The 91st Congress and the Constitution

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Every member of Congress, upon taking office, is required to repeat an oath to "support and defend the Constitution of the United States."¹ In theory then, each member is under a duty to judge the constitutionality of legislative proposals. Moreover, as a practical matter, each member should evaluate the constitutional status of each legislative proposal if only because a charge of constitutional infirmity may impair a proposal's chance of passage.

In terms of these theoretical and practical responsibilities to consider constitutional issues in the legislative process, the most recent Congress is not likely to be recorded a winner. The 91st Congress met from January, 1969, until December 31, 1970. During this period, countless instances arose in which the constitutional power of the national legislature was (or should have been) drawn into question. Of course, constitutional issues, like all other issues considered by Congress, inevitably arise in a broader context. Indeed, it is often political or parliamentary factors that determine how—and whether—constitutional questions are ever considered. Nevertheless, a detailed examination of a few of those instances where constitutional questions were raised will perhaps illuminate the attitudes and performances of the members of Congress with regard to their constitutional responsibilities.

In choosing which instances to consider, we met with our first difficult decision. Among the thousands of bills considered during any Congress, a high proportion involve some constitutional implications. We have chosen four issues considered by the 91st Congress which demonstrate some variations on the theme that, for Congress, the Constitution is a sometimes thing.

The four issues are: (1) the extent to which Congress may encroach

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¹ The oath of office is constitutionally required of all members of both the House and Senate, U.S. CONST. art. VI, § 3, and the form of the oath is prescribed by 5 U.S.C. § 16 (1964).

upon the first amendment freedom of association in the interests of safeguarding non-governmental defense production facilities; (2) the compatibility of preventive detention prior to trial with the constitutional safeguards contained in the eighth amendment and the due process clause of the fifth amendment; (3) the constitutionality of lowering the voting age in local, state and national elections by congressional statute; and (4) the relative constitutional responsibilities of the President and Congress for involving the United States in an armed conflict abroad, specifically the Cambodian invasion of April, 1970.

If some of the description reflects more heat than light, it is because the authors were more than mere observers of the 91st Congress and because they believe the Constitution ought not be a document that one can take or leave alone. In any event, we turn to the 91st.

I. H.R. 14864, DEFENSE FACILITIES AND INDUSTRIAL SECURITIES ACT OF 1970

Section 5 of the Subversive Activities Control Act of 1950² authorized a program to protect "defense facilities," that is, non-governmental installations engaged in industrial production essential to the defense of the United States, against subversion. Section 5(a)(1)(D) of the Act provided that when a Communist-action organization³ was under a final order to register as such with the Subversive Activities Control Board,⁴ it was unlawful for any member of that organization "to engage in any employment in any defense facility."

In 1967, however, the Supreme Court in *United States v. Robel*⁵ invalidated section 5(a)(1)(D) on the grounds of overbreadth. Specifically, Chief Justice Warren, speaking for a majority of the Court, affirmed the dismissal of an indictment against Robel in these terms:

That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made irrelevant to the statute's operation that

² § 5(a)(1)(D), 50 U.S.C. § 784(a)(1)(D) (1964).

³ § 3(3)(a) of the Act, 50 U.S.C. § 782(3)(a) (1964), defines a "Communist-action organization" as:

any organization in the United States (other than a diplomatic representative or mission of a foreign government accredited as such by the Department of State) which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement . . . and (ii) operates primarily to advance the objectives of such world Communist movement

⁴ In *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 105 (1961), the Supreme Court sustained an order of the SACB requiring the Communist Party of the United States to register as a Communist-action organization under the Act.

⁵ 389 U.S. 258 (1967).

an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of § 5(a)(1)(D) may occupy a nonsensitive position in a defense facility. Thus, § 5(a)(1)(D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights.⁶

The Court relied on its earlier decision in *Aptheker v. Secretary of State*,⁷ which first drew the distinction between passive and active membership, and interpreted the Smith Act's membership clause as requiring "a defendant to have knowledge of the organization's illegal advocacy, a requirement that 'was intimately connected with the construction limiting membership to "active" members.'"⁸

In response to *Robel* and other cases,⁹ the Internal Security Committee of the House of Representatives [HISC]¹⁰ began work on H.R. 14864, the Defense Facilities and Industrial Security Act of 1970.¹¹ The congressional consideration of this Act presents a sharp conflict between the desire of Congress to legislate broadly to protect production facilities by establishing employee screening programs and the first amendment's requirement that laws relating to the sensitive areas of political association and belief be narrowly drawn and limited. The response of the House of Representatives to the Court's interpretation of the power to legislate in this delicate area provides a clue to the significance of constitutional scholarship in the legislative process.

On December 16, 1969, the Internal Security Committee reported H.R. 14864 to the House of Representatives with a recommendation for favorable action.¹² The HISC report emphasized Chief Justice Warren's statement in *Robel* that although section 5(a)(1)(D) was void for over-

⁶ *Id.* at 265-66.

⁷ 378 U.S. 500 (1964).

⁸ 389 U.S. at 262, *citing* *Aptheker v. Secretary of State*, 378 U.S. 500, 511 n.9 (1964).

⁹ *E.g.*, *Schneider v. Smith*, 390 U.S. 17 (1968), in which the Court struck down a personnel screening program for access to merchant vessels and waterfront facilities on the ground that it was not expressly or impliedly authorized by Congress in the Magnuson Act of 1950, 50 U.S.C. § 191 (1964).

¹⁰ The House Committee on Internal Security was formerly known as the House Un-American Activities Committee. For reasons best known to the members of the Committee, a successful effort was made to change the Committee's designation in early 1969. H.R. Res. 89, 91st Cong., 1st Sess., 116 CONG. REC. 3745-47 (1969).

¹¹ H.R. 14864, 91st Cong., 1st Sess. (1969).

¹² H.R. REP. NO. 91-757, 91st Cong., 1st Sess. 1 (1969) [hereinafter cited as HISC REPORT].

breadth, the Court did not prohibit all congressional action to protect defense facilities.

We are not unmindful of the congressional concern over the danger of sabotage and espionage in national defense industries, and nothing we hold today should be read to deny Congress the power under narrowly drawn legislation to keep from sensitive positions in defense facilities those who would use their positions to disrupt the Nation's production facilities.¹³

The legislative scheme to control access to defense facilities was simple in outline, if somewhat less than "narrowly drawn." H.R. 14864 would add a new fourth title to the Internal Security Act of 1950, captioned "Defense Facilities and Industrial Security Act of 1970." Section 405 of this new title would authorize the President to establish "screening programs to determine authorization for access to sensitive positions in defense facilities The ultimate standard for determining authorization is that the granting of such authorization be 'clearly consistent with the national defense interest.'"¹⁴

Section 404 of the proposed act specified procedures for designating defense facilities and for determining which positions and areas within those facilities were to be restricted to persons who had survived the screening process. In deference to *Robel* the Committee took some pains to make it appear that the kinds of defense facilities and positions which could be included in the screening program were carefully limited.

For example, section 402 of the new title contained elaborate definitions of such terms as "facilities," "sensitive," "act of subversion," "association," and "affiliation." In addition, to be brought within the program, facilities had to be engaged in classified military projects, production of important weapons systems or their components, production of basic raw materials important to military production or mobilization, or "important utility and service" functions. Finally, in response to the Court's observation that section 5 of the 1950 Act made no distinction between sensitive and nonsensitive positions, the committee bill provided that "[t]he Secretary of Defense shall designate the positions, places, and areas of employment in any defense facility which he determines to be sensitive."¹⁵

To many members of the House, the Committee's attempt to produce "narrowly drawn legislation" was a hopeless failure. In the first place,

¹³ 389 U.S. at 266-67, cited in HISC REPORT at 7-8.

¹⁴ HISC REPORT at 24.

¹⁵ *Id.* at 42.

the Committee's definitions were riddled with terms having no legal significance and left almost complete discretion to defense officials administering the program. For example, the requirement that defense facilities be engaged in "important" classified military projects, or in production of "important weapons, or defense systems, their subassemblies and components" would have brought within the program's reach virtually every one of the hundreds of thousands of employees of United States defense contractors and subcontractors. Moreover, the definition of "facility" covered

any manufacturing, producing, or service establishment, enterprise or legal entity, any plant, factory, industry, public utility, mine, laboratory, educational institution, research organization, railroad, airport, pier, waterfront installation, canal, dam, bridge, highway, vessel, aircraft, vehicle, pipeline, or any part, division, department, or activity of any of the foregoing.¹⁶

In light of such sweeping definitions, the Committee's assertion that its proposal was "... drafted with the most scrupulous attention to the pronouncements of the courts in *Robel* [and other cases]," and that it would "... meet with the most rigorous requirements of the majority and concurring opinions in that case,"¹⁷ can hardly be taken seriously.

A. *The Threat to Associational Freedom*

The most dangerous provision of H.R. 14864—and the most patently unconstitutional provision in light of *Robel*—was subsection 405(c). That subsection authorized the President "to establish criteria and to undertake investigations" to carry out the screening programs established in the Act. Although the Committee argued that "the criteria and investigations . . . will be within the respective limitations, standards, and purposes expressed in sections 404 and 405 . . .," we have seen that these limitations were practically nonexistent. The ultimate purpose of these criteria and investigations, it will be remembered, was to determine whether granting of access to a sensitive position in a defense facility was "clearly consistent with the national defense interest." A standard which would provide the administrator of the screening program with broader discretion is difficult to imagine.

And what was the scope of the criteria and investigations which the President was authorized to establish and conduct under section 405(c)? What were the individual characteristics and activities which would be open to government investigation and review—and which might be the

¹⁶ *Id.* at 40.

¹⁷ *Id.* at 8.

basis for denial of any of a broad range of jobs in private industry? Criteria could be established and investigations undertaken

regarding any such person's present or past membership in, or affiliation or association with, any organization, and such other activities, behavior, associations, facts, and conditions, past or present, which are relevant to any determination to be made under the provisions of this section.¹⁸

Thus, with the sole limitation that the inquiry or criteria must be "relevant" to determinations to be made as part of the screening program, investigators and administrators were free to deny employment in a defense facility to any person based on his membership, passive or active, or even his association,¹⁹ knowing or innocent, with "any organization," as well as on the basis of any person's activities, behavior, associations, facts or conditions. The sole limitation, if a limitation it can be called, was the administrator's notion of what was "relevant" to the inquiry or determination.

The work product of the HISC always involves a special set of pluses and minuses. As the legitimate descendant of the House Un-American Activities Committee, many members support the HISC with special zeal and consider any recommendation of the HISC as scripture. Others remember the excesses of the Committee under Martin Dies and Parnell Thomas, and react adversely with equal zeal. A third group of Congressmen think the whole subject matter is passe, but, politics being what it is, do not relish answering the charge of being "soft on communism" that might follow a vote against the HISC.

To complicate the picture further, Richard H. Ichord of Missouri, the present chairman, is not in the Dies-Thomas mold, and prides himself on his reasonableness. There is no doubt that the circuses of earlier days are no longer countenanced. Indeed, during the entire 91st Congress, only one witness was cited for contempt of HISC, which is probably the lowest number of casualties since Dies began over thirty years ago.

With these facts in mind, opponents of H.R. 14864 began to act. The Washington Office of the American Civil Liberties Union noted in a letter to all members of the House the broad coverage of the proposed bill and made a plea for its rejection. The letter quoted a telling passage from *Robel*:

¹⁸ *Id.* at 42.

¹⁹ "(8) The term 'association,' as applied to a person's conduct, means a person's activities, or other objective manifestation of conduct, in relation to another person or organization." This "narrowly drawn" definition was found in § 402(8) of the proposed new Title IV, HISC REPORT at 40.

It would, indeed, be ironic, if in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile.²⁰

In addition, soon after the Committee issued its report, opponents within the House met to fashion amendments to H.R. 14864 which would narrow its overbroad scope.²¹ The emphasis on legal argumentation in the Committee report made it clear that here was where the majority members of the HISC felt the bill to be most vulnerable. The Committee knew it could be attacked as trying to resurrect the old Subversive Activities Control Act despite the Court's decision in *Robel*. Thus, the problem for those opposing the bill was to draft amendments which would clearly illustrate its unconstitutionality.

The opponents received invaluable support from Congressman Stokes of Cleveland, a member of the Committee, who filed a blistering dissent to the Committee report. He noted:

In a very distinct sense, H.R. 14864 represents a step not forward but backward in progress. Its provisions are so capable of nearly infinite expansion that they contain the dangerous potential for an unprecedented assault on fundamental rights which were protected from the now invalidated section 5 of the Subversive Activities Control Act.²²

Congressman Stokes noted that the bill's most salient weakness, in light of the requirement for precision which the Court had imposed, was its "failure to provide any meaningful standard by which the President can make the determinations with which he is charged."²³

At this point, Chairman Ichord undertook an extraordinary mea-

²⁰ Letter from Lawrence Speiser, Director, Washington Office, American Civil Liberties Union, January 27, 1970, citing 389 U.S. at 264.

²¹ One is always tempted at such strategy conferences to yield to the urge to devise amendments which will render a bad bill still worse in hopes that it will die in the Senate or be vetoed by the President. Such strategies have been known to backfire, however. This is reportedly the way in which the outrageous Emergency Detention Act, Title II of the Internal Security Act of 1950, was added to the Subversive Activities Control Act. A group of liberal Senators conceived Title II in hopes that its patent unconstitutionality would force the President to veto the bill. President Truman, on the advice of the Department of Justice, Department of Defense, Department of State, and Central Intelligence Agency, did veto the bill, but it was subsequently passed by Congress over his veto. H.R. Doc. No. 708, 81st Cong., 2d Sess. 1 (1950).

In his veto message, President Truman noted that "the language of the bill is so broad and vague that it might well result in penalizing the legitimate activities of people who are not Communists at all, but loyal citizens." *Id.* at 3, cited in *United States v. Robel*, 389 U.S. 258 n.1 (1967).

²² HISC REPORT at 57 (dissenting views of Congressman Stokes).

