

THE COOPER-CHURCH AMENDMENT: CASE STUDY OF A
SENATORIAL CHALLENGE TO PRESIDENTIAL
WAR POWERS

A Thesis Submitted to the Faculty of
Baylor University
in Partial Fulfillment of the
Requirements for the Degree
of
Master of Arts

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Waco, Texas

May 1973

ABSTRACT

Ambiguity in the United States Constitution has given rise to many and varied opinions as to the proper delineation between the war powers of Congress and the President. Consideration of the proper locus of the war power is further complicated by certain characteristics of the modern world: communication through the news media as it informs and shapes public opinion, expanded definitions of national security, and the threat of nuclear warfare as it heightens the desire for secretive and prompt decision-making.

The specter of an executive office growing in power and influence has been present throughout the nation's history. Fears have come to the surface from time to time, and efforts have been made to curb that office. President Richard Nixon's decision to send U.S. troops into Cambodia in late April, 1970, provoked such an attempt. Fearing escalation of the Southeast Asian conflict and sensing a mandate from the people, many senators determined the time had come for reasserting congressional prerogatives in the conduct of war.

The Cooper-Church amendment to a House bill sought to place the Senate in a position to check executive decisions in the conduct of armed hostilities. It did this through congressional power of the purse by threatening withdrawal of

funds for military operations in given circumstances. Debate over the Cooper-Church amendment centered on the legitimacy of this effort--that is, the ultimate and proper authority to make decisions regarding war.

By passing this controversial proposal, a majority of the senators indicated their desire to strengthen the position of the upper chamber. The House ultimately defeated the measure, but the entire episode opened the door for numerous other attempts. Some proposals were far more exacting in the demands they would place on the President as he dealt with the Vietnamese conflict. All efforts after that clash drew heavily on the vast bulk of arguments and reasoning unearthed during the Cooper-Church debate. In the following three years, victory appeared closer for those senators who would curb the President's exercise of the war powers. Even as the war in Southeast Asia came to an end, many senators were still in the mood to establish in law distinct rules for exercising the war powers, although the source of their conflict with the executive office was removed.

PREFACE

In conjunction with the tide of public unrest over what seemed to be continuing prolongation and even escalation of the Vietnam conflict by succeeding American Presidents, growing numbers of congressmen attempted to curb exclusive executive direction of that war. Through the early 1970's, such efforts by legislators mushroomed, occupying much newspaper space and stimulating considerable speculation as to the respective roles of the executive and legislative branches, not only in matters pertaining to war but in many other fields as well. These events prompted the author to undertake a case study of the Cooper-Church amendment, which was before Congress in May and June of 1970. By examining this first serious and lengthy attempt to define the respective war powers of the executive and legislative branches, the writer hopes implications may be found for future developments in this area.

As the conflict in Indochina was prolonged, so was the project at hand. Throughout the months of research, writing, and procrastination, I have been pleasantly surprised by the continuing encouragement and assistance from the entire Department of Political Science at Baylor University. Of special note, however, is Dr. Robert Miller, Chairman of the department. In addition to his suggestions for this thesis,

his repeated provision of employment and financial aid have been invaluable in easing the strain of such a project on a mother with a growing family. Foremost, however, is the person of my thesis director, Dr. Lyle Brown. This kind and patient scholar not only has provided invaluable guidance in the technicalities of the writing, but he has urged my continuation toward completion at times and over distances when I might easily have stopped. I am appreciative as well of the time and consideration Dr. Rufus Spain of the Baylor History Department devoted to this project.

Finally, I must express my gratitude to my family without whose support I could not have worked. The hopes and good wishes of my parents and my husband's parents were a constant help. My three children have been understanding beyond their years, hearing too often of late, "Sh-h-h, Mommy is studying." To my husband, Joe, I owe the greatest debt. His patience and help at home with chores and as a sounding board for ideas gave proof to his belief that this research should be completed thoroughly and carefully.

