

## THOMAS F. EAGLETON: A MODEL OF INTEGRITY

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In 1975, I was invited to participate in an all-day conference held in Washington, D.C. to analyze Executive-Legislative conflicts. The objective was to survey the meaning of the pitched battles between Congress and the presidency during the Lyndon Johnson and Richard Nixon administrations. Throughout the morning and afternoon we were joined by senators and representatives. In an informed, thoughtful, and articulate manner they explained different issues, personalities, and procedures. Senior editors and writers from the media sat around the room listening intently. Occasionally I would watch their eyes and expressions to gauge their evaluations. That evening, at the Kennedy Center, we continued the conversation over cocktails and dinner. Again the editors and writers stood nearby to listen. After I finished a conversation with Senator Tom Eagleton, they quickly closed in around me and asked, visibly shaken: “Are *other* members of Congress this bright?” I assured them they were. I wondered what stereotypes about Congress they had promoted over the years without ever getting to know their subject.

Tom Eagleton had a very special capacity to combine intelligence, public service, and a commitment to integrity, honesty, and plain speaking. Those values were in full view with the work he did on war powers. He understood that core constitutional principles kept the war power with the popularly elected Congress. When he saw those values violated he did what he could to restore the model of government fashioned by the Framers. He watched what the House proposed, participated actively in Senate debates and the drafting of the War Powers Resolution, and reacted to what emerged from conference committee. Throughout those years of debate he stood out prominently as someone who understood the constitutional values at stake and was willing, when others were not, to speak forcefully and clearly when those values were betrayed.

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## I. HOUSE ACTION

In 1970, the House of Representatives passed a War Powers Resolution by a vote of 289 to 39.<sup>1</sup> It recognized that “the President in certain extraordinary and emergency circumstances has the authority to defend the United States and its citizens without specific prior authorization by the Congress.”<sup>2</sup> Instead of trying to identify the occasions where presidents are entitled to act unilaterally, the House chose to rely on procedural safeguards. The President would be required, “whenever feasible”, to consult with Congress before sending American forces into armed conflict.<sup>3</sup> Consulting with whom, or when, was not specified. The bill required the President to report the circumstances necessitating the action; the constitutional, legislative, and treaty provisions authorizing the action, “together with his reasons for not seeking specific prior congressional authorization”; and “the estimated scope of activities.”<sup>4</sup> Bottom line: the House was willing to let the President do whatever he thought proper and necessary and report back afterwards. Congressional abdication could not be more sweeping.

Both houses later passed War Powers Resolutions that went beyond mere reporting requirements. The House of Representatives, following its earlier example, did not try to define or codify presidential war powers. It directed the President “in every possible instance” to consult with Congress before sending forces into hostile situations or when hostilities might be imminent.<sup>5</sup> If unable to do so, he was to report to Congress within seventy-two hours, setting forth the circumstances and details of his actions.<sup>6</sup> Unless Congress declared war within 120 days or specifically authorized the use of force, the President would have to terminate the military operation and remove the troops.<sup>7</sup> Congress could also vote to direct disengagement at any time during the 120-day period by passing a concurrent resolution.<sup>8</sup> A concurrent resolution passes both houses of Congress but is not presented to the President

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1. H.R.J. Res. 1355, 91st Cong. (1970), 116 CONG. REC. 37407 (1970). The House passed the same bill the next year under suspension of the rules (requiring two-thirds support). H.R.J. Res. 1, 92d Cong., (1971), 117 CONG. REC. 28870–78 (1971).

2. H.R.J. Res. 1355, 116 CONG. REC. 37398 (1970).

3. H.R.J. Res. 1355 § 2.

4. H.R.J. Res. 1355 § 3.

5. War Powers Resolution, H.R.J. Res. 542, 93d Cong. § 3, 87 Stat. 555 (1973).

6. 119 CONG. REC. 24653–708 (1973).

