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## TOM EAGLETON: TRUE SENATOR

HAROLD HONGJU KOH\*

Like most of the world, I first saw Tom Eagleton on television. It was the summer of 1972, when Eagleton was asked by George McGovern to be his running mate in what turned out to be a doomed presidential bid against Richard Nixon. As a college sophomore, I had never heard of Eagleton, but I certainly liked what I saw: the son of another St. Louis lawyer, he had served in the Navy, graduated from Harvard Law School, turned to public service, and been elected in quick succession as city attorney, Missouri attorney general, Lieutenant Governor and then U.S. Senator, all the while not yet forty.<sup>1</sup> He had the courage to become an early opponent of the Vietnam War,<sup>2</sup> and came across on television as the able, down-to-earth, humble, and moral person I later came to know.

When, a few weeks later, he withdrew from the vice presidential nomination, suddenly deemed unfit for office because he had been hospitalized for exhaustion,<sup>3</sup> he at first seemed destined to become the answer to a trivia question. But instead, like a few others whose aspirations for higher office have been dashed, Tom Eagleton focused on being a superb senator, and served for fourteen more influential years. He emerged as one of the Senate's experts on health care, education, and the environment, and helped spur enactment of laws protecting both clean air and water. While I was still in college, Senator Eagleton achieved particular influence in foreign affairs and intelligence, sponsoring the amendment that stopped the bombing in Cambodia and that finally triggered the end of our involvement in Vietnam.<sup>4</sup>

In the war powers field, Tom Eagleton did not just talk about upholding constitutional principles; he lived that ideal through a series of courageous actions. In 1973, he proposed an appropriations amendment that would have terminated the bombing in Cambodia, but the President issued a veto which the

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1. Jo Mannies, *Loss of a Statesman*, ST. LOUIS POST DISPATCH, Mar. 5, 2007, at A6.

2. *Id.*

3. *Id.*

4. JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 39–41 (1993).

House lacked sufficient votes to override.<sup>5</sup> In June 1973, Senator Fulbright proposed a modified Eagleton Amendment, which would have cut off bombing by August of that year,<sup>6</sup> but Senator Eagleton opposed that revision “on the ground that it indefensibly gave the [P]resident six weeks of extra bombing.”<sup>7</sup> As one of the original Senate sponsors of the War Powers Resolution,<sup>8</sup> he pressed hard to make sure the law meaningfully included Congress in war powers decisions. But when the House-Senate conference committee adopted a watered-down version, he opposed it on principle, because he thought that Congress had abdicated its constitutionally assigned role by giving the President ninety days to wage war at will.<sup>9</sup> He presciently pressed Congress to expand the War Powers Resolution to reach covert wars conducted by paramilitary forces under civilian command, but was resisted by his colleagues on the ground that the problem was too “speculative,” leaving covert warmaking unregulated.<sup>10</sup> But on this matter, too, as John Hart Ely later put it, “once you work it through, it turns out that Eagleton was right again.”<sup>11</sup>

Although I did not follow Eagleton’s activities closely at the time, I talked in the late ‘70s about him with my dear graduate school and law school friend, Joel Goldstein, another devout Missourian and son of St. Louis. Joel told me simply that Senator Eagleton was one of his heroes, and “should be one of mine.” Because his fellows knew that he did not lust for higher office, Joel told me, he was revered as an honest broker, unafraid to speak or stand up for the truth.

By the early 1980s, I was working as an attorney at the Justice Department’s Office of Legal Counsel. My beat was foreign affairs and the Constitution, and I often confronted problems surrounding the war powers. One evening, while researching a problem in the Justice Department library, I pulled from the shelves Senator Eagleton’s war powers book, with its characteristically blunt subtitle *A Chronicle of Congressional Surrender*.<sup>12</sup> I expected it to be a ghost-written political memoir, not the searing account of

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5. *Id.* at 39.

6. *Id.*

7. *Id.* at 40 (reviewing the history of the Eagleton amendments and criticizing the Fulbright variant on the grounds that “telling your kids to be home by midnight gives them permission to stay out until then”).

8. Mannies, *supra* note 1.

9. ELY, *supra* note 4, at 40. See also Joel K. Goldstein, *Learning from a Legend*, ST. LOUIS BRIEF (Saint Louis University School of Law, St. Louis, Mo.), Fall 2005, at 21 (calling him “a profile in courage who put fidelity to the Constitution over partisan loyalty in opposing the War Powers Resolution”).

10. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 125 (1990).

11. ELY, *supra* note 4, at 113.

12. THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWERS: A CHRONICLE OF CONGRESSIONAL SURRENDER* (1974).

the political struggle over Vietnam that it turned out to be. I spent much of that night reading it and admiring the moral character and clarity of the man who wrote it.

In 1987, Eagleton retired from the Senate<sup>13</sup> and returned to his beloved St. Louis as a “man to see.” He became at once an influential attorney who brought professional football back to his hometown<sup>14</sup> and an inspiring teacher who lectured both as a university professor of public affairs at Washington University and on constitutional law at Saint Louis University.<sup>15</sup> In 1988, three years after I started teaching myself, I finally met him at a panel called *Who Makes War: Original Intent and Current Validity of the War Powers Act*, where he was speaking on Yale’s prestigious Chubb Fellowship. I gulped hard at the thought of debating the war powers in public with the man who “should be my hero,” but by evening’s end, he genuinely was. Speaking in a boisterous, gravelly voice with humor, passion, and vivid intelligence, he told a series of gripping political tales that transformed forever the way I look at the war powers. He recounted his recent testimony, bluntly confronting his former Senate colleagues with their fecklessness with regard to the war powers:

I came to the conclusion that Congress really didn’t want to be in on the decision making process as to when, how, and where to go to war. I came to the conclusion that Congress didn’t really want to have its fingerprints on sensitive matters pertaining to putting our Armed Services into hostilities. I came to the conclusion that Congress preferred the right of retrospective criticism to the right of anticipatory, participatory judgment.<sup>16</sup>

At the end of that panel, as generous heroes do, he autographed a framed poster for me, which still hangs on my wall.

And so began a happy correspondence that continued until his death. Every so often, the Senator would send me a note or an article with an inscription that kindly pretended that we were dear friends. Over time, I came to believe it. When I went to St. Louis to visit Joel Goldstein, now himself the distinguished Vincent C. Immel Professor of Law at SLU, I learned with pride that he and Senator Eagleton actually had become close friends, through several years of teaching together a law school seminar on the Presidency and the Constitution.<sup>17</sup> And when, on that same visit, I made a pilgrimage to a

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13. Mannies, *supra* note 1.

14. Mannies, *supra* note 1.

15. *Thomas F. Eagleton, former U.S. Senator and WUSTL professor of public affairs, dies at 77*, RECORD THURSDAY, Mar. 8, 2007, <http://record.wustl.edu/news/page/normal/8981.html>. See Goldstein, *supra* note 9.

16. *The War Power After 200 Years: Congress and the President at a Constitutional Impasse: Hearing on S.J.Res. 323 Before Spec. S. Subcomm. On War Powers, S. Comm. On Foreign Relations*, 100th Cong. 366 (1988) (testimony of Thomas F. Eagleton).

17. Joel K. Goldstein, *Thomas F. Eagleton, Teacher*, ST. LOUIS BRIEF (Saint Louis University School of Law, St. Louis, Mo.), Spring 2007, at 14.

special place named for another of my heroes—the Justice Harry A. Blackmun Rotunda at the Eighth Circuit’s courthouse in St. Louis—I was touched to see over the courthouse door the name of a similarly decent and courageous Midwesterner, Tom Eagleton.

When he died last March, many of today’s students had only dimly heard of Tom Eagleton. But at a time when Congress is trying to figure out how to get us out of an unpopular war, when we hear daily of activities conducted in the shadows by civilian operatives of our government, and when the current Vice President has claimed that he is not constitutionally part of the Executive branch, don’t we miss Tom Eagleton’s voice? Don’t we miss a statesman who was more than a politician, who cared more about the Constitution than about partisan politics, and who would have been — had history taken a different turn — a Vice President who genuinely respected the constitutional roles of both political branches?

But rather than miss Tom Eagleton, we should be thankful for what we had. In his public and private lives, as leader and teacher, he became a true “senator,” in the original Latin sense of that term. In ancient Rome “*senatus*” denoted an elder statesman who, because of judgment honed in the crucible, deserved to be heard and followed, because he strived to protect the true ideals of the Republic. Tom Eagleton should be remembered as both a true senator and as a senator for truth. As I read through my newspaper this morning, how much I wished that he were in the Senate still.