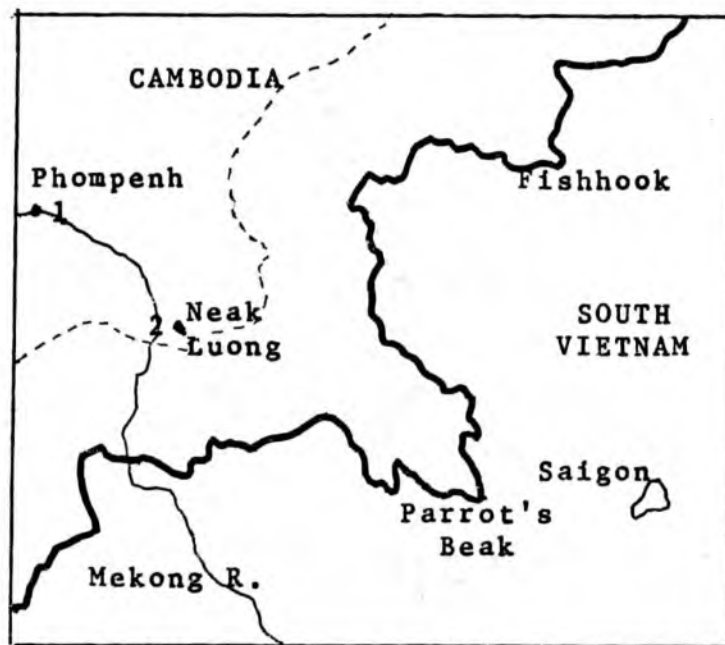
April, 1973

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MAP OF CAMBODIAN-SOUTH VIETNAMESE BORDER*



1 South Vietnamese gunboats penetrated to Phompenh.

2 U.S. ships and advisers will not go beyond this point.

Broken line indicates 21.7 miles beyond which U.S. forces will not penetrate.

Heavy line indicates location of the international boundary.

*Map taken from The New York Times, May 12, 1970, p. 17.

I. THE POWER TO MAKE WAR

As April drew to an end in 1970, the nation's chief executive was confronted with crises at home and abroad. Russian pilots were flying unexplained missions over the United Arab Republic, an action which seemed to threaten the state of Israel and caused some prophets to forecast new and potentially larger-scale hostilities in the Middle East. In Southeast Asia, Prince Norodom Sihanouk of Cambodia had been dethroned by General Lon Nol; and his shaky government seemed to be on the verge of succumbing to Communist invaders from without and dissent from within. At home, students were rioting on the campuses in protest against President Richard Nixon's foreign policies. One particularly hot spot was Ohio State University, where seven students were wounded by National Guard troops. During this same period the inquest into the tragedy that befell Miss Mary Jo Kopechne had most of America asking questions about Edward Kennedy's role in her death. At the same time, the Senate was questioning one after another of Nixon's nominees for the Supreme Court. In the midst of all this activity, events in Southeast Asia forced Nixon to make a decision between two courses, one of which, if chosen, was almost certain to fan the flames of dissatisfaction at home into a veritable bonfire of wrath and lead to untold possibilities for either a widened war or a quicker and more secure withdrawal from the Asian conflict. It was this

controversial course that the President chose; and this, in turn, inspired the Cooper-Church amendment.

Debate over the Cooper-Church measure centered on the constitutional question of who holds ultimate power to make war. Certainly the question was not first considered in 1970; rather, this issue has been of concern since the writing of the federal constitution.

Article I, Section 8 of the Constitution of the United States reads, "The Congress shall have Power . . . To declare war, . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, . . ." Article II, Section 2 of the same document declares that "The President shall be Commander in Chief of the Army and Navy of the United States, . . ." The problem of how to reconcile these two powers, each conferred on different branches of the national government, has given rise to long-standing conflict over who has final authority in foreign affairs involving hostilities. Often an examination of the printed word of the Constitution may help to find the answer.

The article first referred to grants to Congress a number of specific powers as regards the development and maintenance of armed forces, with the inclusion of one general statement--the power to declare war. Giving the words the

strictest literal interpretation could mean, at most, leaving to Congress the formality of drawing up on paper a proper statement of a "declaration of war."¹ The actual letter of Article I makes no mention of the extent of debates preceding such action; of what should be considered in terms of morality, economy, or international justice; of whom should be consulted in such considerations; or, indeed, of what was meant by the term "war" (as opposed to minor skirmishes). Again, only the power of issuing a declaration is granted. The power to actually "make" war might be thought to lie elsewhere.