7. *Id.*

8. *Id.*

for his signature or veto.<sup>9</sup> In 1983, the Supreme Court declared this type of congressional control over executive actions to be unconstitutional.<sup>10</sup>

## II. SENATE ALTERNATIVE

Senator Eagleton regarded the House bill as deficient in protecting constitutional values and legislative prerogatives. On March 1, 1971, he introduced legislation to require “that in virtually all cases involving the initiation of hostilities between United States forces and foreign military forces, the President would not act without prior authorization from Congress.”<sup>11</sup> He believed that the Framers “were right when they decided to place the responsibility for going to war in the Congress.”<sup>12</sup> Part of the Framers’ suspicion of executive authority came from what they saw and experienced during the colonial period, fostering “a deep distrust of inordinate executive power, as they felt that power being exercised by colonial governors and by the English king.”<sup>13</sup> In reading the debates at the Philadelphia Convention, the *Federalist Papers*, and the text of Articles I and II, Eagleton concluded that “[g]oing to war was intended to be an orderly process in which deliberation would be given full play before conflict began and in which reason and caution would be used once hostilities had commenced.”<sup>14</sup>

Eagleton’s resolution in 1971 recognized that “[n]o treaty previously or hereafter entered into by the United States shall be construed as authorizing or requiring the armed forces of the United States to engage in hostilities without further Congressional authorization.”<sup>15</sup> This was a key provision intended to prevent presidents from unilaterally going to war on the basis of treaties like the UN Charter or NATO. President Harry Truman went to war against North Korea in 1950 by seeking “authority” from the UN Security Council.<sup>16</sup> That method of circumventing Congress has been used by other presidents.<sup>17</sup>

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9. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS, 332 (7th ed., 2007) (explaining congressional procedure when the House and Senate adopt a concurrent resolution).

10. *INS v. Chadha*, 462 U.S. 919, 955–59 (1983) (holding a section of the Immigration and Nationality Act that authorized one house of Congress to invalidate a decision of the Executive Branch unconstitutional).

11. THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 121 (1974); *see also*, 117 CONG. REC. 4405–07 (1971).

12. EAGLETON, *supra* note 11, at vii.

13. *Id.* at 5.

14. *Id.* at 9.

15. 117 CONG. REC. 4405 (1971).

16. LOUIS FISHER, PRESIDENTIAL WAR POWER 97–100 (2d ed., Univ. Press of Kan. 2004).

17. Louis Fisher, *Sidestepping Congress: Presidents Acting under the UN and NATO*, 47 CASE W. RES. L. REV. 1237, 1237 (1997) (discussing President Truman in Korea, the first President Bush in Iraq, and President Clinton in Haiti and Bosnia).

President Bill Clinton, unable to obtain support from the Security Council for military operations against the Serbs in Kosovo, sought “authority” from NATO countries.<sup>18</sup>

Eagleton understood, as did the Framers, the fundamental difference between offensive and defensive hostilities. If the United States were attacked, the President could “repel the attack.”<sup>19</sup> For any other use of force, “the judgment of the entire nation, acting through its elected representatives, would have to be sought.”<sup>20</sup> Drawing from those principles, the Senate attempted to spell out the conditions under which presidents were authorized to take unilateral action with military force: “(1) to repel an armed attack upon the United States, its territories, and possessions,” to retaliate in the event of such an attack, and to “forestall the direct and imminent threat of such an attack”; (2) to repel an armed attack against U.S. armed forces located outside the United States, its territories, and possessions, and to “forestall the direct and imminent threat of such an attack”; and (3) to protect and rescue endangered American citizens and nationals in foreign countries or at sea.<sup>21</sup> The first situation, except for the final clause, is consistent with the understanding developed at the Philadelphia Convention.<sup>22</sup> The other situations reflect changes that have occurred in the concept of defensive war and life-and-property actions.

As passed in 1973, the Senate bill required the President to cease military action unless Congress, within thirty days, specifically authorized the President to continue.<sup>23</sup> A separate provision allowed him to sustain military operations beyond the thirty-day limit if he determined that “unavoidable military necessity respecting the safety” of the armed forces required their continued use for the purpose of “bringing about a prompt disengagement.”<sup>24</sup> Eagleton voted for the Senate bill.<sup>25</sup> Obviously these efforts to draft legislative language created the risk of ambiguity and uncertainty, particularly by reference to “imminent” threats and “endangered” citizens.