²³ *Id.* at 58.

sure—a rebuttal of Congressman Stokes' dissent. After the report with dissenting views became available, only three days before H.R. 14864 was scheduled to come before the House, Chairman Ichord sent to each member of the House a 22-page, single-spaced letter and legal brief rebutting the legal constitutional arguments advanced by Congressman Stokes. The letter was particularly unusual in the personal tone and defensive nature of its argumentation.

To support the constitutionality of the proposed bill, Chairman Ichord cited the testimony of Assistant Attorney General J. Walter Yeagley, head of the Justice Department's Internal Security Division, before the Internal Security Committee on a predecessor bill to H.R. 14863. Yeagley stated:

We have no way of knowing in any case whether we are going to win a constitutional test. The same would be true of this program with or without congressional authorization.

We think that it would be held constitutional.²⁴

This grudging endorsement was reminiscent of the Justice Department's position taken in a letter to Chairman Ichord on September 8, 1969. Deputy Attorney General Richard Kleindienst noted:

While the proposed Section 405(c) would specifically touch on associational freedoms, and First Amendment issues would no doubt be encountered in its administration, the provision itself would appear to meet objections of the Court as to unlimited and indiscriminate inquiries, since only reasonable inquiries relevant to making the required determination would be authorized.²⁵

B. *Floor Consideration of H.R. 14864*

Floor debate on H.R. 14864 opened with a long statement of support by Chairman Ichord.²⁶ The Chairman was followed by several congressmen who spoke in general terms about the need to protect defense production facilities from subversives, but said little specifically about the bill's constitutionality. Attendance on the floor was, as is often the case, low.

The first amendment offered to the bill was by Representative Mink of Hawaii. Her proposal was to insure that where an educational institution was engaged in a classified project, only that part of the institution directly engaged in such work would be included in the

²⁴ 116 CONG. REC. 499 (daily ed. Jan. 29, 1970).

²⁵ HISC REPORT at 33. There was no requirement in the bill that inquiries be reasonable.

²⁶ 116 CONG. REC. 489-504 (daily ed. Jan. 29, 1970).

definition of a "defense facility." Surprisingly, the amendment passed by a voice vote.²⁷ Next, Representative Eckhardt of Texas offered an amendment to guarantee that the rights of confrontation and cross-examination would not be forfeited in a hearing under the employee screening procedure without a court order. Mr. Eckhardt's amendment was defeated on a standing vote by 13-37.²⁸

Finally, an amendment was offered which went to the heart of section 405(c) of the bill, the section which authorized the President to establish criteria and undertake investigations of organizational and individual associations "relevant" to the screening procedure. The amendment would have required that the organizational or individual activities inquired into or used as the basis for criteria must be or have been illegal, and that an individual's membership must be or have been "active membership." Active membership in an organization was specifically defined as

such active participation in and support of its activities as evidences a knowledge of the organization's goals and a specific intent to support and further those goals.²⁹

In explanation of the amendment, its author stated on the House floor:

My amendment would limit the situations in which the President could establish criteria to those in which there is active, knowledgeable and knowing membership in the organization. Unless it is so narrowly defined, we are again going through the same exercise that Congress went through in passing the original act

I suggest to you that under the language that is in the bill, unamended, the President could make inquiry and set criteria having to do with Vietnam war opponents, draft resisters, student activists, civil rights workers, labor organizers or just political partisans.³⁰

A colloquy ensued during which Chairman Ichord attacked the amendment as inadequate to protect the national interest in excluding all "undesirables" from employment in defense facilities.³¹ A standing vote was taken in which the amendment was defeated 25-35.³² Later the same day H.R. 14864 passed the House by a record vote of 274-65, with 93 members not voting.³³ Notwithstanding Chairman Ichord's zeal, the

²⁷ *Id.* at 527-28.

²⁸ *Id.* at 528-30.

²⁹ *Id.* at 530-31.

³⁰ *Id.* at 531.

³¹ *Id.*

³² *Id.* at 532.

³³ *Id.* at 535.

bill eventually died a silent death in the Senate Judiciary Subcommittee on Internal Security. While the ways of that Subcommittee are mysterious and frequently beyond analysis, it is a safe guess that there was an overwhelming lack of interest. It would be too speculative to suggest that the constitutional argument influenced the Senate's decision to inter the bill.

C. *The Weight of Constitutional Argumentation*

Several identifiable characteristics of constitutional argumentation in Congress emerged during House consideration of H.R. 14864. First, the most careful and thorough study of all legislation, including that which presents constitutional problems, occurs in the committee of jurisdiction. Thus, if the committee does not give sufficient consideration to the constitutional implications of proposed legislation, it is unlikely that such consideration will occur, or at least will carry much weight, after a bill reaches the House floor.

A second characteristic of House consideration of H.R. 14864, which appears again in the subsequent studies of other legislation, is the extreme difficulty in making a clearly convincing case on one side or the other of a disputed constitutional issue. To non-lawyer members of the House and to those lawyers who cannot take time to study the issues in depth, such divided opinion means that almost inevitably constitutional arguments are resolved not by force of logic, but by the weight of numbers, or by an overwhelming presumption in favor of the Committee majority.

A third unexpected and disturbing aspect of House consideration of H.R. 14864 was that proponents of the bill, particularly Chairman Ichord, seemed considerably more conscientious and careful in their constitutional argumentation than did some of those opposing it. Opponents of the bill often seemed content to rely simply on superficial or emotional reactions to the bill, rather than to delve into the cases to bottom their arguments. Thus, Chairman Ichord's charge that opponents of his bill chose "to rely principally on invective rather than on reasoned argumentation" had some validity.³⁴ This is not to say that a convincing case was not made against H.R. 14864 on constitutional grounds. Rather, some opponents of the bill relied only slightly on the constitutional arguments, using instead a "guilt by association" rationale to oppose any product of HISC.³⁵

³⁴ *Id.* at 498.

³⁵ The phenomenon was even more obvious when HISC brought in a contempt citation against a witness who refused to take the oath, in opposition not to the oath, but rather to the Committee's functioning. Some 14 members of the House voted against the citation without any meaningful expression of reasons or basis. See 116 CONG. REC. 9086 (daily ed. Sept. 23, 1970).

Finally, it must be concluded that in the rough and tumble of parliamentary debate, careful, meticulous reasoning about matters of constitutional interpretation comes in a very poor second to arguments of urgent necessity, debate on issues of public policy, and—not infrequently—sheer emotion. Careful and precise legal and logical distinctions are far more difficult to make, or at least to make convincingly, on the floor of the House than before the bench.

Perhaps this last feature of constitutional debate in Congress should not surprise us. Perhaps it explains why, despite each member's oath to uphold the Constitution, it has always been the Supreme Court—and not Congress—which has given the Constitution the care and support it needs.

II. H.R. 12806, H.R. 16196, PREVENTIVE DETENTION

Probably no single issue raised greater public furor or resulted in deeper soul-searching and more violent constitutional disputation in Congress than the Nixon Administration's proposal for preventive detention of "dangerous" defendants prior to trial.³⁶

In 1966, under the leadership of Senator Sam Ervin, Congress passed the Bail Reform Act of 1966.³⁷ The purpose of the Bail Reform Act was to eliminate the seemingly unconstitutional³⁸ and widely criticized practice of levying exorbitant money bail in order to detain defendants who judges felt ought not to be released before trial. This practice, of course, most heavily burdened the poor. Thus, two classes of defendants were created: those, such as organized gangsters and white collar criminals, who could post bond no matter how high it was set and no matter how heinous their alleged crimes, and less well-heeled defendants, usually those accused of crimes of violence or passion, who could almost never post money bond and either relied on exorbitant bail bondsmen's charges or stayed in jail pending trial.

The Bail Reform Act required federal judges to release a defendant on his own recognizance after determining what conditions of release would best assure his appearance for trial. Unlike bail proceedings

³⁶ The Nixon Administration's preventive detention proposal appeared in two separate but related bills. H.R. 12806, 91st Cong., 1st Sess. (1969), was a proposal to establish preventive detention of dangerous defendants in all federal courts. Since the bill affected federal courts generally, it was referred to the House Judiciary Committee as was an identical bill introduced in the Senate. H.R. 16196, 91st Cong., 2d Sess. (1970), by contrast, was an omnibus court reform and criminal procedure revision bill which applied only to the District of Columbia. Because of its limited territorial effect, it was referred to the House District of Columbia Committee. Although the preventive detention schemes in each bill were identical, the difference in the respective committees of jurisdiction was to have a decisive effect on the success of the two bills.

³⁷ 18 U.S.C. §§ 3141 *et seq.* (Supp. V, 1965-69).

³⁸ See note 40 *infra*.

which take place after conviction and pending appeal,³⁹ the pretrial bail determination could not include any consideration of the defendant's potential danger to the community. This was in line with the historical—and many believed constitutional—concept of bail as a means of assuring only that a defendant would appear for trial.⁴⁰

The Bail Reform Act created a number of problems for trial judges, appellate judges, prosecutors and law enforcement officials. In the first place, federal criminal trials, like civil and criminal trials in almost every court in the nation, were hopelessly backlogged. Years of inadequate resources and inefficient management had so jammed the wheels of justice that they appeared to be barely turning. Often it would be months—sometimes years—before an accused defendant would be brought to trial.⁴¹ This long delay between arrest and trial was one factor which made the incarceration of defendants unable to post high money bail so intolerable. But it also meant that once the Bail Reform Act had been passed, the time during which an accused was free—perhaps to commit another crime—was unconscionably long. Although no reliable figures on crime committed by defendants released prior to trial were produced until well after the introduction of preventive detention proposals,⁴² constant agitation by law enforcement interests, including the highest levels of the Justice Department, unduly magnified the incidence of pretrial crime by defendants out on bail.

The long delay between arrest and trial was important in another way which, for quite obvious reasons, was rarely mentioned by pro-

³⁹ 18 U.S.C. § 3148 (Supp. V, 1965-69).

⁴⁰ "The right to release before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . Bail set at a higher figure than an amount reasonably calculated to fulfill this purpose is excessive under the Eighth Amendment." *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951).

⁴¹ On July 17, 1970, Senator Ervin placed in the Congressional Record a chart showing the amount of time which 1,408 inmates of the D.C. Jail had been awaiting trial as of May 2 of that year. 170 of these inmates had been waiting 12 months or longer, 24 had been waiting 24 months or longer, and 4 prisoners had been in jail for 36 months or more awaiting trial. 116 CONG. REC. S11683 (daily ed. July 17, 1970). This was after bail reform—presenting somewhat of a mockery to the oratory about the presumption of innocence.

⁴² At the time the House of Representatives considered the D.C. crime bill, including preventive detention, a study was underway by the United States Bureau of Standards to study the actual incidence of crime committed by persons released prior to trial. Mysteriously, the results of the study—which showed the amount of crime by pretrial releasees to be actually quite low—were withheld until the House completed consideration of the Administration's preventive detention proposals for the District of Columbia. Statements critical of the timing of the release of study results, and of the exaggeration and misinformation which had played such a large part in the publicity campaign for preventive detention were placed in the Congressional Record by several members of Congress. See, e.g., Mikva, *Study Refutes Claims for Preventive Detention*, 116 CONG. REC. E3465-67 (daily ed. Apr. 21, 1970).

ponents of preventive detention. Our system of criminal justice has traditionally relied on the deterrent effect of the criminal sanction. Whether or not well-founded,⁴³ this belief in the deterrent effect of the criminal law has been the bedrock of our approach to controlling anti-social behavior. In theory, at least, the sanction was to come into play only *after* a trial and conviction—only after guilt had been established beyond a reasonable doubt. Preventive detention, however, relies only on the predictive powers of the judge, and since even innocent persons may be incarcerated under such a scheme the effectiveness of the normal criminal sanction is seriously diluted.

The response of the Department of Justice to the increasing agitation by law enforcement authorities against pretrial release of defendants considered “dangerous” was not to rely on court reorganization and improved management techniques to speed the trial process;⁴⁴ it was to propose preventive detention.⁴⁵

For our purposes, the details of the preventive detention scheme put forth by the Nixon Administration merit careful description. The prosecutor (in the District of Columbia, the United States Attorney) was to make the initial determination to resort to preventive detention of an arrested suspect. The prosecutor’s discretion in this decision was not untrammelled, since he could resort to preventive detention only if the suspect (1) was accused of a violent crime (as defined in the proposal), (2) was accused of a dangerous crime (again, as defined in the bill) and had been convicted within the preceding ten years of a previous violent crime or was on probation or parole at the time of the alleged second offense, or (3) had threatened witnesses in his upcoming trial. The definitions of “violent” and “dangerous” crimes were quite broad, including as a “violent crime” such offenses as statutory rape and as a “dangerous crime” such offenses as purse snatching.⁴⁶

⁴³ A number of recent studies of American criminal justice have raised some doubts about the efficacy of the deterrent effect of the criminal sanction. *See, e.g.*, H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1969); N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN’S GUIDE TO CRIME CONTROL* (1970); Andenaes, *The Morality of Deterrence*, 37 U. CHI. L. REV. 649, 663-64 (1970).

⁴⁴ In Great Britain, whose system of justice still serves as a theoretical model to ours, defendants are regularly brought to trial in a matter of weeks. Defendants accused of particularly heinous crimes may be tried in as little as a few days. These facts often were ignored by those who pointed to the fact that the British system allows a form of preventive detention.

⁴⁵ Although the Administration began by calling its proposal “preventive detention,” it later became more convenient to refer to it as “pretrial detention.” This presumably avoided the embarrassing question of what exactly was being “prevented,” an especially difficult question in light of the vague standards provided to a judicial officer in determining the propriety of preventively detaining an accused defendant.

⁴⁶ 116 CONG. REC. H2046 (daily ed. Mar. 19, 1970).