Continuing in a strictly literal study of the war power, the President of the United States is designated as the Commander in Chief of the armed forces "when called into the actual service of the United States." Because this grant says nothing of the extents or limits of power accrued in holding such a title, or who is to do the calling into service, one must look elsewhere for possible purposes toward which the President might be intended to direct his powers as Commander in Chief, or else be left with no guidelines whatsoever.² Section 3 of Article II demands of the President that he "take Care that the Laws be faithfully executed, . . ." If these words are construed, as they have been in the past, to mean the President has the power

¹"Notes: Congress, the President, and the Power to Commit Forces to Combat," Harvard Law Review, LXXXI (June, 1968), 1773.

²Ibid., p. 1775.

to enforce the "peace of the United States" by any means necessary, then another interesting interpretation of the war power presents itself.³ (Here, however, one has departed from a pure reading of the words of the Constitution, as the ambiguity of that writing eventually demands.) Perhaps the President has power as Commander in Chief to commit troops, if that be necessary to enforce the peace of the United States; but it seems apparent that this power would apply only to those instances where the peace of the territorial United States is threatened--that is, to insurrections or overt attacks from without on the actual borders of the country.

If both of the above explanations of the actual words used in the granting of war powers are accepted, there is still a void in the search for the locus of ultimate power. Who has final authority to state that for given causes the United States shall or shall not make war abroad? As already indicated, a literal reading of the Constitution can never provide answers to questions regarding intent. Language is not static. The written word will never have a single meaning for all time. Passage of years and the change of conditions (and, therefore, change of needs) bring forth new interpretations. Precedent, discovered by an examination of the historical uses of the powers relating to war, would be another means of attempting to find their relative strengths today.

³In re Neagle, 135 U.S. 1 (1890), determined that the President, acting in his role to "take care that the laws be faithfully executed," may, without special statutory authorization, take steps to do just that.

The framers of the Constitution were concerned only with providing a framework for government; details were left to legislation, custom, and usage. Granted, formulating a framework was difficult enough. The founding fathers themselves were divided on what should be the relative strengths of the executive and legislative branches--a division best exemplified by Roger Sherman of Connecticut in calling for an executive that was "nothing more than an institution for carrying the will of the Legislature into effect," and Gouverneur Morris of Pennsylvania in proposing that the executive should be "the guardian of the people, even of the lower classes, against Legislative tyranny."⁴ A plan for either a plural executive with limited powers or a single executive with broad powers would have carried out only one of the respective ideals of this office. Eventually, the compromising structure of the executive effected a mellowing in the intended powers of that branch and made it neither a mighty sword over Congress nor an humble servant to that body. Numerous and intricate measures of interdependability between the two branches--commonly called "checks and balances"--were written into the Constitution. Thus framers did not totally separate the branches of government; instead, they attempted to connect them. Richard Neustadt has referred to this phenomenon of the American government as being one "of separated institutions

⁴Quoted in Arthur M. Schlesinger, Jr., and Alfred de Grazia, Congress and the Presidency: Their Role in Modern Times (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1967), p. 5.

sharing powers."⁵ The result is formal powers that are "so intertwined that neither will accomplish very much for very long without the acquiescence of the other."⁶

It is just this feature of the structure of the United States government which has caused some to cry out in dismay that confusion in defining the proper relationship which ought to exist between the executive and legislative branches has in the past and will in the future lead to stalemates or at best needless delays due to lack of cooperation.⁷ But it would appear that this shortcoming in the framework has been highly exaggerated. Thus one observer has written, "Where stalemates have occurred, the reason has usually been the President's personal and political shortcomings and not the separation of powers doctrine."⁸ Besides, such delays in the field of foreign affairs are of necessity exceedingly rare. World events usually demand either compromise between the two branches or strong leadership by one. Therefore, through the years an ebb and flow of power from one to the other has taken place.

⁵Richard E. Neustadt, Presidential Power: The Politics of Leadership (New York: John Wiley & Sons, Inc., 1960), p. 33.