### III. CONFERENCE VERSION

When the bill emerged from conference committee, it had to combine two entirely different legislative strategies. The House was reluctant to draw any

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18. FISHER, *supra* note 16, at 198–201.

19. EAGLETON, *supra* note 11, at 10; *see also*, FISHER, *supra* note 16, at 8–9.

20. EAGLETON, *supra* note 11, at 10.

21. S. 2956, 92d Cong. § 3, 118 CONG. REC. 12,611 (1972); S. 440, 93d Cong. § 3, 119 CONG. REC. 25119 (1973). For the full Senate debate in 1972 and 1973, *see* 118 CONG. REC. 12577–613 (1972) and 119 CONG. REC. 25051–120 (1973).

22. EAGLETON, *supra* note 11, at 10; FISHER, *supra* note 16, at 8–10.

23. S. 440, 93d Cong. § 5; 119 CONG. REC. 25119 (1973).

24. S. 440 § 5.

25. 119 CONG. REC. 25119 (1973).

hard and fast lines; the Senate tried to do precisely that. Most of the time a conference product can look for compromises that do no fundamental damage to the Constitution. If one house votes \$150 million for a program and the other \$200 million, no harm is done in agreeing to \$175 million. For the war powers bill, however, the compromises produced marked incoherence and contradictions. Section 2(c) provided that presidential power to engage in military hostilities is limited to “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.”<sup>26</sup> Yet the bill authorized the President to use military force for up to ninety days anywhere, for any reason, without responding to an attack and without any declaration or authorization by Congress.<sup>27</sup> Section 2(a) stated that the purpose of the bill was “to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of the United States Armed Forces into hostilities. . . .”<sup>28</sup> Yet the bill clearly broke with the intent of the Framers and did nothing to assure collective judgment in initiating military force.

Senators who had fought hard to reassert legislative authority over the war power nevertheless looked with favor upon the conference product and regarded it as even superior to the Senate version. Senator J. William Fulbright, after recognizing Senators Eagleton and Jacob Javits as “the two principal Senate sponsors of this legislation,”<sup>29</sup> called the conference bill “a reasonable compromise.”<sup>30</sup> Senator Javits agreed that the bill from conference was “a measure of reconciliation” and “an excellent vehicle for expressing the congressional will perhaps better than either of the preceding bills.”<sup>31</sup> Senator Edmund Muskie referred to the conference bill as “a powerful reaffirmation of congressional responsibility in the warmaking sphere.”<sup>32</sup> To Senator Hubert Humphrey, the bill “represent[ed] one of the finest legislative accomplishments in [his] memory.”<sup>33</sup>

Senator Barry Goldwater, who voted against the bill because he thought it infringed on presidential authority, nevertheless recognized that the conference version went a long way in expanding presidential power.<sup>34</sup> He said he could

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26. 119 CONG. REC. 33548 (1973).

27. *Id.* at 33555–57 (statements of Sen. Eagleton discussing the meaning of Section 4).

28. War Powers Resolution, H.R.J. Res. 542, 93d Cong. § 2(a), 87 Stat. 555 (1973) (The identical language appeared in the conference version, which became law over President Nixon’s veto).

29. 119 CONG. REC. 33548 (1973).

30. *Id.*

31. *Id.* at 33549.

32. *Id.* at 33551.

33. *Id.* at 33552.

34. 119 CONG. REC. 33553 (1973).

“probably actually vote for” the bill “because it gives the President even broader powers than the authors of the original bill thought they were correcting.”<sup>35</sup> As rewritten in conference, “the President is no longer prohibited from initiating original actions. He needs only to report during the first [sixty] days.”<sup>36</sup> Eagleton immediately voiced his support for Goldwater’s interpretation: “The Senator is precisely correct.”<sup>37</sup>