Once the prosecutor decided to seek preventive detention, a hearing before a judicial officer was required. Rules of evidence would not apply in this hearing, and the judicial decision was to be made on the somewhat broad guidelines of whether the defendant was "a danger to any other person or the community" and whether there was a "substantial probability" of guilt.⁴⁷

Finally, there were some post-incarceration provisions such as appeal of the preventive detention determination, and a requirement that detention be reviewed if the suspect is not brought to trial within 60 days.⁴⁸

A. *Committee Consideration of Preventive Detention*

The administration's preventive detention proposal, as first submitted to Congress, would have been applicable in all federal courts.⁴⁹ In this form, the proposal was referred to the Judiciary Committees in both the House and Senate. These committees, by congressional tradition, are composed entirely of lawyers, some of whom, such as Senator Sam Ervin

⁴⁷ The effect of this initial finding of "substantial probability of guilt" on the later conduct of a trial was never adequately dealt with by proponents of the bill. There were some restrictions—although not a complete prohibition—on the subsequent use of testimony taken at a preventive detention hearing. But not much was said about the effect of a finding of substantial probability of guilt, made on a "clear and convincing evidence" standard, on the later finding of guilt or innocence by a "beyond a reasonable doubt" standard.

⁴⁸ It was never clear what would happen to one who had been previously detained and not brought to trial within sixty days. The final version of the D.C. crime bill, S. 2601, provided that "[s]uch person shall be treated in accordance with section 23-1321" H.R. REP. NO. 91-1303, 91st Cong., 2d Sess. 194 (1970). Although § 21-1321 was titled "Release in non-capital cases prior to trial," it specifically provided that a defendant should be released only when a judicial officer could fashion release conditions which would "assure the appearance of the person as required [for trial] and the safety of any other person or the community." *Id.* at 191. If such release conditions could not be fashioned, then the person was to be treated under § 23-1322, the preventive detention section. Since the reason that the defendant had been subject to preventive detention in the first place was because no release conditions could be fashioned to assure his appearance and the community's safety, it seemed likely if not inevitable that the sixty-day review would come to the same conclusion as the initial pretrial determination. Senator Ervin, in opposing the preventive detention sections of the D.C. crime bill, made much of this "preventive detention merry-go-round."

It was also a mystery why a preventively detained defendant was eligible for review of his detention after sixty days since existing statistics indicated that criminal trials in the District of Columbia could not be completed in that amount of time. Senator Ervin's statistics on length of detention before trial, note 41 *supra*, showed that only 733 defendants out of 1,408 awaiting trial had been incarcerated for less than two months. The counterproductivity of the sixty-day review period was further compounded by the probability that the sixty-day incarceration would enhance the "dangerousness" of the defendant, because of loss of job, breaking of family and community ties, and the general "finishing school" characteristics of local jails.

⁴⁹ H.R. 12806, 91st Cong., 1st Sess. (1969). See note 36 *supra*.

and Congressman Richard Poff, are regarded highly for their constitutional expertise. If the preventive detention bills came out of the House and Senate Judiciary Committees, it was virtually certain that the lawyers on those committees had resolved any doubts about the proposal's constitutionality.

Hearings were held before Senator Ervin's Constitutional Rights Subcommittee in the Senate and before Subcommittee No. 4, chaired by Congressman Byron Rogers, in the House. Testimony was received in both subcommittees from a wide range of witnesses, including the American Bar Association's Sections on Criminal Law and Individual Rights and Responsibilities, various metropolitan bar associations,⁵⁰ legal scholars, practicing lawyers and law enforcement personnel.

Although there were numerous arguments against preventive detention on policy grounds,⁵¹ two principal arguments dominated the dialogue about preventive detention. The first of these arguments was grounded in the eighth amendment and the second was based on the fifth amendment's due process clause.

The eighth amendment states that "[e]xcessive bail shall not be required . . ."⁵² The central controversy was whether the prohibition of excessive bail in non-capital⁵³ cases should be interpreted as an absolute right to release unless the risk of flight was so great that the defendant's absence was likely to obstruct the further progress of the trial process, or, on the other hand, whether additional factors could be considered. Proponents of preventive detention argued⁵⁴ that courts had

⁵⁰ Both the New York City and Chicago Bar Associations vehemently opposed the enactment of preventive detention. 116 CONG. REC. E1033-36 (daily ed. Feb. 17, 1970) and 116 CONG. REC. S11600-03 (daily ed. July 16, 1970) (remarks of Senator Ervin).

⁵¹ Policy arguments against enacting preventive detention included: (1) the absence of reliable data on the incidence of crime committed by persons released prior to trial; (2) the absence of reliable predictive techniques which would allow judges to minimize error in incarcerating accused defendants before trial; (3) the inability of already overloaded courts to handle the additional burden of preventive detention hearings, which would lead eventually to even further delays in criminal trials; (4) the failure to use techniques which were already available—and constitutional—to restrain defendants before trial, such as revocation of probation or parole, strict enforcement of pretrial release conditions (which went largely unenforced because of lack of judicial and administrative manpower), and closer coordination between jurisdictions to detain persons who were wanted in jurisdictions other than that in which they were arrested; and (5) detention of defendants prior to trial was a radical departure from previous practice which ought not be resorted to until all reasonable alternatives—especially some attempt to achieve speedy trials through legislative and judicial collaboration—had been tried and had failed.

⁵² U.S. CONST. amend. VIII.

⁵³ It was admitted by all sides that the denial of bail in capital cases—which had existed in Britain at the time the eighth amendment was adopted and which had been specifically provided for in the Judiciary Act of 1789—did not violate the "excessive bail" prohibition.

⁵⁴ About the time the House of Representatives began consideration of the preventive

always considered the suspect's danger to the community in setting bail and, as a practical matter, in determining whether he would be released, since high money bail often had the same result as denying bail altogether. They pointed out that at the time the eighth amendment was drafted, many more crimes carried the death penalty, and thus many more defendants could be denied bail absolutely, within the terms of the eighth amendment, than is possible today. Finally, they argued that no Supreme Court case had ever held specifically that there was an absolute right to bail in non-capital cases and that some lower courts had decided to the contrary.

A Justice Department memorandum,⁵⁵ made available to the House Judiciary Committee in late 1969, placed heavy reliance on *Carlson v. Landon*,⁵⁶ a civil proceeding which involved detention of aliens prior to deportation. The case contained language which appeared to support the argument that there was no absolute right to bail:

The contention is . . . advanced that the Eighth Amendment to the Constitution . . . compels the allowance of bail in a reasonable amount. . . . [T]he cases cited by the applicants . . . fail flatly to support this argument. We have found none that do.

. . . Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances of these cases.⁵⁷

The Justice Department memo made only passing reference to, and did not quote from, another important Supreme Court case, *Stack v. Boyle*,⁵⁸ which interpreted the reach of the eighth amendment's bail clause specifically in criminal cases. In *Stack* bail for defendants charged under the Smith Act was set at an unusually high amount. The Court held that the bail was excessive, and included sweeping language which is as close as the Court has come to elaborating the significance of the eighth amendment's excessive bail prohibition.

From the passage of the Judiciary Act of 1789 . . . to the present Federal Rules of Criminal Procedure, Rule 46(a)(1),

detention proposal, a rash of articles and speeches began to appear. See, e.g., J.N. Mitchell, *Bail Reform and the Constitutionality of Preventive Detention*, 116 CONG. REC. E777-82 (daily ed. Feb. 9, 1970); R.G. Kleindienst, *The Case for Pre-trial Detention*, Speech of Jan. 30, 1970, to the American Trial Lawyers' Ass'n, Freeport, Grand Bahama Island, 116 CONG. REC. E858-61 (daily ed. Feb. 10, 1970).

⁵⁵ 116 CONG. REC. E13 (daily ed. Jan. 19, 1970).

⁵⁶ 342 U.S. 524 (1951).

⁵⁷ 342 U.S. at 544-46.

⁵⁸ 342 U.S. 1 (1951).

federal law has unequivocally provided that a person arrested for a non-capital offense *shall* be admitted to bail. This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.

The right to release [not to bail, to *release*] before trial is conditioned upon the accused's giving adequate assurance that he will stand trial and submit to sentence if found guilty. . . . Bail set at a higher figure than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment.

. . . To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act. Such conduct would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the [Smith Act] under which the petitioners were indicted.⁵⁹

Although *Stack* did not completely settle the law under the eighth amendment, it certainly cut against the arguments of the proponents of preventive detention. Moreover, two further possible infirmities, which were given short shrift by the Justice Department memo, remained unanswered: (1) the conflict with traditional conceptions of the presumption of innocence, and (2) the vagueness of the standards provided to guide judicial determinations.

Advocates of preventive detention referred fondly to the presumption of innocence as "a mere rule of evidence," which could not be elevated into an absolute rule of criminal procedure. This cavalier treatment of the presumption of innocence, perhaps more than anything else, alerted opponents of preventive detention to the insensitivity of the leadership of the Justice Department. Men who could take the principle which more than any other represents to the average citizen the whole basis of our criminal justice system and reduce it to a "mere rule of evidence," were capable, it was feared, of still more Draconian action.

A second problem with the preventive detention proposal was the vagueness of the standard to be applied by a judicial officer in his pre-trial detention determination, that is, whether the suspect is "potentially dangerous." This vagueness was apparent during hearings on preventive detention before the Senate Subcommittee on Constitutional Rights. Subcommittee Counsel, Larry Baskir, questioned Donald

⁵⁹ 342 U.S. at 4-6.

Santarelli, a Justice Department representative who reportedly drafted the Administration's preventive detention bill, about the precise meaning of "dangerousness."

Mr. Baskir: . . . So the danger you are seeking to avoid is not specifically the danger of the commission of one of the list of crimes designated by you in your bill . . . as dangerous crimes or the list of crimes designated by you as crimes of violence, but the likelihood of any crime in the future that they may possibly commit that a judge feels is dangerous to the community.

Do I rephrase your statement properly?

Mr. Santarelli: I am not sure you do, and I am not sure we can phrase it definitely at this point. The consideration for the court is to view the defendant in the totality of his circumstances, to review his record of conduct, to review his character and attitude and to conclude if from this prior activity and from information that can be adduced, whether or not he will engage in a course of conduct that will be dangerous to the community. That might include offenses not enumerated in the specified dangerous offense category.

. . . .

Mr. Baskir: If the judge decided the man was, let's say, a kleptomaniac and he engaged in petty shoplifting, the judge could under your bill, detain this person in order to prevent those subsequent offenses; is that correct?

Mr. Santarelli: Or—you know, the line between petty larceny and grand larceny is very difficult to tell, and from the record you don't always know

Mr. Baskir: . . . Your responses suggest that certain kinds of activity which a judge might consider dangerous, but you might not, may involve, let's say, the smoking of marihuana. The judge might consider that to be dangerous. A judge might consider obscene photographs of other judges or publication of scurrilous underground newspapers to be dangerous. A judge might consider to be dangerous certain things which are practiced such as political demonstrations, dissenting, violent or non-violent. He might under this bill consider those activities dangerous and he could make a finding, am I correct, that this is the kind of danger that he would like to correct under this bill? Is that a correct interpretation?

Mr. Santarelli: What a judge can do and what he ought to do—

Mr. Baskir: I am only talking about now what he can do.

Mr. Santarelli: Presumably, such evaluation or conclusion

that those activities are dangerous would not be upheld under the appellate procedures here. . . .⁶⁰

This exchange leaves one wondering how an appellate court could review a judge's finding of "dangerousness" if the drafter of the Administration proposal himself was so uncertain as to exactly what the term included.

The conclusion to the history of preventive detention in the House and Senate Judiciary Committees is that the bill never left subcommittee in either house of Congress. Despite numerous attempts through newspaper articles, speechmaking, and Justice Department cheerleading⁶¹ to color preventive detention as reasonable and constitutionally respectable, the bills remained anathema to a majority of the lawyer-members of both Judiciary Committees.

But this was not the end of the story. The Administration, conservative Southern members of the House District of Columbia Committee, and Senator Joseph Tydings of Maryland had a surprise up their sleeves.

The new strategy, formulated in late 1969 when it became apparent that preventive detention proposals for all federal courts could not be dislodged from either the House or Senate Judiciary Committee, was to include preventive detention in the District of Columbia court reform bill, S. 2601, which had been passed early in 1969 by the Senate and was pending in the House District of Columbia Committee. Although preventive detention was not the only tailgating measure included by the House Committee in an otherwise moderate Senate court reorganization and criminal procedure reform bill,⁶² it was by far the most controversial. The strategy was to lump together the obviously desirable features of court reform—including for the first time an independent District of Columbia court system with plenary

⁶⁰ *Hearings on S. 2601 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess., reprinted at 116 CONG. REC. S12007 (daily ed. July 23, 1970).

⁶¹ See note 54 *supra*.

⁶² In addition to preventive detention, H.R. 16196, as reported to the House District of Columbia Committee, contained authorization for "no-knock" searches, wiretapping and electronic surveillance, treatment of juveniles fifteen or older as adults, authority for juvenile court convictions by "a fair preponderance of the evidence" standard, transfer of control over the Lorton corrections facility to the Federal Bureau of Prisons, harsh mandatory sentences for certain crimes and offenders, and payment of the attorney's fees of a policeman who was successfully sued for wrongful arrest by the plaintiff who was wrongfully arrested.

In one provision of H.R. 16196 the House District Committee so far overreached itself that the provision was declared unconstitutional before the bill had cleared the House-Senate conference. In the case of *In re Winship*, 397 U.S. 358 (1970), it was held that conviction of a charge of juvenile delinquency by a standard of proof less than "beyond a reasonable doubt" violated the due process clause.

jurisdiction over all civil and criminal matters relating to the District of Columbia—with other, far less appealing and more controversial features.⁶³

By placing preventive detention in the District of Columbia omnibus crime bill, the Administration succeeded where it had failed in the Judiciary Committees. Since a large portion of the violent crime which falls under federal jurisdiction occurs in Washington, and since the District of Columbia was a primary target in the President's law and order exhortations during the 1968 campaign, an authorization of preventive detention in the nation's capital would serve in large part the Administration's purpose. The fact that Congress legislates for the District of Columbia without the benefit of advice from any elected members of the House from that city of 800,000 of course made the task of imposing preventive detention much easier.⁶⁴

Although few witnesses appeared before the District of Columbia Subcommittee considering preventive detention, and despite difficulties encountered by members of the House in obtaining an opportunity to testify against it,⁶⁵ on March 13, 1970, the District of Columbia Committee reported the D.C. crime bill to the House for action. The Committee's opening statement in its report to the House set the tone for later floor consideration of the bill.

