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Address by Senator Strom Thurmond (D-SC) on Senate floor in support of his amendment to Alaskan Statehood Bill requiring Congressional approval before President can effect land withdrawals under Section 10, 1958 June 30

Strom Thurmond

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ADDRESS BY SENATOR STROM THURMOND (D-SC) ON SENATE FLOOR IN SUPPORT OF HIS AMENDMENT TO ALASKAN STATEHOOD BILL REQUIRING CONGRESSIONAL APPROVAL BEFORE PRESIDENT CAN EFFECT LAND WITHDRAWALS UNDER SECTION 10, JUNE 30, 1958.

Mr. President:

I call up my amendment 6-25-58-D to the Alaskan Statehood Bill. The portion of the bill which I seek to amend is Section 10, which begins as follows: "The President of the United States is hereby authorized to establish by executive order or proclamation one or more special national defense withdrawals within the exterior boundaries of Alaska, which withdrawal or withdrawals may thereafter be terminated in whole or in part by the President."

Mr. President, I object strongly to lodging in one individual the power thus to shrink a sovereign State by withdrawing from its jurisdiction vast portions of its territory. For this Senate to pass a bill which would subject a State, ultimately any State—South Carolina, New York, California, or Nebraska—to the whim of one man in so important a respect would be, to say the least, most unwise.

I also have grave doubts that Section 10 is constitutional. There is a constitutional requirement that new States be taken into the Union on equal footing with old States. I refer the Senate to the case of Coyle v. Oklahoma, 221 U. S. 559, and other cases which I cited to this body on Friday.

Now I ask, Mr. President, could Alaska possibly be considered to be on equal footing with the other States if the Federal government were given this extraordinary power of withdrawing up to half the State from State jurisdiction? And, Mr. President,
I do not speak of any mere condemnation or eminent domain power, but of this new concept of national defense withdrawal, whereby the government would acquire not just a property right in the land under consideration but dominion also, with exclusive power in the legislative, judicial and executive fields.

Obviously, this glaring inequality between the status of Alaska and the status of the other States would violate the constitutional requirement of equal footing. Well then, some may ask, if I am so sure that the section is unconstitutional, why do I bother to submit an amendment? Why not simply wait for the Supreme Court to strike this section down?

The reason is this, Mr. President. I am not at all sure that the Supreme Court would strike it down. Let us assume—and I realize this is perhaps a rash assumption to make these days, but still let us assume—that the Court will make at least a pretense of following the Constitution. Proceeding upon this assumption, I do not feel that the Court could completely ignore this glaring violation of the equal footing doctrine. However, that does not mean that the Court would necessarily strike out Section 10 granting the Federal government this power of withdrawal.

I have a strong suspicion, Mr. President, that the Court may go about the problem this way: Instead of restoring equal footing between the States by invalidating the withdrawal provision in the case of Alaska, the Court might simply extend the principle of the withdrawal power to cover the present 48 States as well as Alaska. That would restore the situation of equal footing.
Is this a fanciful worry, Mr. President? Is it inconceivable that even the present Supreme Court would do such a thing? I do not think it is inconceivable, Mr. President, for this reason. This is a question involving State jurisdiction and State powers versus Federal jurisdiction and Federal powers. And where such an issue is at stake, the tendency of the Supreme Court is going to be to try in every way possible to find a solution that will favor Federal encroachment on the States, rather than to reach a conclusion which would result in protecting the States from encroachment.

This conclusion is not simply the bitter and cynical remark of one who has been alarmed by the Court's decisions of the past three or four years. This is a tendency that has been noted for a very long time. This tendency on the part of the Court to favor the Federal government at the expense of the States began very early in our history. Thomas Jefferson saw the beginning of this process of usurpation by the Federal judiciary; he feared its ultimate result, and he expressed his fears as follows:

There is no danger I apprehend so much as the consolidation of our government by the noiseless, and therefore un alarming, instrumentality of the Supreme Court.

With prophetic vision, the great Virginian warned further that the germ of dissolution of our Federal system lies in the Federal judiciary, "working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped from the States, and the government of all be consolidated into one."
Jefferson's description of the process and methods of judicial usurpation is truly remarkable. It could well have been written today. These are his words:

The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated republic. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone. This will lay all things at their feet... They skulk from responsibility to public opinion... An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy or timid associates, by a crafty chief judge who sophisticates the law to his mind, by the turn of his own reasoning...