⁶Walter Earl Travis, "General Introduction," in Congress and the President: Readings in Executive-Legislative Relations, ed. by Walter Earl Travis (New York: Teachers College Press, 1967), p. 2.

⁷Ibid., p. 1.

⁸Arnold J. Zucker, "The Presidency, Congress, and Separation of Powers: A Reappraisal," in Congress and the President, ed. by Travis, p. 59.

Washington offered the first challenge to the war powers of Congress when in 1793 he proclaimed America's neutrality in the war between France and England. The pro-French legislative branch claimed that this act usurped congressional prerogative; whereupon Hamilton, writing in defense of executive powers, argued that while it was the duty of Congress to declare war, it was just as clearly the duty of the executive to maintain peace until such a declaration was made. Certainly, a proclamation of neutrality was a necessary step in maintaining peace. Madison argued with Hamilton (interestingly, with Jefferson's fullest support) that Congress was the proper organ to operate in foreign affairs and that the President was only the instrument through which Congress dealt with foreign nations. Congress might be thought to have won this round when it passed the Neutrality Act of 1794, asserting its authority on the matter. But soon congressional power waned, "if only because the project of congressional control over foreign policy was fatally inadequate to the requirements of efficient government."⁹ It was Jefferson himself, contradicting his former position, whose actions against the Barbary Pirates opened the question of the executive's right to involve the country in war without a declaration or formal approval from Congress. Even so, Jefferson acted cautiously. Because he felt that in the absence of congressional authorization he, as President, could take only minimal steps, Jefferson directed his officers to

⁹Schlesinger and de Grazia, Congress and the Presidency, p. 21.

release any prisoners and/or vessels captured after disarming them. Hamilton's reaction was not that Jefferson had usurped the war power of Congress but that he had acted too meekly.

Summing up Hamilton's view, one writer has explained,

[O]nce the country is attacked or war is declared by a foreign nation, the President has full power to respond with whatever force he deems fit. As long as the United States is not the initial aggressor the President's actions will remain "defensive" requiring no further congressional action to enable him to continue to wage the war thrust on the country.¹⁰

This view was strengthened and supported in later wars.¹¹

Expansion of the President's war powers received approval during the Civil War when the Supreme Court validated Lincoln's proclamation (without congressional authorization or direction) to blockade Southern ports. Such action and approval thereof was based, again, on the theory of acting defensively--that a President, in responding to another nation's overt acts of hostility, was not initiating war, but was assuming the war-making powers in defense of the acts committed on the United States.¹² This defensive reaction, then, was for a

¹⁰"Notes," Harvard Law Review, pp. 1779-80, citing Works of Alexander Hamilton, ed. by John C. Hamilton (7 vols.; New York: J. F. Trow, 1850-51), VII, 746-47.

¹¹In Polk's administration, that President ordered General Taylor to occupy disputed territory and to regard any crossing of the Rio Grande as an invasion, thereby allowing United States forces to attack as a "defensive" action. Polk's reasoning for this attitude was that "war exists by act of Mexico"--a point of view finally accepted by Congress which then authorized further hostilities. Ibid., p. 1780.

¹²Again during the Civil War the right of the President to make war without statutory authorization was reiterated by the Supreme Court in the Prize Cases when Lincoln's blockade

time the acceptable limit of the President's war powers-- acceptable, that is, to the majority of the judiciary, the Congress, and the public. Clearly, such an interpretation of the distribution of the war powers makes sense in today's world, as well. It is unreasonable to expect that if another power should initiate hostilities against the United States the President should not "make war" or deploy national forces in retaliation until Congress be convened to formally declare war.

If an isolated existence permitted hostilities threatening the security of the United States to be confined to its territorial limits, conflict over the shared war powers would probably never amount to much, since the above interpretation is generally agreeable. But further expansion of the war powers might be thought to have taken place with assumption by the President of the duty and power to protect American lives and property abroad.¹³

Be this as it may, the nineteenth century saw the President and Congress regarding and acting on the war powers as

of the southern ports was validated. The Court's decision bears hints of Hamilton: "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority." Prize Cases, 67 U.S. 635, 666 (1863).