[This] Committee is not aware of any period in the Capital's history when crime was so rampant as now, when the police have been so shackled, when prosecutors because of technicalities, and courts because of unrealistic philosophies, and failure to go full speed ahead, have contributed to a major breakdown of law enforcement, and there has been such shocking failure

⁶³ After H.R. 16196 was passed by the House of Representatives, that passage was vacated, S. 2601 (previously passed by the Senate and related to D.C. court reform) was taken up, and the provisions of H.R. 16196 as passed by the House were substituted for the Senate version of S. 2601. This is a standard legislative device to reach the point at which each house of Congress has passed a bill with the same designation but different provisions. As it completed House consideration, then, the D.C. Court Reform and Criminal Procedure Act of 1970 bore the designation S. 2601.

⁶⁴ It is interesting to note that members of the House, including members of the House D.C. Committee, who seemed utterly convinced of the value of preventive detention for the District of Columbia were not loudly advocating it for their own states.

⁶⁵ The minority views of Congressmen Diggs, Fraser, Adams and Jacobs described the procedural irregularities which characterized the D.C. Committee's consideration of preventive detention: "The District of Columbia Committee flagrantly violated the sense of fairness which normally surrounds the hearing process. No witnesses, with the single exception of the bill's author, the Department of Justice, were invited, nor appeared, to testify on the bill. Not a single judge appeared. No member of Congress testified. And no official from any appropriate District of Columbia or Federal department or agency was invited." H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 202 (1970) [hereinafter cited as D.C. COMM. REPORT].

in large part of the machinery of justice to bring to punishment [*sic*] admitted murderers, rapists and others guilty of aggravated assaults and robberies. This is a crime-infested city; let there be no ignoring that fact!⁶⁶

B. *Preventive Detention Before the House and Senate*

The House District of Columbia Committee used two pages of its 197-page majority report to reassure the members of the House about constitutional objections to preventive detention. This lack of emphasis and the inaccuracy of the Committee's constitutional scholarship foretold the quality of the constitutional debate which would follow on the House floor. To refute objections based on the eighth amendment, the Committee relied solely on *Carlson v. Landon*.⁶⁷ The Committee asserted that *Carlson* was the "only decision discussing the history of the eighth amendment and its application to the right to bail."⁶⁸ Somehow, *Stack v. Boyle*⁶⁹ was lost in the shuffle.

Responding to presumption of innocence arguments against preventive detention, the Committee relied on the "simply a rule of evidence" argument, and coupled it with the ultimate *reductio ad absurdum*: "Indeed, if the presumption of innocence prohibits detention prior to trial, it would even prohibit a policeman from arresting a person he observed robbing a bank with a shotgun."⁷⁰

Rather than addressing directly the problem of vagueness, the majority report handled due process objections by arguing that no court had ever held detention without bail of a person found likely to flee before trial to be a violation of due process and that, in any case, the bill included other procedural safeguards.⁷¹

The Committee noted further that one of its two primary objectives in reporting a bill including preventive detention was "to eliminate from the bail system the hypocrisy of locking up defendants, without fixed standards, through the device of requiring high money bond."⁷² The Committee failed to note that this misuse of money bail, although widespread, was arguably unconstitutional and specifically prohibited in the District of Columbia by the 1966 Bail Reform Act. Indeed, the Committee may in this argument have discovered an entirely new

⁶⁶ *Id.* at 3.

⁶⁷ 342 U.S. 524 (1951).

⁶⁸ D.C. COMM. REPORT at 91.

⁶⁹ 342 U.S. 1 (1951).

⁷⁰ D.C. COMM. REPORT at 92.

⁷¹ *Id.* at 93. Moreover, the failure to discuss the addition of "dangerousness" to the traditional "risk of flight" standard for the denial of bail avoided the crux of the historical and constitutional objections to preventive detention.

⁷² *Id.* at 82.

approach to constitutional exegesis: take an arguably unconstitutional practice (preventive detention by means of high money bail), venerate it ("700 years of legal practice" was how the Committee described the use of high money bond to detain "dangerous" defendants), and when Congress prohibits the practice specifically by statute, use its venerable history as a justification for enacting the unconstitutional practice into law. Under this "elimination of hypocrisy" rationale, racial discrimination, denial of counsel to indigent defendants, and malapportioned legislatures may have a great future.

Minority views signed by Congressmen Diggs, Fraser, Adams and Jacobs restated the eighth amendment and due process objections to preventive detention and added that the increased difficulty of consulting counsel during pretrial confinement might violate the sixth amendment's guarantee of right to counsel.⁷³

On March 19, 1970, the House of Representatives met in a marathon 11-hour session to consider the omnibus D.C. crime bill. Despite the bill's enormous length and the complexity of many of its provisions, the House Democratic leadership and leaders of the House District of Columbia Committee determined that all consideration should be completed in one day. It is safe to say that no member of the House other than D.C. Committee members had read the entire bill, and many had not read even the bill's more controversial provisions. A number of conscientious members managed to read the 231-page committee report, although it had been available for only three legislative days prior to House consideration of the bill.

The atmosphere created by the hysterical anti-crime tone of the Committee's report and the pressure to complete action on the bill in one day made it almost impossible to debate rationally the merits of the Committee's bill on either constitutional or policy grounds. At one point in the debate, pressure to limit remarks became so great that members of the House were limited to fractions of a minute to comment on pending amendments.⁷⁴

At the session's end, only 47 members voted against passage of the bill; 294 voted for and 88 did not vote.⁷⁵

Of course no one really believed, once the D.C. crime bill left committee, that it could be stopped on the floor. Opponents' hopes had focused instead on the Senate and on a strange coalition of liberals and Southern strict constructionists brought together by Senator Ervin. The

⁷³ *Id.* at 198-202.

⁷⁴ For a summary of the amendments offered to H.R. 16196 and rejected, see 116 CONG. REC. D262-63 (daily ed. Mar. 19, 1970). The House consideration of the bill is contained in *id.* at H1956-2090.

⁷⁵ *Id.* at 2089.

Senate had earlier passed S. 2601, its own version of a D.C. court reorganization and criminal procedure reform bill, which did not include preventive detention. But the Senate would now be acting on the report of House and Senate conferees who met to resolve differences in the House and Senate versions. Since Senator Joseph Tydings, Chairman of the Senate District of Columbia Committee, had already indicated his willingness to accept preventive detention (he had earlier introduced his own preventive detention bill), it was a foregone conclusion that the House-Senate conferees would agree on a compromise version which included preventive detention. What was not known was whether this compromise would be accepted by the Senate as a whole.

Senate debate, which began on July 15, 1970, lasted for seven legislative days, with an unusual number of Senators rising to state personally their support for or objections to the compromise bill. The Senate's prolonged, careful consideration of constitutional implications and the conscientious speeches of many Senators, stand in marked contrast to the legislative pattern followed in the House.

Senator Tydings opened consideration with a long statement in favor of the compromise bill, specifically endorsing the preventive detention provisions.⁷⁶ He did not discuss constitutional issues, preferring instead to emphasize the achievements of the Senate conferees in moderating the harsh provisions of the House bill.⁷⁷ Senator Hruska, following Tydings, expressed his support for the measure, citing his scholarly article on the constitutional and policy issues involved in preventive detention.⁷⁸ Next came the leading opponent, Senator Ervin, inserting statements of opposition on constitutional grounds from the American Bar Association Section on Individual Rights and Responsibilities⁷⁹ and the Chicago Bar Association.⁸⁰

On July 17 and 20, the debate continued, largely dominated by Senator Ervin, but with occasional contributions from other Senators.

⁷⁶ 116 CONG. REC. S11568-74 (daily ed. July 16, 1970) (remarks of Senator Tydings).

⁷⁷ The conference version of the bill did reflect four significant improvements of the House-passed version of preventive detention. These were: (1) a prohibition against the detention of any defendant charged with a non-capital crime solely on the basis of the nature and circumstances of the present alleged offense, (2) the elimination of nonforcible rape and indecent liberties from the definition of "dangerous crimes," (3) the addition of a provision that the sixty-day maximum period of preventive detention could not be extended because of motions filed by the defendant, except motions for continuance, and (4) a requirement that trials of persons preventively detained be placed on an expedited trial calendar. H.R. REP. NO. 91-1303, 91st Cong., 2d Sess. 239-40 (1970) (statement of Managers on the Part of the House) [hereinafter cited as CONFERENCE REPORT].

⁷⁸ See 116 CONG. REC. S11585 (daily ed. July 16, 1970). The article cited by Senator Hruska appears in 3 CREIGHTON L. REV. 36 (1969).

⁷⁹ 116 CONG. REC. S11594-95 (daily ed. July 16, 1970).

⁸⁰ *Id.* at S11600-03.

On July 20, Senator Dole of Kansas fell into the trap of praising preventive detention for exposing the hypocrisy of detention through high-money bail—which was already illegal in the District of Columbia.⁸¹ On July 21, Senators Young of Ohio, Muskie of Maine, and McGovern of South Dakota all criticized the compromise bill, placing heavy emphasis on the practical—but only rarely on the constitutional—weaknesses of preventive detention.

On July 22 and 23, the last days on which the Senate debated the conference report, a strange division between Senators became apparent. Younger, liberal Senators of both parties spoke against the compromise D.C. crime bill, and especially against preventive detention, but rarely relied on detailed constitutional argumentation to support their opposition. In this category were Senators Eagleton, Hart, and Hughes. On the other hand, more conservative Senators almost invariably made the constitutional arguments which they felt supported the viability of preventive detention. Among these Senators were Robert Byrd of West Virginia, Senator Hollings, and Senator Dole. Among conservative Senators, only Senator Fannin of Arizona spoke out without buttressing his statement with constitutional argumentation.

On July 22, an interesting colloquy took place between Senator Robert Byrd and the much younger Senator William Saxbe of Ohio, both of whom favored preventive detention. The exchange illustrates well the widely held congressional attitude about constitutional problems: "Let the Court decide it."

Mr. Saxbe: To what does the distinguished Senator from West Virginia attribute the seeming reluctance of the opponents of the conference report to submit to the courts the questions of unconstitutionality of these two specific provisions? I find that their opposition to the conference report always goes back to the constitutional question, and when one says, "Well, if it is unconstitutional, we have a court for that purpose," yet they do not want that. Has that disturbed the Senator?

Mr. Byrd: I have mixed feelings with regard to this I believe that it is the responsibility of every Senator to attempt to interpret the Constitution as well as his best lights will allow him to do so, in voting for or against a bill when the constitutionality thereof may be in question.

I think we, as Senators, have that responsibility.⁸²

This discussion illustrates what seems in general to be the case: that

⁸¹ 116 CONG. REC. S11761 (daily ed. July 20, 1970).

⁸² 116 CONG. REC. S11878 (daily ed. July 22, 1970).

older, often more conservative members of Congress seem to have a greater sense of obligation to work out to their own satisfaction constitutional problems in the proposals before them than do younger, often more liberal members.

Finally, on July 23, after a constitutional debate which did great credit to the Senate as a legislative institution and to many of its individual members, the Senate approved the conference report on the D.C. crime bill by a vote of 54 to 33.⁸³ Those voting against the bill included a surprising number of Southern or border-state Senators—Anderson, Cook, Cooper, Fulbright, Jordan and Stennis in addition to Senator Ervin—who might otherwise have been expected to favor a tough anti-crime bill for the District of Columbia. Senator Holland of Florida, who voted for the bill, expressed his misgivings and put his finger on the explanation for this unexpected Southern opposition.

My respect for the distinguished senior Senator from North Carolina is such and in particular my recognition of his unexcelled capability in the field of constitutional law is so great that I was unwilling to vote for said conference report in view of his deep and expressed conviction as to the unconstitutionality of several portions of that bill in the absence of a conviction of my own as to its usefulness and the very great existing need for many unquestioned [court reform] provisions of the measure.⁸⁴

C. *Congress, Preventive Detention and the Constitution*

Several conclusions may be drawn from this study of congressional consideration of preventive detention. First, it would seem that parliamentary procedures in the House of Representatives are far less conducive to thorough consideration of legislation (constitutional or other) than the procedures of the Senate. Perhaps this is inevitable in a body more than four times the size of the Senate.

It was also obvious that the House was far more subject to the artificially created pressures surrounding the D.C. crime bill than was the Senate. Many members of the House believed—incorrectly in our opinion—that for political reasons they simply could not vote against one of the Administration's most publicized anti-crime proposals, no matter what their constitutional reservations. By contrast, Senators, in part due to their longer terms of office, appeared to remain much freer and more independent in weighing political and constitutional considerations.

⁸³ 116 CONG. REC. S12029 (daily ed. July 23, 1970).

⁸⁴ *Id.*

Finally, congressional consideration of preventive detention reinforced the conclusion—reached tentatively during discussion of the Defense Facilities and Industrial Security Act—that highly charged, emotional situations make it virtually impossible to bring to bear convincing constitutional argumentation during the course of legislative debate. It is interesting, in connection with this conclusion, that the pressures and emotionalism brought to bear on the first bill were different in nature from those which influenced enactment of the second. The Defense Facilities bill involved a more traditional form of “fear” symbolized by the witchhunts of the McCarthy era, while preventive detention was fostered by a new strain of “fear” on the issues of law and order. The two pressures originated in different eras, from different social and historical circumstances, but their impact on the Congress and the nation was much the same. In yielding to these pressures, the prevailing view of the Congress was: “If it is unconstitutional, that is what we have a court for.”

III. H.R. 4249, THE VOTING RIGHTS ACT OF 1970 AND THE 18-YEAR-OLD VOTE

Our examination of the significance of constitutional debate in the legislative process has thus far been limited to cases where the Constitution arguably restricted congressional power. But the Constitution not only restrains national legislative power, it also grants it. During the 91st Congress some of the most interesting and important constitutional debates involved the proper interpretation of constitutional grants of legislative power. It would not have been surprising if Congress had assumed a broad interpretation of such constitutional grants, without questioning their limits. In fact, this turns out not to be the case. Experience with the question of Congress' power to enfranchise 18-year-old voters and the exercise of its warmaking powers shows the national legislature to be seriously concerned that the manner in which grants of power are exercised be consonant with the Constitution.

A. *The Voting Rights Act of 1970*

The issue of Congress' power under the Constitution to enfranchise the nation's 18, 19 and 20-year-olds in local, state and national elections arose as part of the debate over extending provisions of the Voting Rights Act of 1965.⁸⁵ That Act, widely and justly hailed as the most effective civil rights legislation of modern times, was scheduled to expire on August 7, 1970. Its straightforward, no-nonsense approach to guaranteeing the voting rights of black voters in seven Southern states

⁸⁵ 42 U.S.C. §§ 1971, 1973-73p (Supp. V, 1965-69).

had, in the course of five years, produced enormous results.⁸⁶ By even the most conservative estimates, some 800,000 black voters had been registered in the states covered by the Act in that time. In the three years between 1964 and 1967, the percentage of the non-white voting age population registered to vote increased dramatically: in Georgia, from 27.4 to 52.6; in Alabama, from 19.3 to 51.6; in Mississippi, from 6.7 to 59.8.⁸⁷ As a direct result of the Voting Rights Act of 1965, 540 black citizens had been elected to state and local elective offices in 11 Southern states by the year 1970.

On December 11, 1969, the House of Representatives, caught in the squeeze between a watered-down Administration voting rights proposal and the traditional Southern-Democratic and conservative-Republican coalition, had by the narrowest of margins refused to pass a straight extension of the 1965 Act as recommended by the House Judiciary Committee.⁸⁸ Instead, the House passed the Administration's compromise bill and sent it on to the Senate Judiciary Committee, chaired by Senator James O. Eastland of Mississippi. In the Senate, however, a bipartisan coalition of pro-civil rights Senators joined efforts to see that the Senate Judiciary Committee did not pigeonhole H.R. 4249. Initially, it extracted from the Judiciary Committee leadership a commitment to report the Voting Rights Act of 1970 to the Senate floor no later than March 1, 1970. As this date approached, the same coalition blocked consideration of the nomination of Judge G. Harrold Carswell to the Supreme Court as a lever to insure prompt consideration of the Voting Rights Act.

As effective as the bipartisan civil rights coalition had been in assuring full Senate consideration of H.R. 4249, virtually no one anticipated—in the early stages of maneuvering on the bill—that it would ultimately involve the constitutional issue of Congress' power to grant the 18-year-old vote. By a coincidence of time, Senator Birch Bayh's Judiciary Subcommittee on Constitutional Amendments was holding

⁸⁶ The three most important provisions of the Voting Rights Act of 1965 were: (1) a suspension of literacy tests and other "devices" used to impede voter registration in areas covered by the Act, (2) an authorization for federal registrars to enter counties covered by the Act and register voters in place of registration by local officials, and (3) a requirement that changes in state election laws by states covered by the Act be submitted to the United States Attorney General for approval and be subject to expedited challenge procedures in the United States District Court for the District of Columbia. The Act's coverage formula was that any county was covered in which less than 50% of the voting age population had been registered to vote in the presidential election of 1964. 42 U.S.C. § 1973b(b) (Supp. V, 1965-69).

⁸⁷ 116 CONG. REC. S3191 (daily ed. Mar. 6, 1970) (remarks of Senator Bayh).

⁸⁸ The vote on acceptance of the Administration's watered-down voting rights proposal over the straight extension of the 1965 Act recommended by the House Judiciary Committee was 208-203. 115 CONG. REC. H12184 (daily ed. Dec. 11, 1969).

hearings on a proposed constitutional amendment to lower the voting age to 18 nationwide. During these hearings, both Senator Edward M. Kennedy and former Solicitor General of the United States Archibald Cox argued that the job could constitutionally be accomplished simply by congressional enactment.

When first presented in February,⁸⁹ the Kennedy-Cox argument met with skepticism and downright disbelief. But by mid-March, when the Voting Rights Extension Act of 1970 was before the Senate, a significant number of Senators had resolved their doubts and agreed to co-sponsor the attempt to enact 18-year-old voting by statute. Much of the persuasion involved in this constitutional change of heart went on behind the scenes and cannot be documented. The slowly spreading conviction of Congress' power to enact 18-year-old voting by statute, however, provides perhaps the clearest example during the 91st Congress of the power of a pure constitutional argument. There were, of course, partisan political considerations surrounding consideration of the Voting Rights Extension Act as a whole. On the substantive issue of whether 18-year-old citizens should have the vote, however, there was virtual unanimity among Senators, with proponents stretching from Senator Goldwater to Senator Kennedy. Thus, the issue of Congress' constitutional power to enact 18-year-old voting by statute—as opposed to the wisdom of such a policy—was presented in almost pristine form.

On March 10, 1970, Senate Majority Leader Mike Mansfield introduced Senate Amendment No. 545 to H.R. 4249. The amendment added a new Title III to the Voting Rights Act which prohibited states from discriminating against 18, 19 and 20-year-old citizens by denying them the right to vote. The new title also provided expedited procedures for a speedy court test of the constitutionality of the prohibition. The congressional prohibition against the 21-year-old voting requirement was based on a congressional finding that such a requirement violated equal protection and due process of law as to citizens over 18 but under 21 years of age. When introduced, the amendment had 17 co-sponsors.

The constitutional theory behind Mansfield's amendment—the strength and persuasiveness of which more than any other single factor carried the day for the amendment—was outlined in a letter from Harvard Law Professor Paul Freund to Senator Mansfield. The letter supported in spare but eloquent prose the constitutional argument urged earlier by Senator Kennedy and Professor Cox.

⁸⁹ Senator Kennedy's memorandum and testimony appear at 116 CONG. REC. S3392-96 (daily ed. Mar. 10, 1970). Professor Cox's testimony appears at 116 CONG. REC. S3481-83 (daily ed. Mar. 11, 1970).

The Constitution of 1787 left the question of suffrage basically to the several states. In Article I, section 2, it is provided that the electors in each state for the House of Representatives "shall have the same qualifications requisite for electors of the most numerous branch of the state legislature." . . .

But that original text does not stand alone. The Fourteenth Amendment, with its guarantee of equal protection of the laws . . . introduced a vital gloss on the authority of the state, namely that unreasonable classifications by law are unacceptable. This general standard applies to the laws of suffrage no less than to other laws . . . It is much too late to question this force of the Fourteenth Amendment in this area. Indeed, the first of the so-called white primary cases was decided on the basis of the Fourteenth rather than the Fifteenth . . . *Smith v. Allwright*, 321 U.S. 649, 658 (1944), referring to *Nixon v. Herndon*, 273 U.S. 536 (1927). The whole line of reapportionment cases rests on the application of the equal protection guarantee to suffrage; . . .

The essential [constitutional] question, then, is whether Congress, in its power and responsibility to enforce the guarantees of the Fourteenth Amendment, may properly conclude that exclusion from suffrage of those between 18 and 21 years of age now constitutes an unreasonable discrimination. That this is a judgment for the Congress to make is plain from the original conception of the Fourteenth Amendment and from recent decisions under it. Section 5 of that Amendment, empowering Congress to enforce its provisions "by appropriate legislation," was regarded as the cutting edge of the Amendment. It was expected that Congress would supply the substantive content for the deliberately general standards of equal protection, due process, and privileges and immunities.

Recent decisions have emphasized the propriety, indeed the responsibility, of Congressional action in the area of voting rights. In [*Katzenbach v. Morgan*] the Supreme Court emphasized that the judgment of unreasonable discrimination [of New York state's English language voting requirement] was one that Congress had appropriately made for itself, and that its judgment would be upheld unless it were itself an unreasonable one. Any other view of the court's function, said the Court, "would deprecate both Congressional resourcefulness and Congressional responsibility for implementing the Amendment. . . . It is enough . . . that we perceive a basis upon which Congress might predicate a judgment that the application of New York's literacy requirement . . . constituted an

invidious discrimination in violation of the Equal Protection Clause." *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966).

.....
The question for Congress is essentially the same, whether the exclusion be on criteria of sex, residence, literacy, or age. It is not my purpose to review the considerations that have been brought forward in favor of reducing the voting age. They involve a judgment whether twenty-one has become an unreasonable line of demarcation in light of the level of education attained by younger persons, their involvement in political discussion, their capacity in many cases to marry, their criminal responsibility, their obligation for compulsory military service. Historically, we are told, twenty-one was fixed as the age of majority because a young man was deemed to have become capable at that age of bearing the heavy armor of a knight.⁹⁰

During the three days of Senate debate which followed the introduction of Senate Amendment No. 545, additional co-sponsors were added, bringing the total to within a few Senators of an absolute majority. Not until the vote was taken, however, on March 12, was it clear how convincing the supporters of the Mansfield-Kennedy position had been. The Mansfield amendment passed overwhelmingly, 64-17.⁹¹

Adoption of the Mansfield amendment was followed, one day later, by Senate approval of the Scott-Hart substitute for the House-passed Administration Voting Rights Extension Act. Essentially, the Scott-Hart proposal: (1) extended the 1965 Act without change, (2) enlarged the scope of its authorization to the Attorney General to employ federal registrars and review changes in state voting laws so that this authority included some Northern and Western counties as well as Southern, (3) suspended the use of literacy tests nationwide for five years, and (4) established nationally uniform residence requirements and absentee voting procedures in presidential elections. This Scott-Hart substitute proposal, along with the Mansfield amendment on 18-year-old voting, became known as "the Senate amendments" to H.R. 4249.

With Senate passage of H.R. 4249, as amended, on March 13, 1970, the first stage in an historic constitutional debate had ended. It remained to be seen what attitude the House of Representatives would take in considering the Senate amendments to H.R. 4249.

⁹⁰ 116 CONG. REC. S3502-03 (daily ed. Mar. 11, 1970).

⁹¹ 116 CONG. REC. S3585 (daily ed. Mar. 12, 1970).

B. *House Consideration of the 18-year-old Vote*

The process of constitutional argumentation and debate on the 18-year-old vote question took place in the House, as it had in the Senate, largely off the floor and informally. This renders precise documentation difficult, although perhaps personal recollections will serve to bridge the gaps.

It was up to the House either to "disagree to" the Senate amendments and request a conference to resolve differences, or simply to accept the Senate amendments. In the latter case, the bill would become law in the precise form passed by the Senate, with both the Scott-Hart substitute and the Mansfield amendment in place of the weaker House-passed version. If the House requested a conference, however, the Senate conferees were expected to be somewhat cool to the bill in its entirety; with the lever of the Carswell appointment no longer available, there was fear that a conference could be the end of the entire bill in the Senate.

The chairman of the House Judiciary Committee, Emanuel Celler, did not favor 18-year-old voting. When Senator Kennedy first proposed to Chairman Celler the idea of amending the Voting Rights Act to allow 18-year-old voting, the reaction was extremely negative. The chairmen felt it was irresponsible to jeopardize this essential legislation by such a controversial provision. Senator Kennedy and his staff then set out to persuade Chairman Celler that 18-year-old voting was both constitutional and passable. Even before the amendment passed the Senate, Mr. Celler was bombarded with letters, articles and miscellaneous documents supporting constitutionality. Simultaneously, the House Judiciary Committee was informally polled to show an overwhelming support for the amendment.

The most telling argument, however, for Chairman Celler and others was the pragmatic one that either 18-year-old voting be accepted or there might be no Voting Rights Act at all. Chairman Celler was too firmly and irrevocably committed to a straight extension of the 1965 Voting Rights Act to let that happen. The original 1965 Act was considered by Chairman Celler to be among his highest achievements in a long career of civil rights advocacy. In order to extend that law, he was willing to enact the 18-year-old vote provisions of the bill and leave their validity for final determination by the Court.

The strategy adopted by Mr. Celler was to obtain a special rule from the House Committee on Rules which would provide for a single vote, up or down, on accepting the Senate Amendments to H.R. 4249. If the House as a whole adopted this rule—that is, agreed to consider H.R.

4249, as amended, on those terms—all members of the House would consider the Senate action as a whole, with no opportunity for a separate vote on any part, including the 18-year-old vote. Since supporters of lowering the voting age were known to include many Southern Democrats and Republicans who might otherwise have favored the weaker Administration version of the Voting Rights Act, this strategy was considered most likely to maximize support from all quarters for the Senate version of H.R. 4249. It also meant, however, that there would be no clear vote in the House on the constitutional issue of lowering the voting age by statute, as there had been in the Senate.

Despite the different parliamentary situation faced by House supporters of the 18-year-old vote, all of the same arguments which had been used—and used successfully—in the Senate were reasserted in the House. Indeed, many House members had been watching with fascination as H.R. 4249 changed shape in the Senate.

One similarity between House and Senate consideration of the 18-year-old voting issue is particularly relevant to this study. Both houses attached a very large importance to constitutional scholarship and the views of legal scholars in determining the outcome of the crucial constitutional issue: the extent of congressional power, under the Constitution, to change state-established age qualifications for voting. The 18-year-old vote issue was probably unique among issues considered by the 91st Congress in this respect. The Bickelites and the Borkites jostled daily with the Coxites and the Freundites, and the cloakrooms resounded with learned discussions about the true impact of the *White Primary Cases*.

The importance of constitutional scholarship became so magnified in the last days before House consideration of the Senate version of H.R. 4249 that the Congressional Record became a veritable battleground of conflicting letters and opinions from constitutional scholars. As a part of the Senate's consideration of 18-year-old voting, Professors Freund and Cox had fired the initial salvos. Response was not long in coming from the Administration, in the form of an opinion from the Department of Justice stating that the constitutionality of a congressional lowering of the voting age was "uncertain and dubious."⁹² This was followed by a weighty packet of letters from constitutional law experts throughout the country discounting the possibility that 18-year-old voting by congressional statute was constitutionally supportable.⁹³

⁹² 116 CONG. REC. S3418 (daily ed. Mar. 10, 1970). For the Department of Justice's entire position on the question of 18-year-old voting, see *id.* at 3417-19.