Or, Mr. President, to sum the situation up in a few words, we might remember the conclusion reached by the late Professor Walter F. Dodd, one of America's most distinguished authorities on constitutional law. Writing in the Yale Law Journal—the citation, for all who may be interested, is 29 Yale Law Journal 137 (1919)—in an article entitled "Implied Powers and Implied Limitations in Constitutional Law," Professor Dodd declared, and I quote:

The Court is an organ of the national government, associated with that government, and has in the long run shown a disposition to support national powers."

Professor Dodd was not mistaken in his conclusion, Mr. President. Nor did it take any great constitutional expert or genius to comprehend the truth of that which Professor Dodd was stating. One of the very basic axioms of Anglo-Saxon law is the rule that "No man shall be judge in his own cause." The justice of this rule could hardly be denied, for a man judging in his own cause is
is rather likely, to say the least, to favor himself. Does it not follow then, Mr. President, that if, in a dispute involving the rights of a State versus the rights of the United States, a branch of the United States government is permitted to be the judge, the rights of the United States are in the long run going to be upheld, rather than the rights of the States?

The answer to this question is too obvious, Mr. President, especially in view of the record of anti-State, pro-Federal government decisions by the Supreme Court to date. Equal footing would be interpreted by the Court to mean that the old 48 States must relinquish their sovereign rights to place them on an equal footing with the less-sovereign, new 49th State.

As a matter of fact, the Court was once before faced with a problem which is somewhat similar to this one. The question involved the rights of the Federal government versus the rights of the States, and, although the Court had to perform some remarkable contortions to reach its conclusion, it reached a decision favorable to the Federal government. I refer, Mr. President, to the question of the extent of the Federal government's right of eminent domain.

I am going to take a few moments to explain to the Members of this body just how it was that the Federal government came to claim the unlimited power of eminent domain.
Mr. President, I should say, not how the Federal government came to claim or acquire the right of eminent domain, but rather how the Federal government overcame a constitutional limitation on its right of eminent domain.

If anyone today should challenge the Federal government's right of eminent domain, he would probably be referred to the case of Kohl v. the United States, 91 U. S. 367, a case decided in 1876. For example, in the famous steel seizure decision, Youngstown Sheet and Tube Co. v. Sawyer, 343 U. S. 579, a case which dealt really with the secondary issue of seizure by the President without Congressional authorization, both Mr. Justice Douglas in his concurring opinion, and Mr. Chief Justice Vinson in his dissent, asserted, in passing, the existence in the Federal government of the power of eminent domain. Both Douglas and Vinson cited as their authority, the Kohl case. Although there are sections in the Constitution which expressly or impliedly confer a power of eminent domain on the Federal government, the Kohl case bases the Federal government's right of eminent domain primarily on the theory that eminent domain is an incident of sovereignty.

Now, generally, the Court has rejected the idea that the United States possesses powers by virtue of its sovereignty rather than by specific constitutional grant. For example, in the case of Kansas v. Colorado, 206 U. S. 46, (1907), when counsel for the United States, as intervenor, urged upon the Court a doctrine of "sovereign and inherent" power, the Court replied as follows:

But the proposition that there are legislative powers affecting the Nation as a whole which belong to, although
not expressed in the grant of powers, is in direct conflict with the doctrine that this is a government of enumerated powers. That this is such a government clearly appears from the Constitution, independently of the amendments....This natural construction of the original body of the Constitution is made absolutely certain by the Tenth Amendment. This Amendment, which was seemingly adopted with prescience of just such contention as the present, disclosed the widespread fear that the National Government might, under the pressure of a supposed general welfare, tend to exercise powers which have not been granted.

However, we need not argue at this point the question of whether the Federal government can have sovereign and inherent powers; for, whether as an attribute of sovereignty or by constitutional grant, it seems clear that the Federal government does possess the bare right to condemn for public use lands situated within a State.

But the real question, Mr. President, is this: Is the Federal government's right absolute, or is it restricted? Corpus Juris Secundum espouses the attribute-of-sovereignty theory and denies the necessity of constitutional grant. However, it goes on to say as follows -- and I quote from 29 Corpus Juris Secundum, Section 3: "The right of eminent domain is not conferred, but may be recognized, limited, or regulated by constitutions."

Now, Mr. President, according to the Constitution, the Federal government's right of eminent domain is limited, and very severely limited, by two provisions. One of these is in the body of the Constitution, and the other is in an amendment. The Amendment to which I refer is, of course, the Fifth. The limitation expressed therein is well recognized and has for the most part been faithfully observed. It reads: "...nor shall private property be taken for public use, without just compensation."
Let me interject here, Mr. President, the observation that the Fifth Amendment, of course, does not in any way supersede, but only supplements, the other limitation, which I am about to mention, on the Federal government's right to acquire lands within a State.

But the other provision in question, Mr. President, the one in the body of the Constitution itself, most definitely has not been faithfully abided by. As a matter of fact, it has been nullified, its meaning subverted by a trick of word-juggling, or Constitution-twistup, as brazen as any ever attempted by our Supreme Court.

Mr. President, what is this limitation within the main body of the Constitution, on the Federal government's right of eminent domain? I shall read to you this limitation, which, while stated indirectly, is stated perfectly clearly. The provision, found in Article I, Section 8, reads as follows:

The Congress shall have Power...to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislatures of the State in which the Same shall be, for the Erection of Forts, Magazines, arsenals, dock-Yards, and other needful Buildings.

What that Section says, Mr. President, is -- leaving aside the portion which refers to the acquisition of the District of Columbia -- that the Congress is given the power of exclusive jurisdiction over such lands within the States as may be acquired, for the stated purposes, by the Federal government -- such acquisition being dependent upon the consent of the Legislatures of the affected States.

Now, Mr. President, in the face of this clear constitutional clause, it seems almost unbelievable that any jurist could ever have
asserted that there are other ways in which the Federal government could acquire lands within a State. Can it be seriously contended that the words "by the Consent of the Legislature..."—placed directly after the word "purchased" and modifying it—would have been inserted if the Framers had intended that the Federal government should also possess the power to acquire such lands without the consent of the State Legislature? The men who framed the Constitution were not in the habit of wasting words, nor did they insert words for no purpose. They meant that what lands the government may need for the stated purposes could be purchased with the consent, and only with the consent, of the Legislature of the affected State.

Mr. President, this is beyond dispute. This intention of the Framers can be shown by the Madison papers. The consent provision was missing from the original draft, and it was inserted specifically to give the States the right to veto Federal land acquisition. I shall now read from Madison's Reports of Debate in the Federal Convention to prove my point:

So much of the Fourth Clause as related to the seat of government was agreed to, nem. con.

On the residue, to wit, "To exercise like authority over all places purchased for forts, etc."

Mr. GERRY contended that this power might be made use of to enslave any particular State by buying up its territory, and that the strong holds proposed would be a means of awing the State into an undue obedience to the General Government.

Mr. KING felt, himself, the provision unnecessary, the power being already involved; but would move to insert, after the word "purchased," the words, "by the Consent of the Legislature of the State." This would certainly make the power safe.

Mr. GOVVENEUR MORRIS seconded the motion, which was agreed to, nem. con.; as was then the residue of the clause, as amended.
Mr. President, those quotes are taken verbatim from Madison's *Reports of Debates in the Federal Convention*. They show clearly that the Federal government's power to purchase land within a State was strictly dependent on consent by the State. But listen, Mr. President, to how the Supreme Court now "interprets" this clear mandate of the Framers. I shall quote briefly from the case of *James v. Dravo Contracting Company*, 302 U. S. 134, (1937):

> It is not questioned that the State may refuse its consent and retain jurisdiction consistent with the governmental purposes for which the property was acquired. The right of eminent domain inheres in the Federal government by virtue of its sovereignty and thus it may, regardless of the wishes either of the owners or of the States, acquire the lands which it needs within their borders....In that event, as in cases of acquisition by purchase without consent of the State, jurisdiction is dependent upon cession by the State, and the State may qualify its cession by reservations not inconsistent with the governmental uses....

You can see what has happened, Mr. President. The phrase "by the Consent of the Legislature" has been bodily lifted from its position after the word "purchased"--which word it was clearly intended to modify, as demonstrated in the Madison papers--and has been made, instead, to modify the phrase "exercise like authority." In other words, Mr. President, according to the Court, the provision now reads: "The Congress shall have power to exercise exclusive legislation, provided the State Legislature consents thereto, over such lands as may be purchased for the erection of Forts, Magazines, Etc."