Eagleton refused to indulge in the euphoria and self-congratulatory speeches of Fulbright, Javits, Muskie, Humphrey, and others. Instead, he rigorously analyzed what the Senate set out to do and compared it to what was done in conference.<sup>38</sup> He pointed out that the House and Senate bills “were not generally compatible. They marched down separate and distinct roads, almost irreconcilable roads.”<sup>39</sup> After looking at the language in Section 2 that supposedly limited the President to certain conditions before ordering U.S. troops into hostilities, he dismissed that section (titled “Purpose and Policy”) as “precatory words; they are meaningless.”<sup>40</sup> As noted above, Section 2 also included language about fulfilling the intent of the Framers and ensuring the collective judgment of both branches before introducing American forces to combat.<sup>41</sup> Eagleton examined the substantive sections, such as Section 4, and told his colleagues that the bill authorized the President to “keep the forces anywhere in the world for ninety days without Congress doing a thing about it.”<sup>42</sup> The bill produced by the conferees allowed “an open-ended, blank check for ninety days of warmaking, anywhere in the world, by the President. . . .”<sup>43</sup> The bill represented “a near-total abrogation of the Senate position on war powers.”<sup>44</sup>

Javits challenged Eagleton’s analysis by claiming that the conference product “may very well be . . . a stronger statute than [what] the Senate passed.”<sup>45</sup> Enactment of the bill “will make history.”<sup>46</sup> Eagleton had no patience for this rhetoric. “We are not here to make history,” he told Javits, “we are here to make law.”<sup>47</sup> Comparing what the Senate had passed, after

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 33555.

39. 119 CONG. REC. 33555 (1973).

40. *Id.*

41. *See supra* note 28 and accompanying text.

42. 119 CONG. REC. 33555 (1973).

43. *Id.* at 33556.

44. *Id.*

45. *Id.* at 33558.

46. *Id.* at 33559.

47. 119 CONG. REC. 33559 (1973).

several years of debate, to the bill that came out of conference left Eagleton with a feeling of repulsion:

Yes, I helped to give birth to the Senate bill three years ago, but the child has been kidnapped. It is no longer the same child that went into the conference. It has come out a different baby—and a dangerous baby, Mr. President. Because this bill does not go one inch in terms of constricting the unilateral war-making of the President of the United States.

Try as he may, and able lawyer that he is, the Senator from New York [Javits] cannot get around the language of the statute. He cannot get around the fact that the purpose and the political effect of section 2(c) is “nothing.” Nobel in concept but worthless in execution.<sup>48</sup>

The Senate agreed to the conference report 75 to 20.<sup>49</sup> Eagleton was among those voting “Nay.”<sup>50</sup> The House agreed to the conference report 238 to 123.<sup>51</sup> Some of the House members, who had supported a war powers bill that would protect legislative interests, flagged the deficiencies of the conference product. Elizabeth Holtzman stated that the Constitution does not permit the President “without congressional approval to commit U.S. forces to war, except in certain specific and limited circumstances, such as an emergency, an attack upon the United States, or an action taken in certain instances to protect the lives of American citizens and troops abroad.”<sup>52</sup> Yet the bill authorized the President to go to war for sixty to ninety days anywhere in the world, for any reason, without congressional approval.<sup>53</sup> Bella Abzug pledged to vote against the bill “because it is patently unconstitutional and gives the President power he does not now have.”<sup>54</sup> Ron Dellums understood that the Senate bill had placed limits on military initiatives by the President but “the conference version does not even bother to try.”<sup>55</sup> Having cleared the House and the Senate, the bill went to President Nixon for his signature or veto.

#### IV. NIXON’S VETO

President Nixon vetoed the bill on October 24, 1973, calling it contrary to “the wisdom of the Founding Fathers in choosing not to draw a precise and detailed line of demarcation between the foreign policy powers of the two

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48. *Id.*

49. *Id.* at 33569.

50. *Id.*

51. *Id.* at 33873–74.

52. 119 CONG. REC. 33868 (1973).

53. *Id.* at 33870.