¹³An international law case involving a mob attack on the United States consul in Nicaragua centered on just such a question. The position of the United States was that "citizens abroad, no less than citizens at home, are entitled to look to the Executive as head of the nation for the protection of person and property." Durand v. Hollins, 8 F. Cas. 111 (No. 4186) (1860).

fairly equal partners, notwithstanding one enduring and powerful executive act which would seemingly thrust that branch ahead in the race for preeminence in foreign affairs--the Monroe Doctrine. Even so, most observers agree the President did not acquire a monopoly over foreign affairs in the 1800's: "When strong executives, . . . or national emergencies, made the presidency paramount for a time, the natural suspicions and asserted interests of the people forced Congress swiftly to assert itself."¹⁴ And when a weak President seemed to bring Congress to the front in the struggle for power, national interests demanded a strong executive--like Lincoln. In reality, the nation was more concerned with continental expansion and related problems; and it was in this direction that Presidents turned their attention. Thus, Congress assumed by default more powers in foreign affairs; but even so, the legislative body was more involved with consular matters than with diplomacy.¹⁵ Members of Congress were concerned about protection of individual interests abroad. Gradually, however, "lives and property" were thought to include many interests--even general matters of foreign policy. Strong Presidents assumed similar views; and "by the end of the nineteenth century the capacity of the Executive to protect apparently without distinction the great variety of such interests whether evidenced by statutes,

¹⁴Clinton L. Rossiter, "The Modern Presidency and Congress," in Congress and the President, ed. by Travis, p. 123.

¹⁵Schlesinger and de Grazia, Congress and the Presidency, p. 24.

treaties, international law, or broad foreign policy aims, was well documented."¹⁶

It is in the twentieth century that the most striking trend has emerged to lay the heavier balance of the war powers in one branch or the other. The practice of Presidents taking an active part in the legislative process (even leading Congress or, more emphatically, using their war powers without official authorization from the legislative body) may be traced to the terms of three men: Theodore Roosevelt, Woodrow Wilson, and Franklin D. Roosevelt.¹⁷ More important to a study of the war powers is a consideration of the expansion of the purposes for which they may be used, a development also linked with this dynamic century. In this era the United States has had to concern itself with an extraterritorial security because "of the delicate balance of power among nations as well as the frightening technology of modern warfare. . . ."¹⁸ Under such circumstances, to limit the power to engage in war to instances of direct attack on the United States is unrealistic, indeed, foolish. National security has come to mean world security, the result being that it is possible for an attack on another country to be equated with an attack on the United States and, therefore, for the war power to be utilized. Such a decision is not as clear, however, as it once was, when an overt attack on United

¹⁶"Notes," Harvard Law Review, p. 1777.

¹⁷Rossiter, "The Modern Presidency," p. 123.

¹⁸"Notes," Harvard Law Review, p. 1782.

States boundaries made "defensive reaction" undeniably appropriate. Now, many factors, such as the location of the offended country, its value as an ally, other existing involvements there (military sites, expenditures and investments, American civilians living there) must be considered in determining whether an attack on that country is worth war. "In each case," regarding the advisability of involving the United States in armed action, "difficult political and military decisions must be made which may well lead reasonable men to different conclusions."¹⁹

In addition to this ever-broadening scope of events which might call for a decision whether or not to make war, recent strong presidential leadership and even congressional grants of power to the President have taken place. One observer has written to this effect:

In instance after instance the exceptional behavior of our earlier "strong" presidents has now been set by statute as a regular requirement. . . . Wilson and F. D. R. became chief spokesmen, leading actors on a world stage at the height of war; now U. N. membership, far-flung alliances, prescribe that role continuously in times termed "peace." Through both world wars, our presidents grappled experimentally with an emergency-created need to "integrate" foreign and military policies; the National Security Act now takes that need for granted. . . . F. D. R. and Truman made themselves responsible for the development and first use of atomic weapons; the Atomic Energy Act now puts a comparable burden on the back of every president. . . .²⁰

¹⁹Ibid., p. 1783.

²⁰Travis, "General Introduction," pp. 4-5.