This is quite a change in meaning. Naturally, the idea of State consent as a prerequisite to the Federal government's acquisition of necessary lands was intolerable to the advocates of
consolidation and national supremacy. Yet, they could not ignore completely the existence of the passage/beginning with the words "by the consent." Their only alternative was simply to juggle the clause to suit themselves—which they did. The new line was laid down by Mr. Justice Strong in the Kohl case. Here is what he said:

The consent of a State can never be a condition precedent to its (the power's) enjoyment. Such consent is needed, only, if at all, for the transfer of jurisdiction and of the right of exclusive legislation after the land shall have been acquired.

Mr. Justice Field laid bare the process by which, without any amendment, this constitutional limitation on Federal power
was subverted and brazenly given a different meaning, one that was harmless to the concept of national supremacy. In the case of Fort Leavenworth Railroad Company v. Lowe, 114 U. S. 525, Field described the change that came about in the matter of eminent domain. He did not seem to express approval of the change, and, in fact, some of the language in his dissent in the Kohl case indicates that he had some doubts about Justice Strong's sweeping assertion. In this Fort Leavenworth case, decided in 1885, Field wrote as follows:

This power of exclusive legislation is to be exercised, as thus seen, over places purchased, by consent of the Legislatures of the States in which they are situated, for the specific purposes enumerated.

It would seem to have been the opinion of the Framers of the Constitution, that without the consent of the States, the new government would not be able to acquire lands within them; and therefore it was provided that when it might require such lands for the erection of forts and other buildings . . ., and the consent of the States in which they were situated was obtained for their acquisition, such consent should carry with it political dominion and legislative authority over them. Purchase with such consent was the only mode then thought of for the acquisition by the General Government of title to lands in the States.

Now, Mr. President, here is Mr. Justice Field's description of the metamorphosis of this constitutional limitation:

Since the adoption of the Constitution this view has not generally prevailed. Such consent has not always been obtained, nor supposed necessary, for the purchase by the General Government of lands within the States. If any doubt has ever existed as to its power thus to acquire lands within the states, it has not had sufficient strength to create any effective dissent from the general opinion. The consent of the states to the purchase of lands within them, is however, essential, under the Constitution, to the transfer to the General Government, with the title, of political jurisdiction and domain. Where lands are acquired without such consent, the possession of the United States, unless political jurisdiction be ceded to them in some
other way, is simply that of an ordinary proprietor. The property in that case, unless used as a means to carry out the purposes of the government, is subject to the legislative authority and control of the States equally with the property of private individuals.

Thus, Mr. President, did the consolidationists overcome the view held by the Framers that the Federal government could acquire lands within a State only by consent of the State. They simply "interpreted" the consent provision as modifying "exercise like authority," instead of the word "purchased," which it did in truth modify. One can easily see the motive of the consolidationists: They had, at any cost, to get rid of the rule of State consent as a prerequisite to Federal acquisition of land, for they knew that this doctrine of State consent was a powerful weapon by which the States could resist that centralizing trend promoted by the Federalists.
This was perhaps the most flagrant, the most outrageous, of all the many examples of the Court's Constitution-twisting. I submit that a Supreme Court which is capable of this feat, which I have described, is certainly capable of extending the principle of national defense withdrawal from Alaska to all the States, especially since it could do so on the specious excuse of upholding the equal footing requirement of the Constitution. In fact, Mr. President, such a Supreme Court is capable of absolutely anything.

This is why I do not feel that we, here in the Senate, should shirk our duty and simply permit the Supreme Court to pass on the validity of this withdrawal clause later. Since the Supreme Court is likely to extend the withdrawal power to cover all the States, in the event this bill is passed, it is up to us in the Senate to erect as many safeguards as possible around this withdrawal power.

I hope you will note, Mr. President, that my amendment does not propose to delete completely the section authorizing defense withdrawals. I am not unaware of the importance of Alaska to our national defense. In fact, I so fully realize just how vital Alaska is that this is another reason why I oppose statehood: I feel that Alaska—and I mean all of Alaska, not just this section within the withdrawal zone boundaries—is so crucial to our defense against Soviet Russia that it should be regarded as a military frontier area in which national security considerations must govern in every case.