⁹³ These letters were later inserted in the Congressional Record by Representative Clark MacGregor at 116 CONG. REC. H5647-63 (daily ed. June 17, 1970). Letters were received from Professors William B. Lockhart, University of Minnesota; Charles Allan

In response to these letters, Senator Kennedy, whose office remained deeply involved in helping to secure House acceptance of the Senate amendments, placed in the Congressional Record a large collection of letters from constitutional law experts affirming the constitutionality of congressional action to lower the voting age.⁹⁴ The "letters to the editor" pages of the New York Times, the Washington Post, and such political journals as the New Republic became battlegrounds on which the constitutional struggle over H.R. 4249 raged.

One of the earliest and most influential expressions of opposition to the Kennedy-Cox-Freund line of reasoning came from five faculty members at Yale Law School.⁹⁵ In what came to be called the Bickel letter, the five Yale professors relied on three constitutional provisions in arguing against the validity of proposed congressional action to lower the voting age. First, of course, was the basic allocation of control over voter qualifications to the states in article I, section 2. As proof that the fourteenth amendment had not substantially altered this initial grant of power, the Bickel letter argued that granting of women's suffrage had "required" a constitutional amendment just as changing the method of electing United States Senators had "required" a comparable amendment. The Bickel letter also placed great weight on the use of 21 years of age as the presumptive age of voting eligibility in section 2 of the fourteenth amendment.⁹⁶ Finally, the Bickel position held that the heavy reliance placed by Kennedy-Cox-Freund on the *Katzenbach v. Morgan* case was unjustified. It saw that case as making sense only in the long fourteenth amendment tradition of restraining state legislation that discriminates against ethnic minorities, but not

Wright, University of Texas; Philip B. Kurland, University of Chicago; Alexander M. Bickel, Robert H. Bork, Jan G. Deutsch, Louis H. Pollak, and Eugene V. Rostow, Yale Law School; Gerald Gunther, Stanford University; Gerhard Casper, University of Chicago; Herbert Wechsler, Columbia University; Louis Ninkin, Columbia University; Ernest J. Brown, University of Pennsylvania; Robert G. Dixon, George Washington University; and Paul G. Kauper, University of Michigan.

⁹⁴ 116 CONG. REC. S7277-85 (daily ed. May 18, 1970). Letters were received from Professors Melville B. Nimmer, University of California; Jon M. Van Dyke, The Center for the Study of Democratic Institutions; Peter J. Donnici, University of San Francisco; David J. Reber, Arthur Earl Bonfield, University of Iowa; Lawrence R. Velvel, University of Kansas; Arthur E. Sutherland, Andrew L. Kaufman, Law School of Harvard University; John D. O'Reilly, Jr., Boston College of Law; Albert J. Rosenthal, Columbia University; Frank R. Strong, University of North Carolina; Frederic S. Gray, Chase Law School; Raul Serrano-Geyles, University of Puerto Rico; Martin A. Frey, Texas Tech University; William F. Swindler, College of William and Mary; Abner Brodie, University of Wisconsin; Christopher D. Stone, University of Southern California; Paul Bender, University of Pennsylvania.

⁹⁵ Reprinted at 116 CONG. REC. H5648 (daily ed. June 17, 1970).

⁹⁶ *Hearings Before Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 249 (1970) (testimony of Dean Louis Pollak).

as a basis for validating congressional action affecting eleven million young Americans of all racial and ethnic origins.

On June 17, the House met to consider the Senate amendment to H.R. 4249. The initial issue to be decided was whether the House would accept the Rules Committee recommendation that the Senate amendments be voted up or down as a package, with no separate votes on individual amendments. If the recommendation prevailed, it was virtually certain that the entire package—extension of the 1965 Voting Rights Act, new nationwide bans on literacy tests and residence requirements over thirty days for presidential elections, and 18-year-old voting—would pass the House. By House rules, unfortunately, debate on the recommended rule was limited to one hour.

Although some procedural and partisan political commentary did creep into the debate, the one hour of debate was almost pure constitutional argument. That one hour was as close as the House of Representatives ever came during the 91st Congress to sustained, scholarly, careful debate directed solely at a difficult and important constitutional issue.

Much of the debate on the House floor summarized the arguments which had been made in private among House members in the several weeks preceding June 17. That argument had taken on a mildly partisan—as opposed to scholarly—cast with the dispatch of President Nixon's letter to House Minority Leader Gerald Ford.⁹⁷ In his letter, the President stated that although he favored both extension of the 1965 Voting Rights Act (a change from his earlier proposal to weaken it) and 18-year-old voting, he did not believe that the latter change could be accomplished constitutionally by statute. He therefore recommended that the Senate amendments to H.R. 4249 be disagreed to by the House and the differences between House and Senate versions of the bill be worked out in conference. Since Senate Judiciary Committee members, the most senior of whom were Southern and very conservative, were the most likely Senate conferees, proponents of the lowered voting age viewed the President's recommendations as a potentially disastrous course for the House to follow.

The President's letter was important not so much because of the force of its constitutional arguments, but because it put in the hands of those favoring a House-Senate conference the implied threat from the President that he might veto H.R. 4249 if passed by Congress in the Senate form. The letter drew quick rebuttals from both Democrats and Republicans who upheld the constitutionality of statutory enfranchisement of 18-year-olds and disputed the President's recommended

⁹⁷ 116 CONG. REC. H3610-11 (daily ed. Apr. 28, 1970).

action.⁹⁸ These same arguments were repeated during the one hour of debate on June 17.

The debate on enfranchisement of 18-year-olds developed around three general positions. The first affirmed without question both the constitutionality of enacting 18-year-old voting by statute and the wisdom of such a congressional policy determination. The second held that unquestionably Congress was without constitutional power to lower the voting age by statute.⁹⁹ The third position frankly admitted uncertainty on the constitutional issue, but recognized the desirability of enfranchising 18-year-olds and was willing to "let the court decide it." Typical of this point of view was Representative Matsunaga's statement:

As in any other questions of constitutionality, sincere and well-intentioned minds can and will differ on this issue. The Supreme Court is duly designated by the Constitution as the final arbiter on questions of constitutionality. Let us, therefore, carry out our responsibilities as Members of Congress and legislate as we deem proper and let the Court decide whether or not we acted beyond our constitutional authority. Let us do now what we think is right.¹⁰⁰

At the end of one hour's debate, the House adopted the Rules Committee recommended rule by a vote of 224-183, thus assuring simultaneous consideration of all Senate amendments to H.R. 4249. The ensuing vote to accept those amendments in toto was more substantial, 272-132.¹⁰¹

C. *Congress and the 18-year-old Vote*

Of all the constitutional issues considered by the 91st Congress, the question of Congress' power to enfranchise the nation's 18, 19 and 20-year-old citizens was by all odds the most thoroughly and carefully considered. The quality of debate in both the House and Senate was high. Both sides made use of expert opinions of constitutional scholars. Since there was very little expressed disagreement on the non-constitutional merits of the 18-year-old voting issue, most discussion and controversy centered on the question of Congress' constitutional power to make the change.

⁹⁸ See, e.g., 116 CONG. REC. H3672-73 (daily ed. Apr. 29, 1970).

⁹⁹ Even Chairman Celler adhered to this unequivocal view about the unconstitutionality of the 18-year-old voting proposal. As indicated earlier, however, he had overpowering reasons for supporting the rule anyway. 116 CONG. REC. H5641-42 (daily ed. June 17, 1970).

¹⁰⁰ *Id.* at H5640 (remarks of Representative Matsunaga).

¹⁰¹ *Id.* at H5679.

In light of the Court's ultimate resolution of this question,¹⁰² it is interesting to note that at no time during congressional consideration of the 18-year-old vote issue was the possibility raised that there was greater power to affect voter qualifications for elections to national offices than for elections to state and local offices. Since neither the Constitution nor the proposed statute differentiated voter qualifications by the offices to which candidates were being elected, the distinction simply never occurred to any of those engaged in the debate. Indeed, in view of the Constitution's express linking of voter qualifications for state and national elections and the absence of any previous Supreme Court decision turning on such a distinction, it can safely be said that the Court's ultimate resolution of the problem was almost wholly unanticipated by scholars and legislators alike.¹⁰³

The full, fair and enlightened nature of the constitutional debate on 18-year-old voting in both the House and Senate can be attributed to at least three factors. The first factor was the relative absence of disagreement on the policy—as opposed to the constitutional—merits of the issue. This produced a much less heated and emotional atmosphere than was present in the considerations of preventive detention and the Defense Facility Act. Second, debate in both the House and Senate was under the control of men who were willing to allow the full merits of the issue to be debated. This openness promoted a feeling of fairness and decorum on both sides of the constitutional argument. Finally, in the case of 18-year-old voting, Congress was considering not a constitutionally imposed and court enforced restraint on its power, but the dimensions of a constitutional *grant* of power. This factor seems to have produced a greater feeling of congressional responsibility and self-restraint. It was almost as if Congress could accept more gracefully and deal more maturely with self-imposed restraints on the exercise of its power than with restraints imposed or enforced by a coordinate branch of government.

In sum, the debate over the constitutional permissibility of reducing the voting age by congressional enactment seemed to bring out the best in both the House and Senate. It was almost as if the Court's charge in *Katzenbach v. Morgan*—"it was for Congress . . . to assess and weigh

¹⁰² *United States v. Arizona*, 91 S. Ct. 260 (1970).

¹⁰³ The Supreme Court's opinion in *United States v. Arizona* itself is evidence of an unusual divergence of opinion. Four Justices (White, Brennan, Douglas and Marshall) voted to uphold the constitutionality of Title III of H.R. 4249 in its entirety; four Justices (Burger, Harlan, Stewart and Blackmun) voted to void Title III in its entirety. Thus the opinion of Justice Black became the crucial swing vote. It was Justice Black alone who adhered to the distinction between elections for national offices and elections for state and local offices. *Id.* at 4027-33.

the various conflicting considerations. . . . It is not for us to review the congressional resolution of these factors. . . ."¹⁰⁴—had put Congress on its best constitutional behavior.

IV. CONGRESS AS WARMAKER VS. THE PRESIDENT AS COMMANDER-IN-CHIEF: THE COOPER-CHURCH AMENDMENT

No constitutional issue debated by Congress in recent decades holds greater significance for the future of this nation than the question of the respective powers of Congress and the President to commit us to foreign wars. Within the last five years the most searching re-evaluation of congressional versus presidential warmaking powers has come from the United States Senate, and within that body from the Senate Foreign Relations Committee. The Cooper-Church amendment to H.R. 15628, the Foreign Military Sales Act, was the culmination of a long series of Foreign Relations Committee activities dealing with the important imbalance it believed had developed since 1945 between congressional and presidential responsibilities in foreign affairs generally, but most specifically in the area of national commitments to employ armed force abroad.

On March 24, 1970, the House of Representatives passed H.R. 15628, a bill to amend the Foreign Military Sales Act. As passed by the House, the bill simply updated the existing authorization to finance credit sales of military equipment and services by the United States to allied foreign countries.¹⁰⁵ Between the time H.R. 15628 passed the House and May 12, 1970, when it was reported for Senate action by the Senate Foreign Relations Committee, a nation-shaking event had occurred: the entrance of American ground combat troops into Cambodia.

The conjunction of the incursion into Cambodia and the shocking May 4 slaying of four students at Kent State University evoked widespread anger, revulsion and fear, grounded in a sense of helplessness. The Cambodian venture looked to many like a repeat of our earlier mistakes in Vietnam. And once again a decision had been made which seemed to alter American foreign policy significantly, and it had been made without the advice or knowledge of either the public or the public's representatives in Congress. Large numbers of amateur lobbyists descended upon Washington to impress their concern upon the insulated, surreal world of Capitol Hill. Significantly, many realized that it was unwise to try anew to convert supporters of an expanded war effort into opponents of the President's move into Cambodia. Thus, tactics as well as heartfelt concern over the proper extent of Executive

¹⁰⁴ 384 U.S. 641, 648-49 (1966).

¹⁰⁵ H.R. REP. No. 91-869, 91st Cong., 2d Sess. 2-3 (1970).

Power dictated that the focal point of discussion be the constitutional question of the war powers of the President and the proper role of the Congress in formulating and controlling foreign policy.

The Senate Foreign Relations Committee provided the vehicle for this discussion. Because the Committee believed that foreign policy and military commitment of such consequence ought not to be made by the President alone, and because it was unhappy with the Administration's failure to consult or even to advise Congress in advance of its invasion plans,¹⁰⁶ the Committee added an amendment to the House-approved Foreign Military Sales Act. This amendment contained what eventually came to be called the Cooper-Church amendment.¹⁰⁷

The Cooper-Church amendment did not go as far as some Senators wished—it did not address itself to the question of ending American involvement in Southeast Asia. Instead, it dealt only with the length of time United States forces could remain in Cambodia and the type of military assistance that could be provided after the withdrawal of American ground troops.¹⁰⁸ But these specific questions reflected con-

¹⁰⁶ Secretary of State William P. Rogers had met personally in executive session with the Foreign Relations Committee twice in the month of April, the last time on April 27, three days before the Cambodian invasion, and had assured the Committee that it "would be consulted to the fullest extent possible concerning the [Cambodian] situation." S. REP. NO. 91-865, 91st Cong., 2d Sess. 3-4 (1970) [hereinafter cited as FOREIGN RELATIONS COMM. REPORT]. On the date of the invasion the Committee had sent a detailed letter to Secretary Rogers requesting information on the precise nature and extent of the United States invasion and the Administration's plans for the future. Two weeks later, the Committee had received no reply. *Id.* at 4-5.

¹⁰⁷ The Cooper-Church amendment was approved by the Senate Foreign Relations Committee before that Committee reported H.R. 15628 to the Senate. Although a number of amendments to Cooper-Church were adopted on the Senate floor, including a substantial modification of its preamble, the operative sections of the original amendment remained intact. As it emerged from the Senate Foreign Relations Committee, the Cooper-Church amendment read as follows:

Sec. 47. Prohibition of assistance to Cambodia.—In order to avoid involvement of the United States in a wider war in Indochina and to expedite the withdrawal of American forces from Vietnam, it is hereby provided that, unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended for the purpose of—

- (1) retaining United States forces in Cambodia;
- (2) paying the compensation or allowance of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnish military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;
- (3) entering into or carrying out any contract or agreement to provide military instruction in Cambodia or to provide persons to engage in any combat activity in support of Cambodian forces; or
- (4) conducting any combat activity in the air above Cambodia in support of Cambodian forces.

FOREIGN RELATIONS COMM. REPORT at 15.

¹⁰⁸ In the Foreign Relations Committee, the amendment had been known as the Cooper-Church-Mansfield-Aiken amendment. The usual procedure for amendments adopted by the committee of jurisdiction is that they are later adopted by the full Senate by unanimous consent. Obviously, the regular procedure could not be followed with an

cern about two far more important and fundamental issues: the extent to which Congress would allow the President continued independence in formulating national security policy, and whether effective congressional limitations on that independence could be enforced. These were the two most important constitutional questions faced by the 91st Congress.

The amendment relied on a combination of two congressional powers over warmaking, the war powers of article I, section 8,¹⁰⁹ and the so-called power of the purse.¹¹⁰ Although the warmaking power is an explicit grant of congressional authority, it was ultimately the power of the purse on which Cooper-Church relied. This explained the amendment's basic proscription: ". . . no funds authorized or appropriated pursuant to this Act or any other law may be expended for the purpose of" ¹¹¹

A. Senate Floor Consideration of Cooper-Church

In his opening speech on the amended H.R. 15628, Senator Fulbright noted that the Cooper-Church amendment itself was only the latest in a series of Foreign Relations Committee efforts aimed at restoring some balance to the respective foreign policy roles of the President and Congress. Chairman Fulbright pointed to the National Commitments Resolution, passed by the Senate in mid-1969.¹¹² Although only a "sense of the Senate resolution," it had clearly put the Administration on notice that the Senate intended to assert its proper constitutional responsibilities as a coordinate branch of government, especially in the case of national commitments leading to use of American military forces abroad.¹¹³

Senator Fulbright noted that in light of the Cambodian incursion it was necessary to reassert some of the principal points which had been made at the time the national commitments resolution was adopted:

Our country has come far toward the concentration in its national executive of unchecked power over foreign relations, particularly over the disposition and use of the Armed Forces The notion that the authority to commit the United States to war is an Executive prerogative, or even a divided or uncertain one, is one which has grown up only in recent

amendment as controversial as the Cooper-Church-Mansfield-Aiken amendment. Thus, Senators Cooper and Church were forced to offer the amendment again on the floor.

¹⁰⁹ U.S. CONST. art. I, § 8, cls. 12-15.

¹¹⁰ *Id.* art. I, § 9, cl. 7.

¹¹¹ For text of Cooper-Church amendment, see note 107 *supra*.

¹¹² S. Res. 85, 91st Cong., 1st Sess., was considered by the Senate at 115 CONG. REC. 17214-46 (1969), and passed by an overwhelming 70-16. *Id.* at 17245.

¹¹³ 116 CONG. REC. S7106 (daily ed. May 13, 1970) (remarks of Senator Fulbright).

decades. It is the result primarily of a series of emergencies or alleged emergencies which have enhanced Executive power, fostered attitudes of urgency and anxiety, and given rise to a general disregard for constitutional procedure.¹¹⁴

The report of the Senate Foreign Relations Committee which accompanied the national commitments resolution traced the history of executive-congressional authority over foreign military policy. This report stressed the intent of the framers of the Constitution. In a letter to Madison in 1789, Thomas Jefferson expressed the common understanding:

We have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body, from those who are to spend to those who are to pay.¹¹⁵

In *The Federalist* No. 69, Alexander Hamilton, a strong advocate of executive power, had written:

The President is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same as that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy, while that of the British king extends to the declaring of war and to the raising and regulating of fleets and armies—all of which, by the Constitution under consideration, would appertain to the legislature.¹¹⁶

Against this history of intended restraint on untrammelled executive warmaking power, the Administration had put the Senate on notice that it took a wholly different view of the President's power. In a letter to Chairman Fulbright, the Department of State asserted:

As Commander in Chief, the President has the sole authority to command our Armed Forces, whether they are within or outside the United States. And, although reasonable men may differ as to the circumstances in which he should do so, the President has the constitutional power to send U.S. military forces abroad without specific congressional approval.¹¹⁷

Senator Fulbright concluded his presentation in support of the

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

Cooper-Church amendment by placing the Cambodian invasion in the context of the continuing debate over executive versus legislative war-making powers.

It is noteworthy that, in his address to the Nation of April 30 explaining his decision to send American troops to Cambodia, the President did not think it necessary to explain what he believed to be the legal ground on which he was acting, other than to refer to his powers as Commander in Chief of the Armed Forces. Equally noteworthy was the President's repeated assertion in his press conference of May 8 that he—and he alone—as Commander in Chief was responsible for the conduct of the war and the safety of our troops. This sweeping assertion of the President's authority as Commander in Chief amounts to the repudiation of those provisions of Article I, section 8 of the Constitution which empower Congress not only to "declare war" but to "raise and support armies," "provide and maintain a Navy," and "make rules for the Government and regulation of the land and naval forces." It is true, of course, that the present administration's attitude in this area hardly differs from that of its predecessors—except that preceding administrations took no special pride, as the present administration does, in adherence to a "strict construction" of the Constitution.¹¹⁸

Senator Fulbright's presentation set the tone which was to be maintained by later supporters of the Cooper-Church amendment. Often they dealt with matters of history, matters of policy, or the refutation of opponents' arguments. But almost without exception they returned in the end to the bedrock argument that the Cambodian invasion was the culmination of a series of unconstitutional usurpations of congressional authority by the executive, and that the Cooper-Church amendment was a decisive and effective way to restore the balance.

Opponents of Cooper-Church, who eventually were to drag the debate on until the self-imposed June 30 deadline which the President had set for withdrawal of American ground forces from Cambodia, relied on a number of arguments, most of them non-constitutional and non-legal in nature.¹¹⁹ But there were in addition several constitutional arguments

¹¹⁸ *Id.*

¹¹⁹ The most common of the non-legal arguments were: (1) that whatever Congress' constitutional prerogatives, it was not wise policy to "tie the President's hands" when American forces were engaged in a shooting conflict abroad; (2) that although both the President and Congress might have constitutional responsibilities to protect troops in combat, only the President had sufficient "intelligence," meaning information, to accomplish this task, and therefore Congress must defer to him on decisions such as the invasion of Cambodia; (3) that the Gulf of Tonkin Resolution, Act of Aug. 10, 1964, 78

relied upon, none of which went as far as the State Department's bald assertion that regardless of surrounding circumstances, the President could commit United States military forces to combat abroad without so much as a nod to Congress.¹²⁰

The simplest argument urged by opponents of Cooper-Church was that the framers had intended the President to have the power to repel armed invasions of United States territory.¹²¹ This proposition was close to undisputed by supporters of the amendment. The problem was that it did not go to the essence of the Cooper-Church limitation, a ban on the retention or redeployment of American forces in Cambodia.

A second constitutional argument was more substantive, but no more responsive to the gravamen of Cooper-Church. This was the proposition, already accepted by many constitutional and international law experts, that although some congressional assent was necessary to take the nation to war, that assent need not be a formal declaration of war.¹²² This argument interpreted Congress' power to "declare war" as a non-exclusive method of assenting to armed conflict abroad, and included such other congressional actions as a joint resolution (for example; the Gulf of Tonkin resolution)¹²³ or a mere appropriation of funds to support an armed conflict entered by order of the President.¹²⁴ Although this second argument was well supported by constitutional theory and historical practice, it—like the repulsion of armed invasions argument—did not go to the heart of Cooper-Church. It dealt with the initiation of hostilities, not with their termination and prevention.

Stat. 384, had authorized the Cambodian invasion and would support any further such action by the President (the Administration later repudiated this argument because it maintained that the President had ample authority to carry out the invasion under his constitutional powers as "Commander-in-Chief"); and (4) that there was ample historical precedent of presidential wars.

¹²⁰ See text at note 117 *supra*.

¹²¹ For an admirable scholarly essay which reaches this conclusion, see R. Scigliano, *The President and the War Power: The Intent of the Framers*, reprinted at 116 CONG. REC. S8795-98 (daily ed. June 10, 1970). There is virtually no dispute among legal and historical scholars that the Constitution drafters intended the President to have the power to repel attacks on the territory of the United States without seeking a declaration of war from Congress.

¹²² Indeed, the national commitments resolution, *supra* note 112, had itself said that a national commitment, including one involving the use of military force, could be supported by "a treaty, statute, or concurrent resolution of both Houses of Congress . . ."

¹²³ See note 119 *supra*, item (4).

¹²⁴ The Senate had attempted to exercise its control over the appropriations process by adding to the Defense Department appropriations bill for fiscal year 1970 a prohibition on the expenditure of any appropriated funds for the introduction of American ground troops into Laos or Thailand. At that time, the Kingdom of Cambodia was still under the apparently firm control of Prince Norodom Sihanouk, and the possibility of introduction of United States forces into Cambodia was not foreseen. See 116 CONG. REC. S7106 (daily ed. Mar. 13, 1970) (remarks of Senator Church).

Other constitutional arguments by Cooper-Church opponents were more tenable and more to the point. One incorporated in the second Byrd amendment stated that the President's powers as "Commander in Chief" included authority to "protect American forces wherever deployed."¹²⁵ This position was closely related to the argument that crossing an international frontier had no consequence—in either international law or constitutional doctrine—if the foreign territory invaded was controlled by some enemy other than the putative sovereign of that foreign country. This argument considered Cambodia just an extension of Viet Cong territory in South Vietnam.¹²⁶ These propositions did go to the heart of Cooper-Church's ban on future involvement of United States military forces in Cambodia, and were thus hotly debated. In the end, Senators Cooper and Church accepted the Byrd position that their amendment did not restrict the President's power to protect American forces deployed in South Vietnam when they were in imminent danger, even if that danger threatened from Cambodia. Since "protection of American forces" was precisely the rationale used by the President to justify the April 30 Cambodia invasion, many felt that acceptance of Senator Byrd's limitation "gutted" the entire Cooper-Church effort.¹²⁷

Much of the seven weeks which the Senate spent debating the Cooper-Church amendment was devoted to constitutionally inconse-

¹²⁵ The second Byrd amendment, also called the Byrd-Griffin amendment, would have added a proviso to Cooper-Church: "Nothing contained in this section shall be deemed to impugn the constitutional power of the President as Commander in Chief, including the exercise of that constitutional power which may be necessary to protect the lives of United States armed forces wherever deployed." 116 CONG. REC. S9313 (daily ed. June 18, 1970).

On the question of allowing the President to use armed forces when *he* shall deem it "necessary" for some purpose, Senator Church cited a well-known rebuttal of Abraham Lincoln made in reference to the United States invasion of Mexico while he was serving in the House of Representatives:

Allow the President to invade a neighboring nation whenever *he* shall deem it necessary to repel an invasion, and you allow him to do so, *whenever he may choose to say* he deems it necessary for such purpose—and you allow him to make war at pleasure. Study to see if you can fix *any limit* to his power in this respect, after you have given him so much as you propose.

The provision of the Constitution giving the warmaking power to Congress, was dictated, as I understand it, by the following reasons. Kings had always been involving and impoverishing their people in wars, pretending generally, if not always, that the good of the people was the object. This, our Convention understood to be the most oppressive of all Kingly oppressions; and they resolved to so frame the Constitution that *no one man* should hold the power of bringing this oppression upon us.

116 CONG. REC. S7186 (daily ed. May 14, 1970) (remarks of Senator Church) (emphasis in the original). Lincoln's remarks were made in a letter to W.H. Herndon, Feb. 15, 1848.

¹²⁶ See, e.g., 116 CONG. REC. S7243-44 (daily ed. May 15, 1970) (remarks of Senator Stennis) and 116 CONG. REC. S7461 (daily ed. May 19, 1970) (remarks of Senator Miller).

¹²⁷ The four specific restrictions on the expenditure of appropriated funds to support United States operations involving Cambodia, *supra* note 107, retained their substantive force after adoption of the second Byrd amendment.

quential amendments. Although both sides agreed that nothing contained in Cooper-Church, or any congressional statute for that matter, could detract from the President's constitutional authority as Commander-in-Chief, opponents of Cooper-Church continually accused its supporters of attempting to do exactly that. To counter this charge, Senator Mansfield, himself one of the original co-sponsors of Cooper-Church within the Foreign Relations Committee, offered an amendment stating that "[n]othing contained in this section shall be deemed to impugn the constitutional power of the President as Commander-in-Chief."¹²⁸ It was adopted unanimously, probably because its vagueness suited the Senate's weariness with the whole subject after an entire month's debate on Cooper-Church. The Mansfield amendment was followed a few days later by the Javits amendment, which allowed Cooper-Church supporters to save face. It read: "Nothing contained in this section shall be deemed to impugn the Constitutional powers of the Congress including the power to declare war and to make rules for the government and regulation of the Armed Forces of the United States."¹²⁹

Cooper-Church opponents continually engaged in long recitations of past wars and armed conflicts in which Congress had not played the constitutional role envisioned by supporters of the amendment. Past practice is always of some value in interpreting the proper meaning—or at least the common understanding at any given period—of uncertain constitutional provisions. But the most sensible answer to these past congressional failures to assert its constitutional prerogatives was offered by University of Chicago law professor Philip B. Kurland in a debate with Professor Morton A. Kaplan, professor of political science, also at the University of Chicago.

I would not mean to controvert the proposition that many Presidents in the past have engaged in what I would consider unconstitutional wars.