This is to indicate that generally the Congress has aided, albeit unwittingly, in the gradual accumulation of the war powers in the executive branch. Even in this century, however, there have been attempts by Congress to regain some of its initiative in the exercise of war powers. Reminiscent of congressional action in 1794 was the battle over a Neutrality Act in the early 1930's. Roosevelt had drawn up legislation which would permit the United States to continue to trade with and if necessary aid an alleged "attacked" nation in the international arena while cutting off all trade with an alleged "aggressor"--all in the name of neutrality. The House of Representatives was generally in favor of the administration's plan, but the Senate was strongly opposed to it. Leadership in the latter body argued for a Neutrality Act which promised an "impartial embargo," or the stoppage of all trade with all belligerents. The Senate was victorious in this instance:

[I]t was in that summer [1935] that Roosevelt suffered the first severe rebuke to his prestige and discretionary authority, as Congress forced him to accept a Neutrality Act which narrowly restricted his conduct of foreign policy. . . . [L]imitations . . . may be placed on even the strongest of leaders at the height of their power when congressmen believe they, rather than the President, speak for the national interest and have the support of the American people.²¹

To say Congress forced Roosevelt to accept its measure may be somewhat misleading, however. After an initial drive to

²¹Stuart L. Weiss, "American Foreign Policy and Presidential Power: The Neutrality Act of 1935," The Journal of Politics, XXX (August, 1968), 673.

see his bill through, the President suddenly dropped the matter, fearing a battle would endanger his domestic program which still had to face votes in both houses and was more important to him than this matter of foreign policy. One cannot say who would have prevailed had Roosevelt determined to fight the Senate. In retrospect, he did admit years later that he had made a mistake. "Most historians have been inclined to agree, recognizing that it established a precedent for successively severe measures which nullified American influence in the restraint of aggression and the prevention of a global war."²² Nevertheless, in a decade which saw one of the strongest Presidents this country has known, Congress was able in this instance to take the initiative and check the executive. A similar effort was mounted in the mid-fifties through the Bricker Amendment. In this case, however, a direct attempt to curtail the President's powers over treaties and executive agreements was unsuccessful, leaving "still unclear and requiring further reappraisal . . . such substantive matters as the prerogatives of the Executive and the Departments of State and Defense to make agreements or pledges short of treaties with foreign countries without 'the advice and consent' of the Senate."²³

Before the Bricker episode, the Korean War under Truman's administration had taken place with very little congressional

²²Ibid., p. 691.

²³Robert Shaplen, "Our Involvement in Laos," Foreign Affairs, XLVIII (April, 1970), 478.

participation. In spite of the legislative success in 1935, then, it has been generally conceded that the executive is in control today and does appear to have the advantage over Congress in use of the war powers although the Constitution grants the powers concurrently. Indeed, the two great branches really could have collided on these vague points had not other factors weighted the outcome of such a contest in favor of the executive. Truly, as Schlesinger has stated, the question of relationship between the President and Congress "involves practical questions of power rather than abstract questions of principle."²⁴

Through the years there has been an ebb and flow of political power between President and Congress. Recently it seems there has been greater flow toward the executive office--in foreign affairs as well as other matters. Although the writers of the Constitution attempted to create three equally influential branches, constitutional development through custom and practice has witnessed growing presidential prestige and power. In the area of foreign affairs, this trend is particularly significant; and one writer has explained,

The President's power to act is potentially the most far-reaching in the sphere of foreign relations. Not only do the Constitution, custom, and usage accord him great latitude but diplomacy requires the expertise, quickness of response, and flexibility which characterize the executive branch.²⁵

²⁴Schlesinger and de Grazia, Congress and the Presidency, p. 15.

²⁵Weiss, "American Foreign Policy," p. 673.

While the Constitution gives to the President the command of the armed forces, the treaty-making power, and the prerogative of receiving ambassadors (with its concomitant power of recognition), it gives to Congress virtual control over the armed forces through the appropriation power, the duty of maintaining the armed forces, and the right to withhold consent required for treaties. Recent events in a complex and shrinking world have given new meaning to these constitutional provisions and have led to increased presidential strength. Growth in federal influence over the state governments has been accompanied by a growth in the influence and responsibility of the executive--a development which has caused twentieth-century Presidents to set precedents which have become imbedded in custom. All of this has not been successfully stymied or even slowed by the legislative branch. For one reason, in the area of foreign affairs Congress is neither structurally nor ideologically suited to decision making:

Congress, hierarchically managed, responsible to hundreds of jealous constituencies, cumbersome in organization and procedures, heir to the conflicting claims and prejudices of numerous lesser interests, is not the body to manage such affairs. For these are matters of national power and that is eminently the president's to wield.²⁶

The time factor is of prime consideration: "Limits and restraints can be set by the Senate constitutionally and should be observed; but it has been argued, mostly by military men, that in certain emergency situations, and in meeting

²⁶Tom Wicker, "It Is the People Who Face the Test," in Congress and the President, ed. by Travis, pp. 144-45.

obligations already spelled out, there may not be enough time to consult the Senate."²⁷ The delays of calling Congress into session, of hearing proposals and counter-proposals, and of voting are no match for the speed of an executive decision which the urgency of most crises in this nuclear age seems to demand. Regardless of who makes the decisions, they need often to be carried out with a degree of secrecy which cannot possibly be effected by the Congress. Secrecy should not always imply, as many would have the American public believe, that military hounds are trying to keep from the public eye the great drive and aggressiveness with which they are trying to make or expand a war. A case in point is recent United States involvement in Laos:

Until recently the operation was an official secret. The secrecy was regrettable from an American constitutional point of view, and after a time should have ceased, but from the point of view of commitments it avoided the Vietnam type of entanglement. If we had ever been faced with the unfortunate choice between a Laotian capitulation and the dispatch of large numbers of American combat troops, we could have chosen the former and walked away from the situation. Even when the United States government decided on March 6 of last year [1970] to make a public acknowledgment of its activities in Laos, it did so in order to portray how little, not how much, we were doing there.²⁸

Also to be noted is the fact that the executive has acquired (certainly without devious intent, but coincidentally) a near

²⁷Shaplen, "Our Involvement in Laos," p. 491.

²⁸Roland A. Paul, "Laos: Anatomy of an American Involvement," Foreign Affairs, XLIX (April, 1971), 543.

monopoly on information sources, both incoming and outgoing.²⁹ He is surrounded by advisers--experts in their respective fields--plus huge staffs of secretaries and assistants to handle relations with the public, with the press, and with Congress itself. There are personnel to help draft addresses to Congress and even bills to be proposed from the floor of Congress, so that if a specific directive were forthcoming from that body concerning the use of war powers, one might be well advised to search for its origin before crediting the legislative branch with positive action in this field. With these aids at his disposal, it becomes clear that the executive has not only an advantage in identifying problems, but also in proposing alternatives to their solution. In this regard, one authority has explained,

As a result there is an increasing inclination to rely on the executive for the presentation of proposals to deal with problems. Congress' role, then, becomes less and less one of the initiation of policy alternatives and more and more the modifier, negator, or legitimator of proposals which originate in the executive.³⁰

This is to imply that the mere listing of alternatives tends to limit choices and thus constitutes a significant power.

One element of executive-legislative relations which has recently emerged in the mounting debate over United States commitments in Southeast Asia is public opinion. The presence

²⁹Zucker, "The Presidency," p. 58.

³⁰James A. Robinson, Congress and Foreign Policy-Making (Homewood, Ill.: The Dorsey Press, 1962), p. 8.

of this phenomenon is somewhat rare in the field of foreign relations and has received relatively little attention from scholars and researchers. One writer has commented,

Unlike most domestic issues, controversies over world problems have been relatively insulated from popular influence. Hence, research on the development of international conflict usually has devoted more attention to the statements and behavior of national leaders or key influentials than to public sentiments regarding war.³¹

But the bitterness of feeling generated by extended war and loss of lives in Vietnam has caused public opinion to be taken more seriously by political scientists and by both branches of government. In this way public opinion has been given a place, even though indirectly, in the decision-making process. This development is not unique. The prolonged Korean War had the same effect. By studying correspondence files and voting records of senators in the decade of the fifties, