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ASSUMING RESPONSIBILITY: THOMAS F. EAGLETON, THE SENATE, AND THE BOMBING OF CAMBODIA

JOEL K. GOLDSTEIN*

INTRODUCTION

The past has a way of repeating itself. Events may not reoccur in the precise manner previously experienced; yet, the pattern often is sufficiently familiar to resemble one encountered before. For those who experienced the Vietnam years, the war in Iraq carries some feeling of “*déjà vu* all over again.”¹ There are differences, to be sure, yet a familiar pattern emerges—a failed discretionary war on foreign shores, executive use of manipulated intelligence to build support, the parade of shifting rationales offered to replace those exposed as unconvincing, the presidential deceit and dissembling, the legislative abdication.

Thomas F. Eagleton spent the last years of his life preoccupied with the war in Iraq. From the outset, he recognized it as an ill-conceived mission which could not be accomplished, as a disaster waiting to happen. He witnessed from afar the executive overreaching and the congressional surrender. He had seen it all before, during the 1960s and 1970s, in Vietnam. Eagleton was not part of the political leadership that blundered into Vietnam; instead, he went to the Senate in 1968 as an avowed dove anxious to extricate America from that debacle. That effort became a central commitment of his extraordinary first term in the Senate. The Eagleton Amendment to end the bombing of Cambodia was a significant event in that term.

In early 1973, the United States, at long last, ended its military involvement in Vietnam. Nonetheless, even after that war had ended, the parties had signed a peace treaty and the troops had come home, the United States military continued to rain bombs on Cambodia. The debate over

* Vincent C. Immel Professor of Law. I had the privilege of teaching The Presidency and the Constitution with Tom Eagleton among other cherished associations with him. I am grateful to Brian Atwood and Louis Fisher for comments on an earlier draft, to Brian Atwood and Walter F. Mondale for helpful conversations, to John Greffet and Margaret McDermott, J.D. for research assistance, and to Mary Dougherty for clerical help. I bear responsibility for any shortcomings of the article.

1. LAWRENCE J. “YOGI” BERRA, *THE YOGI BOOK: “I REALLY DIDN’T SAY EVERYTHING I SAID!”* 30 (1998).

whether to prohibit American bombing of Cambodia in the spring of 1973 presented one of the clearest tests of Congress's willingness to flex its institutional prerogatives. Nearly thirty-five years later, it is worth looking back at that episode to extract from it lessons to carry forward.

This essay presents a case study of Tom Eagleton's role in seeking to end the bombing of Cambodia. It traces his contributions as the author and principal advocate of the Eagleton Amendment. Eagleton sought both to end at long last America's involvement in Southeast Asia and to force Congress to reassert its dormant war powers. Eagleton put the issue on the legislative agenda in a meaningful way, he pushed his colleagues to come to grips with the challenges involved, and he was a central figure in the debate which ensued. Eagleton's efforts helped bring the war to an end, although six weeks later than his bill would have done. He was less successful in persuading his colleagues to reassert the full scope of their constitutional power, although he did move them in that direction. His performance displayed mastery of the political, moral, and constitutional arguments surrounding the issue. It presented an example of a senator willing and able to think in a critical manner independent of an emerging consensus. Ultimately, Eagleton encountered formidable institutional barriers which resisted easy movement.

I. THE CONTEXT OF THE EAGLETON AMENDMENT

Decisions regarding war have often raised fundamental constitutional questions regarding the respective roles of the Executive and Legislative Branches. Since the administration of Franklin D. Roosevelt, power has flowed to the Executive. Under a familiar pattern, the Executive has played the dominant role in committing American troops to battle and has done so with nominal legislative involvement, or less. Sometimes the President usurps, sometimes Congress abdicates, often both dynamics converge.²

That was certainly our experience with Vietnam. After years of acquiescence to presidential action, Congress handed President Lyndon B. Johnson essentially a blank check when it passed the Gulf of Tonkin Resolution on August 7, 1964.³ With little thought, discussion or dissent, the Resolution put Congress on record as supporting Johnson's "determination . . . , as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."⁴ Safeguarding the peace and security of Southeast Asia

2. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 117-18 (1990). See generally Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7 (2000).

3. See H.R.J. Res. 1145, 88th Cong., 110 CONG. REC. 18471 (1964) (enacted).

4. *Id.*

was deemed to be in America's national interest and, accordingly, the United States was "prepared, as the President determines, to take all necessary steps, including the use of armed force" to assist any member of the Southeast Asia Collective Defense Treaty requesting military assistance.⁵

Many members of Congress spent most of the next decade lamenting their votes and, in some cases, their personal involvement. The regret was multi-dimensional. Vietnam proved a colossal foreign policy blunder as America ultimately stationed more than 500,000 men there at one time to fight a war with no rational purpose at great cost in American lives, limbs, and prestige. It was a political miscalculation which diverted resources from domestic needs and badly divided the country. And it represented an abdication of Congress's constitutional powers as members of the House and Senate largely deferred to Johnson and his associates. Not until 1966 did some significant numbers begin to challenge the policy as Senator J. William Fulbright, who had managed the Gulf of Tonkin Resolution, convened hearings critical of the war.⁶

Richard M. Nixon won reelection in a landslide in November 1972. The overwhelming margin of victory reflected misgivings regarding Nixon's opponent, Senator George McGovern, rather than enthusiasm for Nixon or many of his policies.⁷

In the early 1970s, some in Congress sought to reclaim for Congress some portion of the war power which had, over time, flowed to the Executive Branch. Eagleton had emerged as a principal author of the War Powers Bill. After introducing Senate Joint Resolution 59 in March 1971,⁸ Eagleton joined forces with Senator Jacob Javits and Senator John Stennis to submit S. 2956⁹ which the Senate Foreign Relations Committee reported on February 9, 1972¹⁰ and which the Senate passed on April 13 of the same year.¹¹ The bill did not become law in 1972, but Eagleton and his co-authors reintroduced it as S. 440 the following year.¹²

The Eagleton War Powers Bill sought to curtail the President's ability to commit American troops to non-emergency situations in which conflict was likely.¹³ The act reflected the conclusion that Congress needed to reassert and enforce the constitutional limits on the President's power to go to war and that

5. *Id.*

6. See, e.g., *Supplemental Foreign Assistance Fiscal Year 1966—Vietnam: Hearing on S. 2793 Before the S. Comm. On Foreign Relations*, 89th Cong. (1966).

7. STANLEY KELLEY, JR., *INTERPRETING ELECTIONS* 99–125 (1983).

8. 117 CONG. REC. 4379 (1971).

9. 118 CONG. REC. 11021, 11027, 11042–53. (1972).

10. *Id.* at 3316.

11. *Id.* at 12610–11.

12. 119 CONG. REC. 1339, 1411–13 (1973); see generally THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* 145 (1974).

13. 119 CONG. REC. 1411–13 (1973).

the deliberative process the Constitution envisioned as a prerequisite to war would produce better results than one which committed it to the President's unilateral choice. Eagleton said:

If we fail to act now after the horrors of Vietnam have so clearly exposed the danger of individual war-making, we may never again see the questions of war and peace being decided by the sobering and deliberative processes inherent in the concept of collective judgment.¹⁴

Eagleton thought the long-term solution was to adopt his War Powers Act.¹⁵ In the meantime, the more immediate issue during his first years in the Senate was how to end the war in Southeast Asia. During the early months of 1973, American involvement in Vietnam wound to a conclusion. On January 27, 1973, the parties signed a cease fire agreement in Paris.¹⁶ Over the next two months, the remaining American troops came home from Vietnam. Finally, on March 29, 1973, Nixon announced that no American troops remained in Vietnam and all prisoners of war were on their way home.¹⁷

But the fighting had not ended. During this period, the United States continued to engage in heavy bombing of Cambodia.¹⁸ In February 1973, the Khmer Rouge had rejected a de facto cease fire to which Cambodia's Lon Nol government had committed.¹⁹ The United States responded with massive bombing to force Khmer Rouge into compliance.²⁰ For two months after the cease fire, the rain of bombs continued.²¹

The Nixon administration had justified bombing Cambodia as a means to protect American troops in Vietnam.²² The withdrawal of the troops by late March 1973 seemingly removed that rationale. The Nixon administration began the task of articulating a new rationale for the bombing. Assistant Secretary of State William Sullivan found support for the bombing in "the

14. 119 CONG REC. 1413 (1973); *see also* Thomas F. Eagleton, *White House Mythology*, N.Y. TIMES, Mar. 27, 1973, at 47.

15. *See generally* EAGLETON, *supra* note 12, at 126-40.

16. Agreement on Ending the War and Restoring Peace in Vietnam, Jan. 27, 1973, 24 U.S.T. 1, 935 U.N.T.S. 2.

17. Address to the Nation About Vietnam and Domestic Problems, PUB. PAPERS 234 (Mar. 29, 1973).

18. *See, e.g.*, Malcolm W. Brown, *Cambodia Bombing is Jointly Planned*, N.Y. TIMES, April 20, 1973, at 4; *Pentagon's Statistics Underscore Intensity of Cambodia Bombing*, N.Y. TIMES, June 22, 1973, at 2.

19. EAGLETON, *supra* note 12, at 150.

20. *Id.*

21. *Id.* at 109.

22. A Conversation with the President About Foreign Policy, PUB. PAPERS 543-52 (July 1, 1970); Address to the Nation on the Cambodian Sanctuary Operation, PUB. PAPERS 476-77 (June 3, 1970); Report on the Cambodian Operation, PUB. PAPERS 529 (June 30, 1970).

reelection of President Nixon.”²³ Secretary of Defense Elliot C. Richardson justified it as “the wind-up” and “a kind of residue” of the decade long conflict in Vietnam.²⁴

On March 29, 1973, Eagleton took the Senate floor to challenge as unlawful the continued bombing of Cambodia.²⁵ He systematically rebutted the legal defenses which the Nixon administration had offered for bombing Cambodia. He pointed out that the Gulf of Tonkin Resolution had been repealed in January 1971 and that the SEATO Treaty did not apply since it required unanimous agreement of all parties in accordance with their constitutional procedure, a condition which had not been fulfilled. Nixon had justified bombing Cambodia as a means to protect American troops: “Now that our troops have been totally withdrawn, that rationale for operation in Cambodia goes by the board.”²⁶

Five days later, Eagleton warned that “our Nation continues to suffer the consequences of the institutional breakdown that led us into Vietnam.”²⁷ After standing “idly by” while the United States “became ever more deeply committed to a presidential war,” Congress “unquestioningly gave away our most solemn responsibility” in the Gulf of Tonkin Resolution.²⁸ Eagleton feared Congress again was “standing on that dangerous threshold.”²⁹ This time, however, Nixon would not seek congressional approval but would claim he did not need it.

Eagleton thought Nixon’s actions in Cambodia reflected bad and dangerous policy which “might lead to reinvolvement in Southeast Asia.” “But the real issue is not whether the President’s Indochina policy is good or bad. The issue is whether the President can legally continue his action without the authorization of Congress.”³⁰

Eagleton restated in more detail the arguments which made clear that Nixon lacked legal authority to continue to bomb Cambodia. Nixon was bombing Cambodia not to defend absent American troops but to support the Cambodian government: “Whatever the merits of this objective, it cannot be pursued on the basis of the Commander in Chief power alone.”³¹ Eagleton warned that Nixon would “continue to act without regard for the powers of

23. STAFF OF H. COMM. ON FOREIGN AFFAIRS, 97TH CONG., THE WAR POWERS RESOLUTION: A SPECIAL STUDY OF THE COMMITTEE ON FOREIGN AFFAIRS 107 (Comm. Print 1982).

24. *Id.*

25. 119 CONG. REC. 10188 (1973) (statement of Sen. Eagleton).

26. *Id.*

27. *Id.* at 10678.

28. *Id.* (statement of Sen. Eagleton).

29. *Id.*

30. 119 CONG. REC. 10678 (1973) (statement of Sen. Eagleton).

31. *Id.* at 10679.

Congress until we move to reassert our own constitutional prerogatives.”³² He endorsed the Church-Case legislation to prohibit military activity in Indochina absent congressional approval. He concluded, “Congress can no longer sit idly by while the President usurps our responsibilities. If we are to win back our power to declare war, we must begin today by insisting that American military activities in Indochina be consistent with the Constitution.”³³

When Secretary of State William Rogers first deferred testifying before the Senate Foreign Relations Committee and then claimed scheduling conflicts, Eagleton accused the administration of delaying Rogers’s appearance to dodge congressional questioning. Rogers’s position, said Eagleton, was that “it would be inconvenient to testify so long as troublesome questions are being asked by Congress about the President’s authority to conduct military operations over Cambodia.”³⁴

Eagleton again took the Senate floor on April 17, 1973 to denounce the continued bombing of Cambodia and Laos.³⁵ Although Nixon had announced in late March that the war was over and the troops were out, Eagleton said, “[t]here is a war still going on in Southeast Asia . . . a war with a continuing and now escalating American presence.”³⁶ Eagleton pointed out parallels between the escalating action against Cambodia and Laos and the way in which the United States became involved in Vietnam. Was American security “inseparably entwined” with the survival of the Cambodian regime as we had been told it was with a succession of governments in South Vietnam? Would the Cambodian bombing lead to a new military commitment?³⁷

Eagleton’s concern was not simply with the prospect that Nixon was leading America into another presidential war. He also lamented the sudden indifference of the American people:

How short our memories. How still our voices.

Gone are the peace rallies; gone are the sacks full of mail; gone are the earnest college students walking up and down the hallways of the Senate office buildings lobbying Senators to vote for peace.

Maybe it[’]s because the draft calls have ended. Maybe it[’]s a stupifying cynicism about the whole governmental process as being incapable of responding. Maybe we are so emotionally drained that we simply no longer have the ability to care. Maybe our national elation at the news of March 30 so saturates our thoughts as to preclude a dream-interrupting doubt.

32. *Id.* at 10679–80.

33. *Id.* at 10680.

34. *Id.* at 11507.

35. 119 CONG. REC. 12724 (1973) (statement of Sen. Eagleton).

36. *Id.*

37. *Id.*

Whatever the cause of our current unconcern it, like our renewed military activity in Southeast Asia, is dangerous business.³⁸

Three weeks after Eagleton's attack, Rogers finally provided the administration's rationale to the Senate Foreign Relations Committee.³⁹ Rogers argued that the continued bombing of Cambodia was necessary to implement Article 20 of the cease fire agreement which required foreign troops to be withdrawn from Cambodia and Laos and obligated all parties to respect the sovereignty and security of those nations. Article 20, Rogers said, was "of central importance" since the conflicts in Laos, Cambodia, and Vietnam were "so inter-related as to be considered parts of a single conflict."⁴⁰ In concluding the cease fire agreement, the United States had told the North Vietnamese that if they continued hostilities in Cambodia the United States would reciprocate to implement Article 20.⁴¹ American bombing in Cambodia did not "represent a commitment by the United States to the defense of Cambodia" but an "interim action" to implement a "critical provision" of the cease fire.⁴² The administration's reliance on Article 20 was problematic. Article 20 was contained in an executive armistice agreement which was neither a treaty ratified by two-thirds of the Senate nor approved by Congress. Surely the President could not enter into an executive agreement and then commit troops to war to enforce it. As John Hart Ely pointed out, "For if the President could make an agreement authorizing the use of force without even the concurrence of the Senate, and then turn around and implement that agreement, he would have become a virtual law unto himself: The bootstrap would be too clearly visible."⁴³ The constitutional validity of an armistice agreement as a basis to wage war could be no stronger than that of the war it ended.

During the early part of 1973, Nixon's involvement in the Watergate cover-up became more apparent. On April 30, 1973, Nixon announced the departures of four close associates—Attorney General Richard Kleindinst, Chief of Staff H.R. Haldeman, White House aide John Erlichman, and White House counsel John Dean.⁴⁴ Reflecting these shocking revelations, Nixon's popularity began to plummet. By May 8, 1973, the Gallup Poll found that 44.49% thought Nixon knew of the Watergate bugging in advance (compared

38. 119 CONG. REC. 12724 (1973) (statement of Sen. Eagleton).

39. *Department Discusses Presidential Authority to Continue U.S. Air Combat Operations in Cambodia*, 68 DEP'T ST. BULL. 652, 652 (1973) (statement of Secretary of State Rogers).

40. *Id.*

41. *Id.* at 652–53.

42. *Id.* at 654.

43. JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 35–36 (1993).

44. Statement Announcing Resignation of the Attorney General and Members of the White House Staff, and Intention to Nominate Elliot C. Richardson to be Attorney General, PUB. PAPERS 326 (Apr. 30, 1973).

to 34.62% who thought he did not); 53.45% thought he had participated in the cover-up.⁴⁵ By May, Nixon's approval and disapproval ratings were essentially equal and in the low to mid-40% range.⁴⁶

The American people also had misgivings over Nixon's policies in Cambodia. Gallup found on April 24, 1973 that 75.75% thought that "further military action in Southeast Asia should require a vote of approval by Congress"⁴⁷ Fifty-nine percent thought the bombings in Cambodia and Laos would result in troops being sent to Southeast Asia.⁴⁸ And 56.92% disapproved of American planes bombing Cambodia and Laos while only 28.64% approved.⁴⁹

II. THE EAGLETON AMENDMENT

In order to finance the bombing, the administration in early 1973 asked Congress to increase by roughly \$500 million the Pentagon's authority to transfer money between accounts as part of a supplemental appropriation request.⁵⁰ Such requests are routine measures to allow federal agencies to meet shortfalls caused when unforeseen expenditures produce shortfalls. That requested amount could finance the Cambodia bombing and the administration would cite its authorization as congressional support for the activity.⁵¹

In early May 1973, Secretary of Defense Elliot Richardson testified before the Senate Appropriations Committee of which Eagleton was a new member.⁵² Under questioning Richardson said that Nixon could continue bombing Cambodia even without congressional approval of the transfer authority. Richardson did not rely on Article 20 to provide legal authority for Nixon to bomb. Instead, he insisted that Nixon had the same authority to bomb Cambodia that he had before the cease fire agreement was signed on January 27, 1973 because the cease fire agreement did not terminate his authority.⁵³

On May 10, 1973, the House of Representatives cast two votes to limit Nixon's ability to bomb Cambodia.⁵⁴ By a vote of 219 to 188, the House deleted the nearly \$500 million in additional transfer authority for the Department of Defense.⁵⁵ And by 224 to 172, the House amended the supplemental appropriations bill to prohibit the use of any funds the bill

45. Gallup Poll No. 871 (May 08, 1973).

46. *Id.*

47. Gallup Poll No. 869 (April 24, 1973).

48. *Id.*

49. *Id.*

50. *See* EAGLETON, *supra* note 12, at 155–56.

51. *Id.* at 156.

52. *Id.* at 157.

53. *Id.* at 157–58.

54. 119 CONG. REC. 15317–23 (1973).

55. *Id.* at 15317–18.

provided for combat in Cambodia.⁵⁶ Nonetheless, the House measure left a significant loophole. It put off limits only the funds covered therein. It did not restrict funds previously appropriated. The administration had taken the position that it could and would divert funds *previously* appropriated for other defense purposes to fund the bombing of Cambodia. The House legislation accordingly offered its members an opportunity to vote against the bombing of Cambodia without actually stopping it.

That was not the sort of formula which appealed to Thomas F. Eagleton. Eagleton saw that the House legislation would fail to stop the bombing of Cambodia because Nixon would divert other resources to that effort.⁵⁷ Accordingly, Eagleton wrote on his yellow legal pad the seven words “or heretofore appropriated under any other act” to close that loophole.⁵⁸ Eagleton offered that language as an amendment to the House bill when the Senate Appropriations Committee met on May 15, 1973 to address the second supplemental appropriations which the House had passed.⁵⁹ The Senate Appropriations Committee voted 24 to 0 in favor of the Eagleton Amendment to cut off all funds for bombing in Cambodia.⁶⁰ The surprising vote made front page news in part because it was unanimous and included a number of Republican conservatives,⁶¹ some of whom were concerned that the bombing runs could result in American pilots taken prisoner and a subsequent escalation of the war.⁶² The action of the Appropriations Committee in adopting the Eagleton Amendment constituted “a shout of defiance that shook a White House determined to continue with the bombing of Cambodia.”⁶³ The next day Nixon issued a statement expressing concern that Congress had “taken action that could severely undermine prospects for success.”⁶⁴

At the same time, Senators Case and Church had offered an amendment to the State Department authorization bill to bar use of funds to finance American military involvement in, over, or from off shores of North Vietnam, South Vietnam, Laos, or Cambodia without specific congressional authorization.⁶⁵ Case-Church was broader than the Eagleton Amendment since it applied

56. *Id.* at 15323.

57. Eagleton was not alone in recognizing this hole in the House bill. *See, e.g., id.* at 15435 (statement of Sen. Brooke); *id.* at 15436 (statement of Sen. Case).

58. EAGLETON, *supra* note 12, at 160.

59. S. REP. NO. 93-160, at 133 (1973).

60. 119 CONG. REC. 17103 (1973) (statement of Sen. McClellan).

61. John W. Finney, *Senate Panel Votes, 24-0, To Bar Cambodian Raids*, N.Y. TIMES, May 16, 1973, at 1.

62. Interview with J. Brian Atwood (July 13, 2007).

63. John W. Finney, *A Shout of Defiance in The Senate*, N.Y. TIMES, May 20, 1973, at 208.

64. White House Statement About Congressional Role in Indochina Peace Efforts, PUB. PAPERS 537 (May 16, 1973).

65. 119 CONG. REC. 15436-37 (1973) (statements of Sens. Case and Church).

throughout Southeast Asia.⁶⁶ It was not, however, on as fast a legislative track as the Eagleton Amendment.

The Senate considered the Eagleton Amendment as part of the supplemental appropriations bill on May 29, 1973.⁶⁷ When the Appropriations Committee had unanimously approved the Eagleton Amendment, Senator Roman Hruska had been among the 24 votes in favor.⁶⁸ He now argued, by point of order, that the Eagleton Amendment violated Rule XVI of the Senate's Standing Rules in that it sought to limit not simply the funds in the subject bill but funds "heretofore appropriated under any other act."⁶⁹

Eagleton led the successful fight to defeat Hruska's point of order. He presented his Amendment as a test of the operation of the American system of government.⁷⁰ Congress had a "historic opportunity to show that the system can end, once and for all, what the system should never have allowed to begin."⁷¹ The vote also presented an occasion for members of Congress to accept and act upon their constitutional responsibility. Eagleton implored his colleagues:

We can no longer hide behind the Presidency. We can no longer put off our responsibilities to await the latest word from Paris. And we can no longer rationalize that our individual vote—even though only one of 535—is unimportant. Now, because we have made the American people aware of the role Congress must play within our Government system, we will be held individually and collectively accountable for the action we take.⁷²

Failure "to perform our constitutional duty" would undermine the American system of law.⁷³

Eagleton anticipated, and derided, the argument that his Amendment would embarrass Nixon's and Kissinger's negotiating ability. The American people no longer wanted American troops to be used in combat in Indochina. Moreover, the administration's argument rested on a false premise.

Adversary positions in diplomatic negotiations are constructed from a blend of real strength and bluff. But how much bluff can be left on either side after 5 years of negotiations between the United States and North Vietnam?

It is no secret that the American people want to get out of Indochina—that is why we began the negotiations 5 years ago.⁷⁴

66. Compare *id.* (statements of Sens. Case and Church) with *id.* at 17103 (statement of Sen. McClellan) (noting the geographical area covered by the Eagleton Amendment).

67. *Id.* at 17103 (statement of Sen. McClellan).

68. *Id.* at 17125-26 (statements of Sens. Symington and Hruska).

69. *Id.* at 17124.

70. See 119 CONG. REC. 17128-29 (1973) (statement of Sen. Eagleton).

71. *Id.* at 17128.

72. *Id.* at 17129.

73. *Id.*

Finally, Eagleton addressed the human costs of the war. In the few months since the cease fire agreement was signed, the United States had dropped more than 146,000 tons of bombs on Cambodia and Laos.⁷⁵ Ten Americans had died; two were missing. “And we must also consider the people of Cambodia and Laos—people who have suffered even greater losses.”⁷⁶ The bombing had also “created a serious problem for the living” with millions of Cambodians now refugees. The bombing would impose “devastation” on Cambodia which would be felt “for a decade.”⁷⁷ “Are our goals in Indochina worth this pain and tragedy? Is it worth the risk that the list of MIA’s will increase? Or that another American will be captured and held as a prisoner of war?”⁷⁸

In closing, Eagleton again exhorted the Senate to assert Congress’s constitutional role:

The American people are now more aware than they have been for 30 years of the awesome responsibilities assigned to Congress by the Constitution. If we base our vote today on a desire to defer our judgment to the President, then we will deal a heavy blow to the institutions of government devised by the Founding Fathers.

It is time to answer the hard questions for the American people. Either we vote to stop the war or we vote to grant the President our authority to continue to wage war in Indochina.⁷⁹

The Senate voted 55 to 21 that the Eagleton Amendment was germane to the language the House of Representatives had passed.⁸⁰

On May 31, 1973, Eagleton led a successful effort to defeat amendments offered by Senator Robert Taft⁸¹ and Senator Bob Dole,⁸² which would have eviscerated his Amendment. After Dole delivered an impassioned plea that the Eagleton Amendment would undermine efforts to gain accounting of American prisoners of war and those missing in action,⁸³ Eagleton replied that the issue before the Senate was rather whether the bombing of Cambodia was “legal or wise.”⁸⁴

74. *Id.*

75. 119 CONG. REC. 17130 (1973) (statement of Sen. Eagleton).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. 119 CONG. REC. 17140 (1973).

81. The Taft Amendment would have created an exception to the Eagleton Amendment to allow bombing of Cambodia and Laos against North Vietnamese forces. It was defeated 63 to 17. *Id.* at 17663; see EAGLETON, *supra* note 12, at 164–65.

82. The Dole Amendment was defeated 56 to 25. 119 CONG. REC. 17687 (1973).

83. *Id.* at 17669 (statement of Sen. Dole).

84. *Id.* at 17680 (statement of Sen. Eagleton).

The vote later that day in favor of Eagleton's Amendment was almost anti-climatic. It carried 63 to 19.⁸⁵ The significance of the vote was unmistakable. It constituted the first time the House or Senate had voted for an absolute cut off of funding for combat activities in Southeast Asia.⁸⁶ The margin of more than three to one represented a strong statement of Senate opposition to Nixon's bombing.

The House and Senate bills then went to a conference.⁸⁷ The House conferees included a sizeable delegation of Vietnam hawks who were opposed to the Eagleton Amendment.⁸⁸ Although the House conferees did not adopt the Eagleton Amendment they allowed the full House to decide between the original House position and the more stringent Eagleton Amendment.⁸⁹ On June 25, 1973, the House twice defeated efforts to weaken the Eagleton Amendment.⁹⁰ First, it adopted the Eagleton Amendment in preference to its own legislation, 235 to 172.⁹¹ Representative George Mahon then offered an amendment to defer the effective date of the Eagleton Amendment for sixty days, until September 1, 1973.⁹² Mahon's Amendment failed on a 204 to 204 vote.⁹³ The House then approved the measure, including the Eagleton Amendment, by a voice vote.⁹⁴ The Senate approved the conference report on H.R. 7447 on June 26, 1973 by a vote of 81 to 11.⁹⁵ The supplemental appropriations with the Eagleton Amendment now was presented to Nixon for his consideration.⁹⁶

Nixon wasted no time responding. He vetoed the bill the very next morning.⁹⁷ He did not pull any punches in stating his objections. Nixon expressed his "grave concern" that the Eagleton Amendment would "cripple or destroy the chances for an effective negotiated settlement in Cambodia and the

85. *Id.* at 17692.

86. Richard L. Madden, *House Must Act: Its Version Is Milder—Delay in Sending Bill to Nixon Seen*, N.Y. TIMES, June 1, 1973, at 1.

87. EAGLETON, *supra* note 12, at 168.

88. *Id.* at 169.

89. *Id.*

90. *Id.* at 172.

91. 119 CONG. REC. 21173 (1973).

92. *Id.*; EAGLETON, *supra* note 12, at 172.

93. 119 CONG. REC. 21179 (1973); Richard L. Madden, *House Approves Cutoff of Funds to Bomb Cambodia*, N.Y. TIMES, June 26, 1973, at 1, 6. At one point, Mahon's Amendment held a 205 to 204 margin until Representative Gunn McKay, D.-Utah, withdrew his vote for Mahon's Amendment to pair with an absent colleague who opposed it. Madden, *supra*, at 6. Speaker Albert promptly announced that Mahon's motion was defeated. *Id.*

94. Madden, *supra* note 93, at 1.

95. 119 CONG. REC. 21544 (1973).

96. EAGLETON, *supra* note 12, at 172.

97. *Id.* at 173.

withdrawal of all North Vietnamese troops”⁹⁸ A total cessation of bombing in Cambodia would “virtually remove Communist incentive to negotiate and would thus seriously undercut ongoing diplomatic efforts to achieve a ceasefire in Cambodia.”⁹⁹ It would make a Communist victory more likely in Cambodia thereby undermining “the fragile balance” in Southeast Asia.¹⁰⁰ And it “would call into question our national commitment,” causing a “serious blow to America’s international credibility.”¹⁰¹ If a Supplemental Appropriation was not passed, nine government agencies, including the Social Security Administration, would be unable to pay their employees.¹⁰² But a “greater disservice” would be to enact the Eagleton Amendment which would jeopardize Nixon’s efforts “to create a stable, enduring structure of peace around the world.”¹⁰³

Legislative efforts to end the Cambodian bombing continued on other fronts. The House proceeded to consider a continuing resolution to permit federal departments to operate in the new fiscal year at their present appropriations pending congressional approval of appropriations for the new year.¹⁰⁴ On June 26, 1973, the House had added the Eagleton Amendment, 240 to 172, to the continuing resolution, which would allow government agencies to operate during the fiscal year about to begin.¹⁰⁵

The following day, Eagleton offered his Amendment to pending legislation to raise the debt ceiling of \$465 billion, which would expire on June 30, 1973.¹⁰⁶ He encouraged his colleagues to “persist in this endeavor to bring this unconstitutional and unauthorized war to a termination.” He pointed out that Americans were being killed in Cambodia and Laos and that American bombers had dropped more tonnage on Cambodia in the five months since the cease fire was signed than was dropped on North Vietnam the prior three years. Nixon clearly wished “to continue a bombing policy which is improvident, unwise, and goes directly to the heart of the constitutional process. It is our authority—Congress’ authority—to determine how, when, and where we go to war,” said Eagleton. If Nixon persisted in his

98. Veto of the Supplemental Appropriations Bill Containing a Restriction on United States Air Operations in Cambodia, PUB. PAPERS 621 (June 27, 1973).

99. *Id.*

100. *Id.*

101. *Id.* at 621–22.

102. *Id.* at 622.

103. Veto of the Supplemental Appropriations Bill Containing a Restriction on United States Air Operations in Cambodia, PUB. PAPERS 622 (June 27, 1973).

104. EAGLETON, *supra* note 12, at 173.

105. 119 CONG. REC. 21320–21 (1973); EAGLETON, *supra* note 12, at 173.

106. EAGLETON, *supra* note 12, at 173–74.

“methodology” Congress must persist, too. To delete the Eagleton Amendment would be tantamount to sanctioning the war in Cambodia.¹⁰⁷

There was limited debate. Senator Pete Domenici, who had previously supported the Eagleton Amendment, argued against it now, saying it was “inappropriate” to attach it to the debt ceiling legislation to which it was not “relevant.”¹⁰⁸ Eagleton responded that inasmuch as the Cambodian bombing was expensive it contributed to the need to raise the debt ceiling.¹⁰⁹ Senator George McGovern commended Eagleton for offering “an eminently sensible proposal” and thought “[w]e should make one more effort in the Senate to put an end to this senseless bombing of Cambodia and Laos.”¹¹⁰ Since senators had made clear by overwhelming votes their opposition to the bombing, McGovern declared, “this is Nixon’s war. This is a Presidential war being conducted in clear defiance of the overwhelming expression of opinion of the Members of the Congress of the United States.”¹¹¹ But Senator John Tower argued that though Nixon had not started the war, he had ended it.¹¹² Eagleton’s Amendment “is calculated to perpetuate the war in Southeast Asia.”¹¹³ The war was “Congress’ war.”¹¹⁴ And Senator Strom Thurmond urged his colleagues to give Nixon “a little elbow room in which to negotiate.”¹¹⁵ Eagleton’s bill was playing politics and would result “in great detriment to the welfare of the Nation.”¹¹⁶

In reply, Eagleton agreed that the war in Cambodia was “Nixon’s war” since it was “being waged by the President without the authority of Congress.”¹¹⁷ Eagleton implored the Senate “to do everything in our power so that our voices and pleas will be heeded.”¹¹⁸

Although it may have sounded at the time as if Senators McGovern and Eagleton were traveling a common path, in retrospect the different formulations they used may have foreshadowed their different approaches which became evident forty-eight hours later. Whereas McGovern thought “[w]e should make *one more effort* in the Senate”¹¹⁹ to end the bombing, Eagleton implored his colleagues “to do *everything in our power* so that our

107. 119 CONG. REC. 21659 (1973) (statement of Sen. Eagleton).

108. *Id.* at 21660 (statement of Sen. Domenici).

109. *Id.* (statement of Sen. Eagleton).

110. *Id.* (statement of Sen. McGovern).

111. *Id.*

112. 119 CONG. REC. 21660 (1973) (statement of Sen. Tower).

113. *Id.* at 21660–61 (statement of Sen. Tower).

114. *Id.* at 21661.

115. *Id.* (statement of Sen. Thurmond).

116. *Id.*

117. 119 CONG. REC. 21661 (1973) (statement of Sen. Eagleton).

118. *Id.*

119. *Id.* at 21660 (statement of Sen. McGovern) (emphasis added).

voices and pleas will be heeded.”¹²⁰ Whereas McGovern concluded that “from here on out, this is Nixon’s war” because it was conducted “in clear defiance of the overwhelming expression of opinion of the Members of the Congress . . . ,”¹²¹ Eagleton viewed it as Nixon’s war because it was being waged without congressional authorization.¹²² Whereas McGovern suggested Congress had discharged its duty by the overwhelming votes,¹²³ Eagleton argued that “[w]e exercise that responsibility in a reasonable manner in cutting off funds for Cambodia.”¹²⁴ In any event, the Eagleton Amendment carried, 67 to 29.¹²⁵ Only seven Democrats voted against it; twenty Republicans voted for it.¹²⁶

On June 27, 1973, the House voted 241 to 173 to override Nixon’s veto of the supplemental request.¹²⁷ Although the House vote was an impressive showing, it fell 35 votes short of the two-thirds supermajority the Constitution required to override Nixon’s veto.¹²⁸

At this point White House counselor and former Representative and Secretary of Defense Melvin Laird on Nixon’s behalf began to seek a compromise with Congress.¹²⁹ Laird’s effort was novel. “That was another first—the executive branch was actively bargaining with Congress over its right to continue a war that had never been authorized,” Eagleton later wrote.¹³⁰ On June 28, 1973, Laird advised House leaders that Nixon would sign legislation which deferred the cutoff to August 15, 1973.¹³¹ The same day Rogers met in closed session with the Senate Foreign Relations Committee; following the meeting, Rogers and Fulbright both seemed receptive to a compromise.¹³²

III. THE JUNE 29, 1973 SENATE DEBATE

On June 29, 1973, the curtain lifted for the final act. On that day, the Senate proceeded to consider H. J. Res. 636, the continuing resolution which

120. *Id.* at 21661 (statement of Sen. Eagleton) (emphasis added).

121. *Id.* at 21660 (statement of Sen. McGovern).

122. 119 CONG. REC. 21661 (1973) (statement of Sen. Eagleton).

123. *See id.* at 21660 (statement of Sen. McGovern).

124. *Id.* at 21661 (statement of Sen. Eagleton).

125. *Id.*

126. *See id.*; *see also* Madden, *supra* note 86.

127. 119 CONG. REC. 21778 (1973).

128. *See id.*

129. HENRY A. KISSINGER, YEARS OF UPHEAVAL 356–59 (1982).

130. EAGLETON, *supra* note 12, at 175.

131. Richard L. Madden, *Conferees Agree on a Fund Cutoff for the Bombing*, N.Y. TIMES, June 29, 1973, at 1.

132. *Id.*

the House had passed for fiscal year 1974.¹³³ That morning, the Senate Foreign Relations Committee had voted 15 to 2 to support a compromise between the Nixon White House and Senator J. William Fulbright and some other Senate opponents of the bombing¹³⁴ which would prohibit use of appropriated funds to “finance the involvement of United States military forces in hostilities” in, over, or off the shore of Indochina on and after August 15, 1973.¹³⁵ The Fulbright Compromise deferred the cutoff for six weeks.¹³⁶ It also extended the ban to all of Southeast Asia, not simply Cambodia and Laos.¹³⁷ Only Senate Majority Leader Mike Mansfield and Senator Edmund S. Muskie opposed it in Committee.¹³⁸

The June 29, 1973 debate on the Eagleton Amendment and Fulbright Compromise, in many respects, showed the Senate at its finest. Eagleton later called the debate “the best” he had participated in during his first four years in the Senate.¹³⁹ Hubert Humphrey called the debate “the Senate’s finest hour.”¹⁴⁰ Indeed, thirty Senators participated in a discussion that explored the Eagleton Amendment and Fulbright Compromise from a variety of angles.¹⁴¹ Senators spoke with passion and engaged each other, on and off the floor, and frequent allies found themselves on opposite sides of the question.¹⁴²

In presenting the Compromise, Senator Fulbright argued that the “executive and legislative branches will, at last, act in a coordinate manner to bring to a close this tragic episode in our Nation’s history.”¹⁴³ Fulbright insisted that the August 15 cutoff should not be construed as *recognition* of Nixon’s authority to continue military action in the interim: “The view of most members of the committee has been and continues to be that the President does not have such authority” absent “specific congressional approval.”¹⁴⁴ Although most members would have preferred the Eagleton Amendment, refusal to compromise with Nixon “might precipitate a serious confrontation

133. 119 CONG. REC. 22302 (1973).

134. *Id.* at 22305 (statement of Sen. Fulbright).

135. *Id.* The Amendment read as follows: “Notwithstanding any other provision of law, on or after August 15, 1973, no funds herein, heretofore, or hereafter appropriated may be obligated or expended to finance the involvement of United States military forces in hostilities in or over or from off the shores of North Vietnam, South Vietnam, Laos, or Cambodia.” *Id.*

136. *See id.* (statement of Sen. Fulbright).

137. *Id.*

138. EAGLETON, *supra* note 12, at 176.

139. *Id.* at 182.

140. 119 CONG. REC. 22316 (1973) (statement of Sen. Humphrey).

141. *Id.* at 22302–28.

142. *See, e.g.,* LEROY ASHBY & ROD GRAMER, *FIGHTING THE ODDS: THE LIFE OF SENATOR FRANK CHURCH* 405–06 (1994) (describing encounters of Sen. Church and his aides with other liberal democrats).

143. 119 CONG. REC. 22305 (1973) (statement of Sen. Fulbright).

144. *Id.*

between the two branches of government which would result in severe hardships for many.”¹⁴⁵ The Committee felt compelled to do all it could “to avoid such a confrontation, provided a compromise could be found which would reaffirm the proper constitutional role of the Congress with regard to the warmaking power and which would specify a date certain for” an end to United States military involvement in Indochina.¹⁴⁶

Fulbright reported that the Committee had received assurances that the bombing of Cambodia would not be escalated during the interim.¹⁴⁷ The important facts were “that the war will end, that a proper constitutional balance will have been restored, and that a new era of national unity and positive accomplishment will now be possible.”¹⁴⁸

Others echoed Fulbright’s characterization. Senator Hugh Scott, the minority leader, said the Compromise was in the national interest.¹⁴⁹ Senators had given up their desire that the bombing end immediately, but the Executive had accepted a deadline which hampered its negotiating stance. Scott would remind those who would complain that the Compromise “does continue the right to [bomb Cambodia]” until August 15 “that the right would have continued for a much longer time had the Executive prevailed.”¹⁵⁰ Senator Jacob Javits, who had supported the Fulbright Compromise in the Foreign Relations Committee, approached the agreement with a “heavy” heart but thought it necessary to save lives, avoid “a domestic unconstitutional confrontation,” and avoid a worsening of the bad atmosphere in the country.¹⁵¹ Senator George McGovern praised the Compromise as a “tactical effort to get the best possible veto-proof solution.”¹⁵² Moreover, it did not preclude Congress from attaching provisions requiring an immediate cutoff to other legislation.¹⁵³

The congratulatory tenor of the discussion changed when Fulbright yielded to Eagleton for a question.¹⁵⁴ Eagleton proceeded to expose the inconsistencies in Fulbright’s position in the following colloquy:

Mr. EAGLETON. . . . I want to inquire as to what this resolution includes. What does it prevent within the next 45 days? Does it permit continued bombing between now and August 15?

145. *Id.*

146. *Id.*

147. *Id.*

148. 119 CONG. REC. 22305 (1973) (statement of Sen. Fulbright).

149. *Id.* (statement of Sen. Scott).

150. *Id.*

151. *Id.* at 22306 (statement of Sen. Javits).

152. *Id.* (statement of Sen. McGovern).

153. 119 CONG. REC. 22306 (1973) (statement of Sen. McGovern).

154. *See id.*

Mr. FULBRIGHT. As I have said, I do not regard him as having the right to this. He has the power to do it. And unless we have something like this, the only sanction we have here is to impeach him. And I do not think that is practical. I do not recommend it. I know of no other alternative.

Mr. EAGLETON. In the light of the legislative history, meaning the statement of former Secretary of Defense Richardson that we will continue the bombing unless the funds are cut off, will we with the adoption of this resolution permit the bombing of Cambodia for the next 45 days? That is the question I pose to the Senator from Arkansas.

Mr. FULBRIGHT. Until August 15.

Mr. EAGLETON. Would it permit the bombing of Laos?

Mr. FULBRIGHT. It would not prevent it.

Mr. EAGLETON. Would it permit the bombing of North and South Vietnam until August 15?

Mr. FULBRIGHT. I do not think it is legal or constitutional. But whether it is right to do it or not, he has done it. He has the power to do it because under our system there is not any easy way to stop him.

I do not want my statement to be taken to mean that I approve of it or think that it is constitutional or legal for him to do it. He can do it. He had done it. Do I make myself clear?

Mr. EAGLETON. In a way yes, and in a way no. If we adopt this resolution, the President will continue to bomb Cambodia. That means quite simply that we will sanction it, does it not?

Mr. FULBRIGHT. We do not sanction it. It does not mean that we approve of the bombing. This is the best way to stop it. I have never approved of it. And I do not wish my answer to indicate that I approve of the bombing, because I do not.

Mr. EAGLETON. But the President will exercise a power to bomb in Indochina within the next 45 days, is that correct? A power that will now be sanctioned by our action?

Mr. FULBRIGHT. The President has the power to do a lot of things of which I do not approve.

Mr. EAGLETON. He will exercise that power, and whether he exercises that power wisely, we know that within the next 45 days he will exercise a right to bomb Cambodia—a right given him by the Congress of the United States.

Mr. FULBRIGHT. I do not consider that he has the right to do it. But because we are unable to muster the votes, this is a compromise that would

stop it. This is the time we have had a majority of both Houses take any action to prohibit bombing.

Mr. EAGLETON. But he would now have the power by our action. Would he also have the power to bomb Laos?

Mr. FULBRIGHT. As he viewed it, yes. And he would exercise the power.

Mr. EAGLETON. He would have the power as he viewed it to bomb North Vietnam and South Vietnam.

Mr. FULBRIGHT. The Senator is correct.¹⁵⁵

Those supporting the Fulbright Compromise made several points. They argued that the August 15, 1973 cutoff was the best resolution opponents of the bombing could get.¹⁵⁶ Absent the agreement, Nixon would veto the Eagleton Amendment, thereby shutting down certain government agencies at hardship to government employees and those they serve.¹⁵⁷ Since the House would not override Nixon's veto, Nixon might continue the bombing indefinitely absent this agreement.¹⁵⁸ The August 15, 1973 Compromise did not constitute approval of the bombing.¹⁵⁹ It was "the only possible way out of a nearly impossible situation."¹⁶⁰ Congress could adopt the Fulbright Compromise calling for the end of bombing on August 15, 1973 and, after Nixon signed the bill into law, pass the Eagleton Amendment terminating the bombing sooner.¹⁶¹

Senator Frank Church, a long-time foe of the Vietnam War and an architect of the Fulbright Compromise found "repugnant" the implication that the proponents of the Compromise "are somehow relegated to the ranks of the impure, while those who oppose it somehow stand on the side of conscience."¹⁶² Past legislative proposals which imposed deadlines were not viewed as endorsements of the war; why should this one be so viewed? The war in Cambodia is an "abomination," "unconstitutional," "illegal,"

155. *Id.* at 22306–07 (statements of Sens. Eagleton and Fulbright).

156. *See, e.g., id.* at 22307 (statement of Sen. Fulbright).

157. *Id.* at 22311 (statements of Sen. Fulbright).

158. 119 CONG. REC. 22307 (1973) (statement of Sen. Case); *id.* (statement of Sen. Aiken); *id.* at 22310 (statement of Sen. McIntyre); *id.* at 22316 (statement of Sen. Humphrey); *id.* at 22309 (statement of Sen. Stevenson); *id.* at 22316 (statement of Sen. Hollings).

159. *Id.* at 22310 (statement of Sen. McIntyre); *see also id.* at 22309 (statement of Sen. Stevenson).

160. *Id.* at 22310 (statement of Sen. McIntyre); *see also id.* at 22311 (statement of Sen. Fulbright).

161. *Id.* at 22315 (statement of Sen. McGovern); *id.* at 22318 (statement of Sen. Symington).

162. *Id.* at 22310 (statement of Sen. Church).

“immoral,” and “idiotic.”¹⁶³ But the issue involved “a stark and simple matter of how we bring this awful war to an end.”¹⁶⁴ Congress could not stop the war without overriding Nixon’s veto and it lacked the votes to achieve that result.¹⁶⁵ If Congress passed the Eagleton Amendment again, Nixon would not “cave in” and sign it.¹⁶⁶ The Fulbright Compromise was not a “cave-in.”¹⁶⁷ The alternative course would be “a futile debate, flouting our impotence, and allowing this war in Cambodia to continue indefinitely.”¹⁶⁸

Eagleton responded that no one questioned the motives or integrity of the architects of the Fulbright Compromise.¹⁶⁹ The debate turned on “philosophy.”¹⁷⁰ Eagleton then addressed Church’s argument that supporting a deadline had never before been seen as supporting the war.¹⁷¹ Referring to the previous “end-the-war” efforts, Eagleton argued that “there is a big difference between now and the time that some of those were offered several years ago.”¹⁷² Then, half a million American troops were in Vietnam. Time limits were included in proposed withdrawal legislation to allow for their removal in a safe manner. Now that the troops were home, an extended time limit could have no such justification. Its necessary effect was to put Congress’s sanction on the bombing. Instead of emphasizing that Nixon “will not be cowed” as Church had done, “we must ask ourselves whether we will be cowed.” Nixon’s veto threat could not “whiplash . . . [Congress] into conforming to his desire.” Congress was “caving in when we think of a veto.”¹⁷³

One of the Senate’s most eloquent orators, Senator John Pastore rose to defend the Fulbright Compromise. He would not disagree with anything Eagleton had said or the logic implicit in his position that “if it is immoral to kill after August 15, surely it is immoral to kill now.” But “is it not better to go about it in a realistic and practical way” and act to “stop this immorality after August 15.” The question was not “who is cowed by whom or who is retreating from whom” but what was the most practical way to end the bombing. The only alternative to the Fulbright Compromise was that Nixon

163. 119 CONG. REC. 22310 (1973) (statement of Sen. Church).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. 119 CONG. REC. 22310–11 (1973) (statement of Sen. Church). Senator Church’s biographers report that he left with “mixed emotions” and was “pained” by the disparaging remarks of his traditional allies. ASHBY & GRAMER, *supra* note 142, at 407.

169. 119 CONG. REC. 22312 (1973) (statement of Sen. Eagleton).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 22312.

would continue bombing indefinitely “unless we tie up the mechanism of government.”¹⁷⁴ The Senate was faced with a choice of two evils.¹⁷⁵

Eagleton raised four points in response.¹⁷⁶ First, he reminded his colleagues of the impact of forty-five days of additional bombing in Cambodia.¹⁷⁷ Cambodian lives would be lost and the country subjected to “havoc.”¹⁷⁸ Moreover, if an American pilot was shot down the administration would ask Congress to extend authority to continue bombing and “we will find ourselves locked in the deadly embrace of yet another war—this time in Cambodia.”¹⁷⁹

Second, compromise and accommodating, though generally appropriate legislative activities, were not proper in this context where constitutional issues were implicated. As Eagleton noted, “But the continued bombing of Cambodia is not an issue that yields to compromise. Congress cannot sanction an unconstitutional and illegal endeavor for ‘just a little while.’ There is no way of being just a little bit unconstitutional, or just a little bit illegal.”¹⁸⁰

Third, he raised an institutional argument. Senators could not evade decision and responsibility by punting to the White House. They must accept personal responsibility, a refrain Eagleton had sounded in his April 3, 1973 and May 29, 1973 speeches.¹⁸¹

We have created a legend around the tough, lonely decisions that are made by the one man who occupies the oval office. But today each of us is faced with a decision that could mean life or death for American pilots or Cambodian citizens. Each of us must agonize over the burden of our own office—we must agonize over the great responsibility assigned to the legislative branch by the Constitution.¹⁸²

Congress must reassert its constitutional responsibility. It had a duty to pass “vital appropriations bills,” but it also had a “solemn duty to decide how, when and where our Nation goes to war.” Congress exercised that duty by attaching a cutoff amendment. If Nixon vetoed such an appropriation, “he must accept the full responsibility for the consequences of that action.” Congress “should not be bludgeoned into giving legitimacy to President Nixon’s illegal Cambodian war.” Congress acted appropriately in sending Nixon the

174. 119 CONG. REC. 22312 (1973) (statement of Sen. Pastore).

175. *Id.* at 22312–13.

176. *See id.* at 22313 (statement of Sen. Eagleton).

177. *Id.*

178. *Id.* at 22313.

179. 119 CONG. REC. 22313 (1973) (statement of Sen. Eagleton).

180. *See id.*

181. *Id.* at 10679–80, 17129.

182. *Id.* at 22313.

continuing resolution with the Eagleton Amendment. If Nixon chose to veto it, “the choice is his.”¹⁸³

Finally, Eagleton raised a practical argument. If Congress stood its ground and passed the continuing resolution with the Eagleton Amendment, Nixon would ultimately sign it rather than bring the government to a halt.¹⁸⁴ Eagleton did not believe Nixon would decide that bombing Cambodia for another forty-five days was “more precious to him than continuing the functioning of the U.S. Government.”¹⁸⁵

Although Eagleton led the fight against the August 15 Compromise, others joined in raising these points. Majority leader Mike Mansfield, for instance, implored his colleagues to assert their institutional role, even at the risk of provoking a constitutional confrontation:

The warmaking power is that of Congress exclusively, and the war in Cambodia does not have a shred of validity attached to it. It is illegal, it is unconstitutional, it is immoral.