I do not think this practice legalizes it. Because a large number of murders have occurred does not mean that murder has suddenly become legal.¹³⁰

Throughout the grueling seven-week debate on Cooper-Church, both sides made extensive use of scholarly opinion on the subject of presidential versus congressional warmaking powers. Some of these papers were produced by law teachers and students,¹³¹ others by political

¹²⁸ 116 CONG. REC. S8816-30 (daily ed. June 11, 1970).

¹²⁹ 116 CONG. REC. S9994 (daily ed. June 26, 1970).

¹³⁰ 116 CONG. REC. S9014-15 (daily ed. June 15, 1970).

¹³¹ See, e.g., papers from the Columbia Journal of Transitional Law, 116 CONG. REC.

science and international relations experts.¹³² It is, of course, impossible to determine precisely what effects these learned treatises had on individual members, but without question, Senators debating Cooper-Church had the benefit of the best scholarly thinking available on the complex issues involved.

Finally, on June 30, 1970, the day on which United States forces were scheduled to evacuate completely the areas of Cambodia into which they had moved, opponents of Cooper-Church allowed the amendment to come to a vote. It passed, as modified,¹³³ by a substantial 58-37.¹³⁴ On the same afternoon, the Foreign Military Sales Act, with Cooper-Church included, passed the Senate by a vote of 75-20.¹³⁵

B. *House Consideration of Cooper-Church*

There is no more discouraging chapter in the annals of the 91st Congress than the handling by House leaders, including leaders of the House Foreign Affairs Committee, of the Cooper-Church amendment. In contrast to the seven weeks of exhaustive Senate debate on the constitutional and policy issues underlying Cooper-Church, the House of Representatives was allowed not a single minute of real debate on the amendment. In light of the widespread national interest in the issues involved, and, even more importantly, in light of the total absence of a clear House vote at any time since the 1964 Gulf of Tonkin Resolution on the issue of containing American involvement in Indochina, the attitude of House leaders was incomprehensible. The lack of a clear record vote on House support for the war made possible what was cynically referred to among House members as the "hawk-on-the-floor-dove-on-the-hustings" syndrome. Those who practiced this brand of politics would invariably support the war on every non-record vote taken by the House but when campaigning at home would loudly decry the nation's continued expenditure of blood and treasure in Southeast Asia. When H.R. 15628 came back from the Senate, the syndrome prevailed, but not without some second thoughts by House leaders and

E4571 (daily ed. May 21, 1970); *Indochina: The Constitutional Crisis* (pts. 1-2), by faculty and students of Yale Law School, 116 CONG. REC. S7117 (daily ed. May 13, 1970), and 116 CONG. REC. S7528 (daily ed. May 21, 1970); *Invasion Violates International Law*, by students at New York University Law School, 116 CONG. REC. E4943 (daily ed. June 1, 1970).

¹³² See, e.g., *Symposium on the Constitutional Issues in the Indochina War*, 116 CONG. REC. 7966-75 (daily ed. May 28, 1970); and note 121 *supra*.

¹³³ For a summary of the successful amendments to the Cooper-Church proposal—accompanied by some partisan commentary on the significance of each—see 116 CONG. REC. S10269 (daily ed. June 30, 1970) (remarks of Senator Dole).

¹³⁴ *Id.* at S10275.

¹³⁵ *Id.* at S10285.

not without some lasting effects on the continued practice of legislative secrecy by the House of Representatives.¹³⁶

On July 9, eight days after the Senate passed H.R. 15628 with the Cooper-Church amendment, Congressman Thomas Morgan, Chairman of the House Foreign Affairs Committee, asked unanimous consent to take the Senate-passed bill from the Speaker's table, disagree to the Senate amendments, and go to conference with the Senate. There were objections to the unanimous consent request, whereupon the Chairman made his proposal in the form of a motion. At this point, one hour of debate would normally have been in order. It had been well publicized before House debate began on the Senate amendments to the Foreign Military Sales Act that an attempt would be made to instruct House conferees to accept the Cooper-Church amendment. Although no one believed that the motion to instruct would pass, it would nevertheless provide a clear record of House sentiment—and of the positions of individual House members—on the question of the Cambodia invasion and future United States involvement in Cambodia. It would also provide the only possible opportunity for expression of House sentiment on the constitutional questions considered at such length by the Senate.

Instead of allowing the one hour of debate on his motion to "disagree to" the Senate amendments to H.R. 15628, Chairman Morgan moved immediately to cut off all debate—including any motion to instruct conferees—and to require an immediate vote on going to conference. Chairman Morgan's rather disingenuous explanation was: "I have no desire to use any time and there has been no request for any time, and in an effort to move the legislation along, I will move the previous question."¹³⁷ After Chairman Morgan's move to cut off all debate had passed by 247-143, he was prevailed upon to ask unanimous consent to allow debate notwithstanding the passage of the previous question. This opened the way—not through regular parliamentary procedures but because of the intercession of House Democratic leaders

¹³⁶ In the late summer the House of Representatives finally passed, after months of debate, the Legislative Reorganization Act of 1970, 84 Stat. 1140.

One of the key features of the Act is a change in House parliamentary procedures which will allow record votes on important substantive issues which are considered separately from the question of a final passage of the bill. *Id.* § 120. This provision should go a long way toward eliminating the secrecy which presently attends House consideration of controversial public issues. A good deal of the support of this anti-secrecy provision was generated by the visits of young people and college students and faculty to individual Congressmen and Senators during debate on the Cooper-Church amendment.

¹³⁷ 116 CONG. REC. H6513 (daily ed. July 9, 1970). Although a number of speeches appear in the Congressional Record after Chairman Morgan's motion for previous question, these were not actually spoken on the floor, but were inserted after the debate by Members who wished to be on the record on the Cooper-Church issue.

concerned with the institution's public image—for a motion to instruct House conferees to accept the Cooper-Church amendment. This motion was offered by Congressman Donald Riegle, a first-term Republican member from Michigan. Although another hour's debate was in order on the motion to instruct conferees, the leadership of the House Foreign Affairs Committee once again moved to cut off all debate, this time by a motion to table Riegle's motion to instruct. The net effect of Chairman Morgan's decisions to allow the motion to instruct to be offered and Congressman Hays' motion to table was that although there would at least be a vote on House acceptance of Cooper-Church, not a minute's debate on the desirability of such acceptance or on the underlying constitutional issues would take place on the floor of the United States House of Representatives.¹³⁸

The attempt to table the motion to instruct conferees passed the House, 237-153. Although those voting in favor of tabling the motion to instruct could argue that they were voting only against tying the hands of House conferees rather than against Cooper-Church, it was generally understood by most House members that the vote on tabling was, in effect, the only House vote which would occur on the Cooper-Church amendment. Its results may fairly be interpreted as a measure of House sentiment on the question of reasserting Congress' constitutional role in national security policy making.

C. *Congress, the President, and the Power to Commit the Armed Forces to Combat*

The Foreign Military Sales Act which the House of Representatives sent to conference in such deplorable fashion never emerged. It was often predicted by opponents of Cooper-Church during the Senate debate that House conferees would never agree to such a limitation on presidential warmaking power. The conferees apparently reached an impasse and decided simply to let the bill die in conference.

The final irony of the congressional debate, or non-debate in the House, over the Cooper-Church amendment is that the President himself apparently came to accept the constitutionality of some limitation on his autonomy: even though the Cooper-Church amendment itself never emerged from conference,¹³⁹ a similar restriction¹⁴⁰ finally did pass both houses and was signed into law.

¹³⁸ Representative Hays, to his credit, later tried to obtain unanimous consent to withdraw his motion to table, but this was objected to by several Republicans who were only too happy to see the Democratic leadership saddled with responsibility for suppressing debate on the Cooper-Church amendment.

¹³⁹ Chicago Tribune, Dec. 16, 1970, § 1, at 9.

¹⁴⁰ But the limitation on aid to Cambodia which finally passed Congress as part of the

In light of the congressional deadlock over Cooper-Church itself, the question of whether that amendment, had it passed the House in its original form and been signed into law by the President, would have imposed any legally enforceable restraint on the President's power to commit United States forces to combat abroad is academic. Almost certainly it would have, despite the disclaimer of intent to limit the President's constitutional powers, because the effect of the amendment turned ultimately on Congress' appropriations authority, a basis for congressional control of executive action which no one has seriously questioned.

What is almost more important than the direct effect of Cooper-Church, however, is the indirect effect which the seven weeks of senatorial consideration have had on both Congress and the President. As Senator Robert Dole, a staunch supporter of the President's position on Cooper-Church, summarized it just before the vote on the amendment:

. . . I submit that the past 7 weeks will be recognized as one of the greatest, most productive debates in the history of this body. Not only has a major legislative measure been hammered out and refined, but some of the most significant legislative history in decades has been created. It has been a rare occasion when so many Members of this body have given such attention to a matter with the constitutional significance of the balance of the war powers between the legislative and executive branches of Government. This debate will stand as a valuable guide for the Congress, the President and constitutional scholars for years to come.¹⁴¹

Even the few months since the debate on Cooper-Church have begun to prove the truth of Senator Dole's commentary. The Senate itself has added, almost without debate, a limitation to the Defense Department appropriations bill for fiscal year 1971 limiting expenditures in line with the restrictions first outlined in the Cooper-Church amendment. Moreover, it is likely that in the future both the President, whoever he may be, and the Congress will consider seriously the constitutional issues involved in foreign policy and military commitment decisions.

With these results following despite its lack of legislative success, the Cooper-Church amendment may be said to have made a valuable contribution to the constitutional history of the nation. Not even the recent extension into Laos detracts from the constitutional importance

Supplemental Foreign Assistance Authorization Bill was significantly different from the original Cooper-Church amendment in that it contained no limit on air operations over Cambodia.

¹⁴¹ 116 CONG. REC. S10269 (daily ed. June 30, 1970).

of the Cooper-Church debate. While the spirit of the Cooper-Church limitation is offended more than a little by the extension of the war into Laos, the White House rhetoric emphasizes the President's meticulous compliance with congressional directives. What emerges from these most recent events is an obvious imperative for members of Congress to be more skillful draftsmen if they want to limit executive adventures into war.

V. CONCLUSION—THE 91ST CONGRESS AND THE CONSTITUTION

How did the 91st Congress get along with the Constitution? At best, it was an armed truce.

While some distinctions can be drawn between the treatment of constitutional questions by the two chambers, it is not an overstatement to say that many members of Congress look on their oath to support the Constitution more as a patriotic gesture than as a serious part of their function. Both bodies contain members who cheerfully put off on the courts most if not all of the responsibility for squaring the statute with the Constitution.

The clearest difference between the two houses in large part turns on the easier debate rules in the Senate. As a result, the Senators do most of their constitutional cogitating in public. While this makes it somewhat easier to study the patterns into which such constitutional debate falls, it also demonstrates the difficulty in attempting to separate the constitutional arguments from the arguments of necessity, convenience, policy or just plain politics. Nor is it surprising to find that where other questions are not overpowering, the Constitution gets a better shake. Thus, in 18-year-old voting, given the overwhelming consensus for the merits, constitutional debate predominated.

Both houses of Congress appear to make extensive use of constitutional scholars, although the exact effect which this high-level research and argumentation has on the votes of individual legislators is difficult to determine, and in any case varies according to the "pragmatics" involved in the legislative proposal. It is clear that in some cases the policy predilections of Senators or Congressmen easily tip the scales against the weightiest of constitutional arguments. On the other hand, there are occasions—as in the case of the 18-year-old vote—where constitutional scholarship plays a decisive role in determining a legislative course of action.

There does seem to be a discernible difference in the way Congress approaches the problem of legislating in the face of a constitutional prohibition on the exercise of governmental power—a "Bill of Rights" prohibition—and how it reacts when the question is one of determining

the extent of express grants of legislative power to Congress itself. In the former case, the attitude is often one of hostility and unwillingness to accept any alleged limitation on congressional power to act. The result in such cases is often a court interpretation of congressional intent which considerably narrows—and thus saves—the scope of the statute. The judicial alternative is to declare that Congress has transgressed the boundaries on its constitutional power, a decision courts are reluctant to make.

On the other hand, when Congress bases legislation on an express grant of power found in the Constitution, the extent of which is uncertain or problematical, it seems far more conscientious and careful in attempting to fathom the true limitations of its power. Examples are the reluctant enactment of a statute to lower the voting age and the initial failure of congressional action to increase the weight of its own voice in the use of military forces.

Having once drawn these rather general conclusions about the significance of constitutional argumentation in the House and Senate, what may be said more generally about the value of constitutional analysis in the national legislative process? In certain cases, where it is well established that the federal courts, especially the Supreme Court, will ultimately consider the constitutional merits of congressional action, constitutional analysis and debate serve the function of avoiding that kind of confrontation between coordinate branches of government which could destroy the mutual forbearance and tolerance which have kept our tripartite government intact for almost two centuries. Were Congress to exercise no discretion of its own and view each claim of constitutional limitation on its power as a potential confrontation with the judicial branch, neither the courts nor the Congress could long continue to play a constructive role in the business of governing.¹⁴²

Given the fact that the Constitution, somewhat like the flag, is viewed by many as an emblem of orthodoxy and the exclusive property of a portion of the body politic, the old girl has fared reasonably well for her age. While the last session of Congress may not have revered her as it ought, neither was she done in.

The United States Constitution has proven its ability to withstand

¹⁴² See, for example, the confrontation over the printing of a House Internal Security Committee report listing campus speakers and the fees they received. In response to an injunction issued by a federal district court prohibiting publication of the so-called "blacklist," the House of Representatives passed a resolution ordering the printing of the report. 116 CONG. REC. H11606-25 (daily ed. Dec. 14, 1970). The Resolution in effect "enjoined" the district court which had enjoined the printing. The next step logically would have been for the district court to call out the Army and the Congress to call out the Marines.

the stresses and strains of careless legislation for nearly two hundred years. There is no reason to assume that this venerable document has suddenly lost its capacity to survive these assaults; but there is also no reason to throw the Constitution into needless jeopardy. Congress would do well to spend less time bragging about the document and more time on the care and feeding.