the US Senate nights and weekends, just the way Robert Byrd taught himself constitutional law.

He would have been a great constitutional law professor-Robert Byrd. He would've been the only constitutional law professor that taught himself constitutional law. Um, each of them I think had a very painful experience in their past. Hugo Black uh, had been for a brief period in Ku Klux Klan. Uh, Robert Byrd had opposed the Civil Rights Act. Both of them have deeply regretted that and have somewhat committed themselves to, uh, for the remainder their careers to overcome what each saw as a mistake about southern racial politics that they had made at an earlier time. I think it was a painful for each of them, but one that each renounced and then spent decades doing good works to overcome.

01:17:35:12 01:18:43:23 24 if RCB was sup. ct. justice

Robert Byrd would've been a supreme court justice very much in the mold of Hugo Black. (let me put it another way) If Robert Byrd had been appointed by the, to the Supreme Court by President Nixon, he would've been in the mold of Hugo Black. Interesting because President Nixon would've made a big mistake from President Nixon's point of view. I mean, he would've thought of Robert Byrd as a southern conservative. Uh, he would've looked at an earlier vote of the Civil Rights Act and thought he was a law and order person. But Byrd's devotion to the constitution would have made him a strict enforcer of the rights of criminal defendants and liberties of citizens. Um, I think Byrd's concern for how the law, bear, bears (stutter) down upon the weakest members of society would have made him, uh, someone who was sympathetic to the rights of the

uh, indigent. I think he would've been a quite different justice than what Richard Nixon imagined. (might have been noise at the door, so he says it again.)

01:18:59:14 01:20:38:12 24 sup. ct. justice take #2

It's interesting to think of Robert Byrd as a potential supreme court nominee. I think it would've been Richard Nixon who would've nominated him. President Nixon probably would've made a big mistake from the president's point of view. He probably thought of Robert Byrd as a southern conservative, law and order in the model of the justices that Richard Nixon said he would appoint. And I think it would've been a mistake because Robert Byrd's devotion to the text of the constitution would've made him a strict enforcer of constitutional rights. I think he would've voted far more often that criminal convictions had to be overturned if rights were violated than President Nixon would've liked. And Robert Byrd had a sympathy for the underdog and a sense that we ought to think about how the law bears down on, on people from disadvantaged circumstances and I think that would've made him more sensitive to those concerns than President Nixon's ideal justice. Robert Byrd would've been someone very much like Hugo Black of Alabama who spent 30 plus years on the court defending the rights against racial discrimination, strictly enforcing the 1st amendment. Uh, Byrd would've been a constitutionalist, that is, he would've applied the constitutional rights even when it was uncomfortable or unpleasant for the government to do so. And also he would've been courageous. I mean Robert Byrd would've been the kind of justice who would've had no hesitancy to stand up to the justice that appointed him, uh, and strike down laws that he thought were in conflict with the text of constitution.

01:20:45:00 01:23:12:29 24 war opposition & courage  
(Senator says that he served alongside 11 presidents, but never for)

(stutter at beginning) He's certainly outspoken. His courage in opposing the, uh... The last conversations I had with Senator Byrd were about the lead up to the war in Iraq-the second Persian Gulf War. At a time when, I think popular support for the war was overwhelming, I thought the case had been made. Let me start again... My last conversations with Senator Byrd were about his opposition to the War in Iraq. He came to that opposition at a time when public support for going to war was overwhelming. It was well over 70%. Um, and, uh, support in both houses of Congress was overwhelming in votes to support the President's decision. People thought the case had been made that this was a war we had to engage in. Senator Byrd was deeply offended by the failure of his colleagues and the Congress to exercise their own independent judgment about whether or not to go to war. He thought the constitution made it clear that a decision to go to war was not to be entrusted to one man alone, but that the

more directly representatives of the people had to make that decision or concu in that decision. Um, and he really spoke with great force and eloquence. And he was virtually alone. Uh, a role which did not intimidate him, indeed, a role which I think he relished, speaking truth to power. Uh, and his, the eloquence against the war and against the constitutionality of giving the president a complete blank check were really quite, quite powerful. And even though I did fully agree with, with his opposition to the war, I was really struck by the intensity, by the courage and really by the depth of the understanding of the proper allocation of war powers between Congress and the president.

01:23:18:14 01:23:39:21 24 Byrd understood (more war)  
(Is there a constitutional challenge to that?)

Well, I think one of the things Senator Byrd understood was that the courts are unlikely to intervene. If anybody is going to put the president to the test of whether he has the case for sending American troops into battle, it's gotta be the United States Congress. And if they're not going to do it, the courts are not going to step in.

01:23:53:29 01:24:24:16 24 RCB is good to have on your side

Senator Byrd would be a very good person to have on one's side. Uh, I realize that, that when he once said to me- If I, if I were ever nominated for some high post or a judicial post that he thought he could be of some significant help to me. That, uh, I think as Chair of the appropriations committee that he could be very helpful.

01:24:28:18 01:25:46:08 24 history will record RCB  
(How do you think history will record him?)

Uh, I think history will record Senator Byrd as someone with some success stopped the erosion of power from the legislature to the president. I think we've watched this shifting of power, um, towards an imperial presidency in the last 20 years. It sort of dips up and down, but the direction has been towards a sort of unilateral presidential power. He's really stood up against that on issue after issue and insisted that there is a very important role for the legislative branch to play. He's fought a lot of losing battles, but he's won some. And I think he's very much slowed the tide. And I think what history may record that, if 25 or 50 years the Senate is still a very important body that provides a check on the president, that it was Robert Byrd's tenure as a senator which helped maintain

the role of the senate when it otherwise might have almost completely eroded significant restraint on the president.

01:26:04:27 01:27:24:14 24 greatest victories

I think Senator Byrd's greatest victories have to do with the fact, first of all, that he almost single handedly I think is responsible for defeating an amendment to the constitution that would forever alter how we go about doing our budgeting and would have put us in a straight jacket of a budget balance amendment. Um...That would have been terrible policy and would've been inappropriate with the constitution. And would've diminished the legislative role.

I think his tireless work against the line-item veto, where he, he, he lost and was passed when it was signed by the president. And he lost when he tried to challenge it. But he supported the later, he supported a later challenge and the Supreme Court did strike it down. He gets some points for that.

He has really helped maintain the role of the legislature, particularly the role of the senate. And that's, I think been more important than the particular individual legislative battles that he won or lost, just standing up for the legislative process. And for attention to the constitution, and attention to the constitution by the senators themselves, not just leaving it to the courts.