Why should we be afraid of a confrontation with the executive branch of this Government? Why do we have to cave in so as to avoid the possibility of being unable to override a veto? Why can we not face up to our responsibilities under the Constitution?¹⁸⁶

The bombing had cost, and would cost, the lives and freedom of American soldiers. Moreover, America had dropped more than 200,000 tons of bombs on Cambodia in five months “on a poor, hapless people living in a nation where the majority of the inhabitants desire nothing more than to be let alone.”¹⁸⁷ The United States was denying the Cambodian people the right to determine their own destiny.¹⁸⁸

Senator Mark Hatfield derided the arguments of those who defended the Fulbright Compromise as a legitimate legislative compromise:

There are times and there are issues when one can never compromise.

One does not compromise about the constitutional responsibilities of this body.

One does not compromise about law.

One does not compromise about the slaughter of innocents.¹⁸⁹

183. *Id.*

184. 119 CONG. REC. 22313–14 (1973) (statement of Sen. Eagleton).

185. *Id.* at 22313.

186. *Id.* at 22307 (statement of Sen. Mansfield).

187. *Id.* at 22308.

188. *Id.*

189. 119 CONG. REC. 22308 (1973) (statement of Sen. Hatfield).

Senator Edward M. Kennedy reminded his colleagues that “millions of innocent” people had “endured the brutal onslaught of death and destruction rained down on their homes and villages and countryside” by American bombers.¹⁹⁰ The Fulbright Compromise would “go down in infamy in American history.”¹⁹¹ It was a “cruel and calculated pact” to “ratify the unconscionable and unconstitutional warmaking” Nixon was conducting. The senators should not grant Nixon an “amnesty for the slaughter of the past, and a license for 6 more weeks of slaughter in Cambodia.” If the Senate accepted the Fulbright Compromise, the Cambodian blood shed during the next six weeks would stain its hands. The only purpose of the Compromise was “to save some shred of [Nixon’s] tattered prestige.”¹⁹² The Cambodian people should not bear that price.¹⁹³

Senator Edmund Muskie did not see confronting Nixon as problematic. Tension and conflict between the two political branches would cause “the foundations of government . . . to shake.”¹⁹⁴ But that was how government was supposed to work:

When the President, and we in Congress, are at odds about our respective constitutional roles, should we timidly ask him to return what is ours and expect him to give it back without a fight?

It is in the nature of such tensions and such conflicts that we have to stand up and he has to stand up, until somehow something gives.

Congress had not “tried hard enough” to assert its prerogatives.¹⁹⁵

Similarly, Senator Charles Mathias argued that Congress seemed unwilling “to bear the burden of the responsibility for exercising the power that is entrusted to us.”¹⁹⁶ Congress’s ability to exercise its constitutional “power of war and peace” was “only as strong as our will to employ it.”¹⁹⁷

Senator Walter F. Mondale pointed out a fallacy in the argument that the Fulbright Compromise was the only way to end the bombing since Congress lacked the votes to override Nixon’s veto.¹⁹⁸ Congress’s power to end the war immediately did not turn on whether it could override a veto. Congress could simply refuse to pass the continuing resolution or it could refuse to extend the debt ceiling.¹⁹⁹ Such inaction could not, of course, be presented to the

190. *Id.* (statement of Sen. Kennedy).

191. *Id.* at 22309.

192. *Id.*

193. *See id.* at 22308–09.

194. 119 CONG. REC. 22317 (1973) (statement of Sen. Muskie).

195. *Id.*

196. *Id.* at 22318 (statement of Sen. Mathias).

197. *Id.*

198. *Id.* at 22313 (statement of Sen. Mondale).

199. 119 CONG. REC. 22313 (1973) (statement of Sen. Mondale).

President for approval or veto. Either course would deprive Nixon of the resources to prosecute the war.²⁰⁰

Mondale's point struck Senator Pastore as "simplifying the unsimplifiable."²⁰¹ It was easy to say Congress could "bring the Government to a halt." But what would then become of "thousands and thousands of paraplegics and veterans of Vietnam" who were dependent on government services for their most basic needs? If Congress stopped "the mechanisms of government" the "injury and the irreparable harm will be untold, and it will remain on our souls." Senator Pastore concluded his statement:

I repeat, Senator Eagleton, you are absolutely right. I do not question you one bit. But they have forced us into a corner. We are into a corner. The decision we have to make tonight is not a decision on what is right or what is wrong, but a decision on what is the best course to follow as between two evils—and I am suggesting that the lesser of the two evils is to compromise.²⁰²

Eagleton did not agree. Congress had "let ourselves be forced into this corner. After one veto, we have taken a 'powder.' We have forfeited our role within our system." Eagleton repeated his belief that Nixon would not again veto the Eagleton Amendment if it meant shutting down the government.²⁰³

Some other liberal senators did not agree. Senator George McGovern, for instance, argued that the vote raised no "question of principle" but simply one "of which strategy will achieve the result we seek."²⁰⁴ McGovern regarded the Fulbright Compromise as a "great victory."²⁰⁵ Far from being "a capitulation for the Senate" it was "the culmination of years of effort" by members of Congress.²⁰⁶

Senator Hubert Humphrey, too, supported the Fulbright Compromise. He thought "what we need is not a test of will in this body, but a test of judgment."²⁰⁷ The Fulbright Compromise was the best way to end the bombing under the circumstances. "We are here to help govern a country, not merely to prove a point, or confront a President."²⁰⁸

A number of senators, including George McGovern and Stuart Symington, suggested that the Congress could pass the Fulbright Compromise and, once Nixon signed it, adopt the Eagleton Amendment, thereby ending the

200. *Id.*; see also *id.* at 22318 (statement of Sen. Mathias).

201. *Id.* at 22314 (statement of Sen. Pastore).

202. *Id.*

203. *Id.* (statement of Sen. Eagleton).

204. 119 CONG. REC. 22315 (1973) (statement of Sen. McGovern).

205. *Id.*

206. *Id.* at 22315.

207. *Id.* at 22316 (statement of Sen. Humphrey).

208. *Id.*

bombing.²⁰⁹ Others pointed out that argument was empty rhetoric.²¹⁰ As a practical matter, the vote on the Fulbright Compromise was the “end of the fight.”²¹¹

By a vote of 64 to 26, the Senate voted in favor of the Fulbright Compromise.²¹² Those supporting the motion included the Senate’s conservative members as well as some leading doves—Fulbright, Church, Case, Humphrey, McGovern, Gaylord, Nelson, and Symington.²¹³ Those opposed included nineteen Democrats (e.g., Birch, Bayh, Philip Hart, Kennedy, Mansfield, Mondale, Muskie, and, of course, Eagleton).²¹⁴ The Senate then voted, 58 to 31, to delete the Eagleton Amendment.²¹⁵ The vote generally tracked the prior one except that a few doves—McGovern, Nelson, Claiborne Pell, Symington, and William Proxmire—switched sides.²¹⁶

In short order both houses passed the continuing resolution with the Fulbright Compromise. After deleting the Eagleton Amendment, they also passed legislation to extend the debt ceiling.²¹⁷ The front page banner headline of the June 30, 1973 *New York Times* proclaimed “Nixon Agrees to Stop Bombing By U.S. in Cambodia By Aug. 15, With New Raids Up to Congress.”²¹⁸ The following day a reporter wrote that it had been a “case of an eyeball to eyeball confrontation in which both sides blinked.”²¹⁹ And the *Times* praised Congress for using its power of the purse “with extraordinary determination” to extract concessions which “substantially restore[d] its eroded constitutional role in the war-making process.”²²⁰ The *Washington Post* viewed the episode as a triumph for Congress.²²¹ Nixon signed the legislation on July 1, 1973.²²²

209. 119 CONG. REC. 22315–16 (1973) (statement of Sen. McGovern); *id.* at 22318 (statement of Sen. Symington).

210. *Id.* at 22317 (statement of Sen. Muskie); *see also id.* at 22318 (statement of Sen. Mathias); *id.* at 22322 (statement of Sen. Abourezk).

211. *Id.* at 22317 (statement of Sen. Muskie); *id.* at 22318 (statement of Sen. Mathias).

212. *Id.* at 22325.

213. *Id.*

214. 119 CONG. REC. 22325 (1973).

215. *Id.* at 22326.

216. *Id.*

217. *Id.* at 22617, 22631–32.

218. Richard L. Madden, *Nixon Agrees to Stop Bombing by U.S. in Cambodia by Aug. 15, with New Raids up to Congress*, N.Y. TIMES, June 30, 1973, at 1.

219. Richard L. Madden, *Nixon Accepts a Cut-off*, N.Y. TIMES, July 1, 1973, at 146.

220. Editorial, *Winning Compromise*, N.Y. TIMES, July 1, 1973, at 154.

221. Editorial, *Vietnam: The End Really is in Sight*, WASH. POST, July 3, 1973, at A16.

222. Statement on Signing the Second Supplemental and Continuing Appropriation Bills, PUB. PAPERS 635–36 (July 1, 1973).

Contrary to his assurances, Nixon escalated the bombing. On August 3, 1973 Nixon promised to obey the August 15 cutoff, but blamed Congress for undermining the enemy's incentive to negotiate.²²³

IV. EAGLETON'S ROLE ASSESSED

Eagleton's contribution exemplified legislating at its finest. Rather than contenting himself with the symbolic but ineffective approach the House had taken, Eagleton set out to design legislation that would not simply express sentiment against the bombing but would also confine presidential discretion. He identified the problem with the House approach and drafted the remedy. Having done so, he steered it through the parliamentary minefields, overcoming a point of order with a showing of germaneness. Moreover, he placed the Amendment where it would receive fast track attention. Eagleton's actions raised the stakes for all involved. It confronted Nixon with the specter of a real and effective cutoff of funds. This prospect forced Nixon, for the first time, to bargain with Congress. Once Eagleton placed his Amendment on the continuing resolution and debt ceiling legislation, it also raised the stakes for Congress. Eagleton's Amendment forced Congress either to take responsibility for ending the bombing immediately or run the risk that a veto might upset constituents deprived of valued governmental services.

Eagleton was prepared to make that choice and accept responsibility for the outcome of his action. He did not seek a safe legislative haven which would allow him to speak against the bombing but vote to allow it to continue. On the contrary, his conduct made clear his commitment to help govern by making fundamental choices, not simply to take positions which had limited consequences.

Eagleton acted as he did because he believed the war in Vietnam, including the Cambodian bombing, was a mistaken policy. He also believed that Congress needed to reassert its institutional role in order to bring Congress's performance on issues of war and peace in line with constitutional prescriptions. The prescribed system of checks and balances could only function if Congress resumed its role.

Eagleton was disposed, in the vernacular of the day, to "tell it like it was." He did not hesitate to chastise Congress and congressmen for abdicating their responsibility and challenged it and them to reclaim the institutional and individual roles the Constitution assigned them. He also criticized the American people generally, and the anti-war movement in particular, for not being more vociferous in denouncing the bombing.

223. Letter to the Speaker of the House and the Majority Leader of the Senate About the End of United States Bombing in Cambodia, PUB. PAPERS 686 (Aug. 3, 1973).

Although Eagleton sought to vindicate principle he was not on a quixotic quest indifferent to the practicalities of the issues. He was a politician with a keen sense of what would, or should, work. He emphasized the possible loss of American pilots not only because of the likelihood of that contingency but also because he knew that argument resonated with Republican conservatives. He repeatedly insisted that Nixon would not veto the continuing resolution because he could not imagine Nixon in his weakened state deciding that another forty-five days of bombing was worth shutting down the government, especially when he could deflect the consequence of a bombing halt to Eagleton and his colleagues. Eagleton was convinced Congress had a winning hand if only it had the fortitude to play it.

Eagleton's contribution depended on his ability to view the problem from a different angle, in modern nomenclature, to think outside the box. He displayed that talent when he conceived the remedy inherent in the Eagleton Amendment, of regulating the use of old funds in a new appropriation. He demonstrated that talent again when he led the unsuccessful battle to place the Eagleton Amendment in the continuing resolution instead of embracing the August 15 Compromise. Eagleton saw, and deployed, the full range of moral, political, and constitutional arguments against the compromise in a way that few, if any, of his colleagues did.

This accomplishment did not depend on intellect alone, although Eagleton brought that attribute in abundance. It also was a testament to his political courage. He was not afraid to think and act independently of the prevailing consensus. Eagleton was willing to put his name on, and accept responsibility for, legislation that could lead to a Communist overrun of Vietnam or to suspension of government services instead of accepting a popular compromise which would deflect blame.

V. CONGRESS AND THE AUGUST 15 COMPROMISE

The Eagleton Amendment led to the conclusion of the bombing of Cambodia. By denying Nixon any funding for the bombing, it forced Nixon to seek the face-saving²²⁴ August 15 Compromise. But the Fulbright Compromise was not the untarnished triumph which some depicted. Why did Congress agree to give Nixon an additional six weeks to bomb Cambodia? And what did that action teach about Congress?

If the vote on the supplemental appropriation was a reliable guide, the sentiment in both houses overwhelmingly opposed Nixon's policy of bombing

224. 119 CONG. REC. 22322 (1973) (statement of Sen. Nelson). Senator Nelson characterized the Fulbright Compromise as "a face-saving resolution" for Nixon, saying that the administration had "so little face left that I think we ought to be charitable and let them save what little face they have left." *Id.*

Cambodia. Like the American people, members of Congress wanted the war to end. That sentiment was particularly strong in the Senate.

Had Nixon refused to bargain, perhaps the Senate would have continued to support the Eagleton Amendment. Yet Nixon did not want the continuing resolution or debt ceiling legislation to come to him encumbered with the Eagleton Amendment. That would have presented him two unappealing choices: sign the legislation and accordingly accept the Eagleton Amendment or veto it and risk the wrath of those inconvenienced by a government shut down. Nixon needed a third way.

The six week extension allowed Nixon to save some face but gave him little substantive benefit. Once the North Vietnamese knew Nixon's freedom to bomb was time-limited, they had little incentive to negotiate. Kissinger later concluded that the forty-five day extension was worth little. "An announced deadline was marginally better than an immediate cutoff but equally certain to destroy prospects for a cease-fire."²²⁵ Nixon could, and did, rain torrents of bombs on Cambodia; contrary to the assurances which some senators relied upon, he escalated the bombing.²²⁶ But he gained very little in negotiating strength, if anything, by that exercise which the extension allowed.

It was almost inevitable that Congress would accept the Compromise. Those congressmen with relatively weak commitments to the Eagleton Amendment were attracted to a compromise which would avert a constitutional confrontation and eliminate the risk of a shut down. Once Nixon was willing to deal, those least committed to Eagleton's position switched.

Yet that group, the Republican conservatives and moderates in both parties, were not the ones who made the case for the August 15 Compromise during the June 29 debate. The more interesting question was not why Congress was inclined to make a deal but why certain senators were. The supporters of the August 15 Compromise included some of the leading critics of the war—Fulbright, McGovern, Church, Symington, Case, Javits, and Nelson among them. Why did they embrace the Fulbright Compromise?

It is entirely possible that somewhat different motives influenced different members. Some members of the Senate Foreign Relations Committee may have anticipated attrition in support for the Eagleton Amendment once Nixon began to negotiate and may have felt compelled to position themselves in front of their nominal followers. Some members of the Senate Foreign Relations Committee, which had long been associated with anti-war activity, may have been unhappy that the Appropriations Committee had taken the lead to end the bombing. Were senators with long-standing dove credentials jealous that Eagleton, a freshman senator, had put his name on an issue with which they had long been identified? It is unlikely that Eagleton's close friend Gaylord

225. KISSINGER, *supra* note 129, at 358.

226. EAGLETON, *supra* note 12, at 184.

Nelson and his Missouri colleague, Stuart Symington, felt this way but some of the others may have harbored such resentment. Were senators simply anxious to conclude their work to go home for the July 4 recess?

For many, the August 15, 1973 Compromise maximized benefits while reducing risk. The electoral incentive, David Mayhew pointed out, rewards congressional position-taking more than legislative accomplishment.²²⁷ Having already voted for the Eagleton Amendment, senators could articulate their opposition to the bombing while presenting their support for the August 15 cutoff as a vote to end the war. Many of those who supported the Fulbright Compromise on June 29—Fulbright, Church, McGovern, etc.—did so while strenuously denouncing the bombing they were allowing to continue. To the public, the difference between the Eagleton and Fulbright positions was subtle. It is unlikely that voters would punish support of the August 15 cutoff or give greater reward to one who supported the Eagleton Amendment.

The Eagleton Amendment presented congressmen a much greater risk, however. If it provoked a veto, some Americans would be inconvenienced as their services were interrupted or delayed. They might direct some of their anger at those congressmen who placed higher value on ending the bombing than keeping services flowing.

The debate revealed the disposition of congressmen to compromise. Senator Fritz Hollings, for instance, rejected Eagleton's arguments which invoked "principle."²²⁸ "Government is the art of the possible. It is the art of compromise,"²²⁹ he said. To be sure, legislation requires compromise and governing often requires accepting what is achievable even if it falls short of aspirations. Surely our constitutional system contemplates compromises, not simply within a legislative body but between House and Senate, and between the Legislative and Executive Branches. The Senate was in a tough spot. Sentiment against the bombing in the Senate was far greater there than in the House.²³⁰ And the Executive Branch preferred to continue the bombing although Kissinger later confessed that few—primarily Nixon, Kissinger, and Alexander Haig—really embraced the bombing.²³¹

Yet the Fulbright Compromise was not an ordinary legislative compromise in which competing interests may find an accommodation between allocating a higher or lower sum of money for a program or imposing a tougher or more lenient standard. It involved a compromise, among other things, between the belief implicit in the Eagleton Amendment that the Cambodian bombing was

227. DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 61–77 (1974).

228. 119 CONG. REC. 22319 (1973) (statement of Sen. Hollings).

229. *Id.*

230. *See* EAGLETON, *supra* note 12, at 175.

231. KISSINGER, *supra* note 129, at 359.

not constitutionally authorized and President Nixon's determination to continue bombing.

Whether Congress had authorized the prior bombing of Cambodia generally is a somewhat intricate question beyond the scope of this discussion. Congress had appropriated funds from 1970 to 1973 with knowledge of the bombing.²³² Yet Nixon had justified the bombing to protect American troops in Vietnam.²³³ Presumably Congress's support for bombing Cambodia until March 28, 1973 reflected that purpose. Once the troops came home in late March 1973, that rationale vanished.

The administration believed the President's power as Commander in Chief authorized the bombing without any congressional approval.²³⁴ Accepting for a moment that position as a sincerely asserted constitutional stance would create an impasse between the constitutional interpretations of the Legislative and Executive Branches. Absent Supreme Court adjudication, which seemed unlikely, the branches would need to resolve their differences. Presumably at times Supreme Court justices strike compromises between competing constitutional assertions in order to resolve conflicts. It would not be unreasonable for the Executive and Legislative Branches to strike a similar accord.

Yet this analysis assumes that both sides are asserting credible constitutional positions. The claim that the Executive could bomb Cambodia hardly so qualified. Whatever the merits of Nixon's claim before March 29, 1973, it lost much of its validity once the war in Vietnam ended and the troops were safely home. Thus, the Executive at best offered a somewhat dubious constitutional claim against the compelling one implicit in the Eagleton Amendment that congressional assent was necessary.

More important for present purposes, the architects of the Fulbright Compromise regarded Nixon's position as constitutionally untenable. Fulbright asserted that, "I do not recognize the constitutional right or power of the Executive to continue bombing. Many of us do not believe he has a constitutional right to do this in Cambodia."²³⁵ Under questioning from Eagleton, Fulbright repeated that position. It was not "legal or constitutional" for Nixon to continue to bomb Cambodia until August 15, 1973.²³⁶ Nixon had

232. ELY, *supra* note 43.

233. KISSINGER, *supra* note 129, at 355 n.21.

234. See ELY, *supra* note 43, at 33-34.

235. 119 CONG. REC. 22305 (1973) (statement of Sen. Fulbright).

236. *Id.* at 22307.