I am only proposing, Mr. President, that this authority in the Executive to decimate a sovereign State be, in each case, contingent upon the approval of this body and the House or Representatives. As I have already said, I do not consider it wise to leave a matter which could be so overwhelmingly
disastrous to a State or its people to the discretion of a single individual. I feel that the Congress, and this body especially, should have the final say in any such move. I feel so strongly about this that it is my belief that we, the Members of this body, will be derelict in our duty if we surrender our States to the whim of the Executive by failing to amend this section.

After all, Mr. President, this body is peculiarly the representative of the States collectively; and the individual members of this body are the representatives of their respective States. Are we not, therefore, duty bound to take whatever precautionary step is necessary to withhold from one man the power to destroy, in effect, any one or more of these States which we represent?

Or is it the feeling of some of the Members that the States no longer really matter? This may be the feeling of a few, I suppose, who regard the States as little more than convenient election districts within the framework of an all-powerful monolithic national structure.

But, Mr. President, although some may wish it so, and some even make it so in practice, the Constitution does not provide for United States Senators to be primarily representatives of interstate social and economic groups. The Constitution never envisioned, and never provided for, a United States Senator from the CIO, or from the NAM, or from the ADA, nor even from the Liberal Establishment as a whole.

The Constitution, Mr. President, provided that Senators should represent States. The Constitution still requires a United States Senator to be, first and foremost, a representative of his State—his State as an entity, not merely as the geographical locality inhabited by a varied number of
individuals and by portions of nation-wide social and economic interest
groups.

It is important that we remember this fact, that Senators represent
States, because it is something often lost sight of. Many people have
the mistaken notion that, in some manner, the Seventeenth Amendment
changed the relationship of the United States Senator to his State.
This the Amendment did not do, and in fact, could not do, even had it
purported to do so.

The Seventeenth Amendment only changed the method by which a
State selects its representatives in the United States Senate.
Prior to the adoption of this amendment, Senators were elected by the Legislatures of the States. Since the adoption of the Seventeenth Amendment, they have been elected by direct popular vote. This is a fact of which everyone in this chamber is quite well aware.

Now, what change could be wrought in the relationship between a Senator and his State by the fact that his election is now by the people of the State instead of by the Legislature? Obviously, there has been no change; yet it is not surprising, perhaps, that some people have gained this false impression. From the earliest days of this Republic, the enemies of States' Rights and local self-government have sought, often successfully, to implant in the popular mind the notion that there is some great opposing distinction between the concept "the State" and the concept "the people." The corollary to this strange notion is that the terms "the people" and "the United States" are identical or interchangeable. It is this same notion that the States and the people are in opposition to each other/which is perhaps responsible for the idea that the Seventeenth Amendment changed the basic concept of what a United States Senator represents.

A State can act through other agencies than its Legislature. The State Legislature is not the State. In fact, the State government as a whole--Legislature, Executive and Judiciary combined--does not constitute the State. The State is greater than its government. And, thus, the State is not limited to acting through its government, or through any particular branch thereof. The State can act through its people, either in convention assembled, or by direct popular election.

In fact, "the people," far from being in contra-distinction to the State, is the State, acting in its highest sovereign capacity. Thus the contention that, since the Seventeenth Amendment, a United States Senator has represented the individuals within a State, rather than the State as an entity, is false. The switch from election by the State's Legislature to election by the State's people was a change in method only--it did not affect the fundamental fact that a United States Senator is, first and foremost, the representative of his State.
Obviously, Mr. President, the Seventeenth Amendment could not affect this relationship between State and Senator. No amendment could affect it. For this relationship between Senator and State is clearly set forth in the Constitution, in a clause which is unamendable, and which reads as follows:

Provided...that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Mr. President, the word which appears in that unamendable clause is "State." Not "people of the State," not "people of the United States," not "the United States," but "State." "No State, without its Consent, shall be deprived of its equal Suffrage in the Senate." Thus it can clearly be seen that, according to the Constitution, United States Senators are, first and foremost, the representatives of their respective States.

As such, Mr. President, it is our bounden duty to protect the integrity of our States. This duty is a solemn one, of the nature of a trustee's duty to his cestui que trust. This body should, therefore, be the last, Mr. President, to hand over to the Executive the power to annihilate a State, which is just what Section 10 of this Alaskan Statehood Bill would do.

My amendment proposes that, before the President can take this step of, if effect, depriving a State of great portions of its territory, this body, the Senate of the United States, and the House of Representatives, shall first give their consent. I believe this is asking only a little to protect so much.

-END-