54. *Id.*

55. *Id.* at 33871.

branches.”<sup>56</sup> The bill “would attempt to take away, by a mere legislative act, authorities which the President has properly exercised under the Constitution for almost 200 years.”<sup>57</sup> He regarded two provisions of the bill as unconstitutional: the automatic cut-off of authorities after sixty or ninety days unless Congress extended them, and the use of a concurrent resolution to control the President.<sup>58</sup> The latter, he pointed out, “does not normally have the force of law, since it denies the President his constitutional role in approving legislation.”<sup>59</sup>

The Senate overrode Nixon’s veto by a vote of 75 to 18, far beyond the two-thirds required.<sup>60</sup> Eagleton voted against the override.<sup>61</sup> He reviewed the fundamental principles that should have guided members of Congress in drafting a war powers bill:

In essence, the Senate bill said the following: The decision to go to war, under our Constitution, is a decision for Congress to make. . . . Fresh from the control of King George, they no longer wanted one man, however decent, however benign, to make the troublesome and difficult decision to commit the United States to war.<sup>62</sup>

The Senate had attempted to define three emergency situations that would permit the President to act on his own without any prior authority from Congress.<sup>63</sup> What came out of conference was “a total, complete distortion of the war powers concept.”<sup>64</sup> Some lawmakers looked to the press to see how well they were doing in upholding legislative prerogatives. Eagleton looked to constitutional principles and the language of the bill. He noted that:

[T]he media coverage of the bill still says that this limits the President’s war powers. It does not. The bill gives the President of the United States unilateral authority to commit American troops anywhere in the world, under any conditions he decides, for 60 to 90 days. He gets a free 60 days and a self-executing option for an additional 30 days, making 90.<sup>65</sup>

Having watched the performance of Congress on the war powers bill, Eagleton said he was “dumbfounded” because for the past five years he had been present at all of the resolutions and amendments intended to restrict presidential war power and had heard “Senator after Senator decr[y] the fact

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56. Veto of the War Powers Resolution, PUB. PAPERS 893 (Oct. 24, 1973).

57. *Id.*

58. *Id.*

59. *Id.*

60. 119 CONG. REC. 36198 (1973).

61. *Id.*

62. *Id.* at 36177.

63. *Id.*

64. *Id.*

65. 119 CONG. REC. 36177 (1973).



that a President had got us involved in a nightmare, and that we should not get involved in a nightmare again; and that no one man could ever get us involved in a nightmare again. . . .”<sup>66</sup> He asked how Congress, after a decade of watching the Vietnam War divide the country and consume American lives and American treasure, could once again give “unbridled, unlimited total authority to the President to commit us to war.”<sup>67</sup>

It is extraordinary to review Eagleton’s single-minded focus on the content and meaning of the war powers bill. Democratic members of the House and Senate relished the thought of overriding a Nixon veto, having come up short eight times in a row: “Some of my colleagues will celebrate. The President has beaten us 8 to 0 so far in the veto league, so some of us are eager for our first victory. And so there will be some handshakes and some jubilation. But what a mistake we are about to make.”<sup>68</sup> Press accounts and partisan calculations never diverted Eagleton from his responsibility to see that the Constitution was protected and defended, which was the oath he took as a Senator.

Javits read Nixon’s veto message as proof that the bill was effective. Nixon claimed that the bill “would seriously undermine this nation’s ability to act decisively and convincingly in times of international crisis,” by which Javits concluded that Nixon thought “his power is very reduced, and drastically so.”<sup>69</sup> Javits found the veto message “the best evidence as to whether we are grant[ing] additional authority to him.”<sup>70</sup> Eagleton did not get sidetracked by this type of speculation. He interpreted the Constitution and the bill, not veto messages. Contrary to some of his colleagues who supported the bill and believed they had reasserted the role of Congress, he said, “I do not view this as a historic recapture; on the contrary I view it as a historic surrender.”<sup>71</sup> After hearing Javits say that “the President will make his calculations and take his chances that the 60-day period applies,” Eagleton asked Javits whether he thought “this is a game with the President.”<sup>72</sup>

The House narrowly overrode Nixon’s veto, voting 284 to 135.<sup>73</sup> As in the Senate, some members of the House knew that Congress was transferring its power to the President. Others got caught up in partisan calculations that had nothing to do with the merits of the legislation. William Green remarked that the bill “has popularly been interpreted as limiting the President’s power to engage our troops in a war,” but a careful reading of the legislation convinced

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66. *Id.*

67. *Id.*

68. *Id.* at 36178.