“the power to do it because under our system there is not any easy way to stop him” but he did not have the “right to do it.”²³⁷

In essence Fulbright et al. were willing to strike a compromise which would allow Nixon to pursue for forty-five days more a bombing policy they regarded as unconstitutional in order to secure his approval for that timetable. In other contexts the Court has held that political decision-makers cannot bargain away constitutional safeguards in order to assure contemporary goals.²³⁸ On Senator Fulbright’s interpretation, the Fulbright Compromise would seem to violate that doctrine. As Eagleton later put it, “Little would be accomplished legislatively without negotiation and compromise. But in the war-making area the Constitution is unyielding in its specificity. It gives Congress the exclusive power to authorize war. My view is that that power cannot be compromised.”²³⁹

In fact, however, the Fulbright Compromise was more problematic than even this analysis suggests. The claim of Senator Fulbright and his colleagues that the Compromise did not sanction Nixon’s continued bombing was incredible. Everyone knew that Nixon would continue bombing Cambodia unless denied the means to do so.²⁴⁰ On its face the Fulbright Compromise said that “no funds herein heretofore, or hereafter appropriated” could be used to finance activities of American military forces in Vietnam, Laos, or Cambodia on or after August 15, 1973.²⁴¹ The Fulbright Compromise clearly denied Nixon funds to bomb Cambodia on and after August 15, 1973 but not before that date. As John Hart Ely nicely put it, “telling your kids to be home by midnight gives them permission to stay out until then.”²⁴² Fulbright et al. wanted to claim the benefit of Nixon’s agreement to stop bombing on or after August 15, 1973 but not accept responsibility for its cost, essentially authorizing him to continue bombing until then by their acquiescence in the Fulbright Compromise.²⁴³

To be sure, as Senator Church and others pointed out, senators had previously supported timetables for withdrawals without anyone suggesting that they were authorizing rather than limiting the war.²⁴⁴ But the August 15 cutoff differed from withdrawal timetables previously considered. Until the

237. *Id.*; see also *id.* at 22309 (statement of Sen. Stevenson) (Senate does not condone illegal bombing); *id.* at 22310 (statement of Sen. McIntyre) (“There has been no constitutional basis for the bombing.”); *id.* at 22316 (statement of Sen. Humphrey) (bombing unconstitutional).

238. See, e.g., *New York v. United States*, 505 U.S. 144, 187–88 (1992).

239. Thomas F. Eagleton, *The August 15 Compromise and the War Powers of Congress*, 18 ST. LOUIS U. L.J. 1, 1 (1973).

240. EAGLETON, *supra* note 12, at 178–79.

241. 119 CONG. REC. 22305 (1973).

242. ELY, *supra* note 43, at 40.

243. EAGLETON, *supra* note 12, at 180.

244. *Id.* at 179.

Gulf of Tonkin Resolution was repealed it clearly authorized Johnson and Nixon to use force in Vietnam.²⁴⁵ Therefore, appropriating funds subject to a cutoff was not extending any authority that did not already exist. Once the Resolution was repealed in 1971, a timetable still could be justified to protect American troops until they could be removed. By June 29, 1973, this rationale had collapsed.²⁴⁶

If the Fulbright Compromise was the only way to end the bombing, its proponents might have legitimately claimed that they had no option. But it was not the only course. Putting aside time-consuming remedies like impeachment and removal or litigation, there were at least two other possible routes which might or would have forced Nixon to stop the bombing before August 15.

Congress could have passed the Eagleton Amendment as part of the continuing resolution and/or as part of legislation to raise the debt ceiling. If Nixon vetoed such legislation, sufficient votes might not have existed to override. But would Nixon have vetoed such legislation at the cost of shutting down much of the federal government and leaving many beneficiaries without needed services? Would Nixon value bombing Cambodia for forty-five more days as worth the enormous costs of a veto?

It is impossible to know. Yet Nixon had reason to avoid a confrontation with Congress. His problems with Watergate were worsening. On April 29, 1973 he had accepted resignations of his two closest aides, H. R. Haldeman and John Ehrlichman, his counsel John Dean, and his Attorney General Richard Kleindienst.²⁴⁷ Dean had already provided damaging testimony against him. Nixon's popularity had plummeted. His disapproval ratings equaled his approval rating in the end of May 1973.²⁴⁸ By July 3, 1973, a few days after the vote on the Eagleton Amendment, Gallup found only 39% approved Nixon's handling of the presidency whereas 49% disapproved.²⁴⁹ A clear majority in Congress favored the Eagleton Amendment, and it is unlikely that much national passion was committed to continuing the bombing of Cambodia.²⁵⁰ How would the embattled President have justified that action to a nation fatigued by the war in Southeast Asia? If Nixon relented, he could blame Congress for any adverse consequences in Vietnam. Eagleton did not

245. *See id.* at 100.

246. *Id.* at 179–80.

247. KISSINGER, *supra* note 129, at 102.

248. Gallup Poll No. 871 (May 8, 1973).

249. Gallup Poll No. 874 (July 3, 1973).

250. *See* 119 CONG. REC. 22309 (1973) (statement of Sen. Bayh) (“In adopting the Eagleton and the Case-Church amendments, the Congress was at long last expressing the clear will of an overwhelming majority of the people we represent.”); *see also id.* at 22314 (statement of Sen. Mondale).

think Nixon would veto the legislation and thought it worth calling the President's bluff.²⁵¹

Mondale suggested an alternative, creative approach. Whereas the Eagleton approach required Congress to assert its power by passing legislation, the Mondale approach imagined Congress refusing to legislate to raise the debt ceiling or pass a continuing resolution.²⁵² Whereas the Eagleton approach ran the risk of a presidential veto, the Mondale approach denied Nixon that choice. Whereas the Eagleton approach put the decision on Nixon's desk, the Mondale approach denied Nixon any participation since Congress made the decision itself.

As between the two roads, the Eagleton Amendment would seem the more likely one, at least as a next step once the House failed to override the veto of the supplemental appropriation. Nixon might have signed the legislation with a blast at Congress for failing to support our freedom loving allies in Southeast Asia. In that case the bombing would end, the government would continue to function, and the only risk to Congress would be if the cessation of bombing proved improvident and voters were disposed to punish their congressmen for their votes. Alternatively, Nixon might have vetoed the legislation because of the Eagleton Amendment. That might have resulted in a cessation of some government services. Nixon, not Congress, would seem likely to shoulder most of the public's displeasure if that occurred. Congress could always eliminate the Eagleton Amendment at that point. By contrast, the Mondale approach would have put the burden on Congress for shutting down the government.

Regardless of the likely outcome of these counterfactuals the important point is that contrary to the claims of Fulbright et al., the Eagleton and Mondale approaches show that Congress did have alternatives to the August 15 Compromise. They were not pleasant choices. They presented risks and uncertainties. But they were options.

Senator Pastore characterized the choice facing the Senate as one between two evils.²⁵³ Of course his characterization of the Eagleton Amendment as an "evil" presumes that its presence would cause Nixon to veto the continuing resolution, thereby causing a government crisis.²⁵⁴ If Eagleton was right in predicting that Nixon would sign the measure, Eagleton's Amendment would have represented the immediate realization of the dreams of the advocates of the August 15 Compromise. Even if one accepts Senator Pastore's characterization of the choice the question remains why the Senate thought the Fulbright Compromise the lesser evil.

251. *Id.* at 22314 (1973) (statement of Sen. Eagleton).

252. *Id.* at 22313 (statement of Sen. Mondale).

253. *Id.* at 22313 (statement of Sen. Pastore).

254. *See id.* at 22312–13.

Many proponents of the Fulbright Compromise tended to identify its benefits but not its costs. The benefits were that the bombing would end in forty-five days without any interruption of needed governmental services.²⁵⁵ Otherwise, the “immorality” would “go on for God knows how long,” Senator Pastore reasoned.²⁵⁶ The alternative, said Senator Church, was “a futile debate, flouting our impotence.”²⁵⁷ Moreover, the Fulbright Compromise offered the promise of executive-legislative cooperation; it avoided confrontation and gridlock. There were, however, costs to the Fulbright Compromise. They included the following:

- (1) Unknown numbers of innocent Cambodian people would die or be wounded, and the country would suffer further devastation;
- (2) American pilots might be killed, wounded, or captured;
- (3) Congress would suffer further institutional decline. If Fulbright et al. were right that the Fulbright Compromise did not authorize six weeks of bombing, then the Compromise represented a congressional abdication of its constitutional duty to determine when the nation goes to war. If the Fulbright Compromise did in effect authorize the bombing, Congress would have associated itself in an action many of its members thought immoral because they concluded they lacked the institutional power to protect their turf.
- (4) The Fulbright Compromise abandoned the chance that Nixon would sign legislation with the Eagleton Amendment.²⁵⁸

Those who supported the Compromise tended to ignore its costs and to overstate some of the benefits. Absent the Fulbright Compromise, would the bombing of Cambodia have continued for “God knows how long”? Only if Congress did not act to stop it. Would Congress reveal its “impotence”? Senator Church’s suggestion had the character of a self-fulfilling prophecy. And did the Fulbright Compromise really herald a new age of cooperation?

Comparing the benefits and costs make the Fulbright Compromise look less attractive. Such a comparison would, of course, require senators to evaluate the relative worth of different types of costs and benefits. How does one compare the value of the additional Cambodian lives lost to the inconvenience to Americans denied certain government services? How does one measure the security of a resolution of the war against the failure to assert constitutional power? One suspects that many senators could imagine irate constituents hurt by interruption of government services; the Cambodians needed to depend on surrogate representation of the war movement. And, as

255. 119 CONG. REC. 22313 (1973) (statement of Sen. Eagleton).

256. *Id.* at 22312 (statement of Sen. Pastore).

257. *Id.* at 22310 (statement of Sen. Church).

258. *Id.* at 22313 (statement of Sen. Eagleton).

Eagleton pointed out, it had grown silent as the draft ended and the troops came home.²⁵⁹

In fall 1973, Eagleton put the events in perspective. He wrote:

As the author of the amendment which placed the President in the position of having to compromise on June 29, I was naturally pleased when, on August 15, our long involvement in Indochina finally came to an end. But I cannot agree that Congress is ready to assume its constitutional role in the war-making area. The compromise demonstrated to me, even more clearly than the years of congressional silence during the Vietnam experience, the extent to which congressional awareness of its own war-making responsibilities had been eroded.²⁶⁰

Almost thirty-five years later, that analysis continues to ring true. To be sure, Congress, led by the likes of Eagleton, pushed Nixon to accept a compromise to end an unpopular military effort. Yet ultimately, Congress blinked rather than maintaining its support of an immediate cutoff. If Congress would not hold firm in a battle with a weakened President headed for impeachment when the troops were already home, it is hard to imagine when it will flex its appropriation power to reclaim its constitutional role and responsibility.

259. *Id.* at 12724.

260. Eagleton, *supra* note 239.