69. *Id.* at 36188.

70. 119 CONG. REC. 36188 (1973).

71. *Id.* at 36189.

72. *Id.*

73. *Id.* at 36221–22.

him that it “is actually an expansion of Presidential warmaking power, rather than a limitation.”<sup>74</sup> Vernon Thomson held no illusions about the bill: “The clear meaning of the words certainly points to a diminution rather than an enhancement of the role of Congress in the critical decisions whether the country will or will not go to war.”<sup>75</sup> Bob Eckhardt condemned the abdication of congressional power.<sup>76</sup> Ron Dellums, having opposed the House bill and the conference version, held firm and voted to sustain the veto: “Richard Nixon is not going to be President forever. Although many people will regard this as a victory against the incumbent President, because of his opposition, I am convinced that it will actually strengthen the position of future Presidents.”<sup>77</sup>

The consistency of Dellums was not matched by some of his colleagues. He opposed the House bill and the conference product because he regarded them as bad legislation.<sup>78</sup> He therefore voted to sustain Nixon’s veto to prevent the bill from becoming law.<sup>79</sup> Bella Abzug and others voted erratically, depending on the politics of the moment. She voted against the House bill and the conference version because they expanded presidential war power.<sup>80</sup> As she noted during debate on the conference report: “[It] gives the President 60 to 90 days to intervene in any crisis situation, on any pretext, while Congress merely asks that he tell us what he has done.”<sup>81</sup> Yet she strongly supported a veto override for reasons that had nothing to do with the quality or substance of the bill. She offered this argument: “This could be a turning point in the struggle to control an administration that has run amuck. It could accelerate the demand for the impeachment of the President.”<sup>82</sup>

Abzug was not alone in voting with one purpose on the House bill and the conference report and adopting a different purpose on the override. Fifteen members of the House voted against the House bill and the conference version because they considered the legislation inadequate and unsound.<sup>83</sup> To be consistent, they should have voted to sustain Nixon’s veto to prevent a bad bill

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74. *Id.* at 36204.

75. 119 CONG. REC. 36207 (1973).

76. *Id.* at 36208.

77. *Id.* at 36220.

78. *See id.*

79. *Id.* at 36222.

80. 119 CONG. REC. 36222 (1973).

81. *Id.* at 33870.

82. *Id.* at 36221.

83. *See id.* The Representatives the author refers to are: Bella Abzug, Robert Drinan, John Duncan, John James Flynt, Jr., William Harsha, Ken Hechler, Elizabeth Holtzman, William Hungate, Phillip Landrum, Trent Lott, Joseph Maraziti, Dale Milford, William Natcher, Frank Stubblefield, and Jamie Whitten.

from becoming law. Yet they switched sides and delivered the decisive votes for enactment.<sup>84</sup>

#### CONCLUSION

Throughout the years of debate on the War Powers Resolution, no member of Congress commanded the field like Tom Eagleton. He developed a sophisticated and clear understanding of what the Framers intended and why they thought the way they did. He took that framework of the Constitution, as adapted over two centuries by precedent and practice, and proceeded to draft legislation that would be faithful to those constitutional values. Many of his colleagues, though initially motivated as he was to redress the imbalance between Congress and the President, lacked his clarity of thought and integrity of purpose. They did not measure up to his depth of commitment. At no time did he posture and pretend that the war powers bill, as it came from conference committee, represented a reassertion of legislative power because that was how the press viewed it. He did not let his opinion of individuals, such as Richard Nixon, weaken his ability to evaluate the substance of legislation. One Senator told him after the override debate: "I heard your argument. I agree with you. I love the Constitution, but I hate Nixon more."<sup>85</sup> Eagleton did not switch votes, as many did, by calculating how it might have short-term partisan or political benefits. He was there for the long term. He had taken an oath to support and defend the Constitution and that dedication provided all the lodestar he ever needed. Blessed by intelligence, he was blessed even more by an inner strength that allowed him to see things as they were and to remain steadfast to the Constitution.

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84. *See id.*

85. EAGLETON, *supra* note 11, at 220.

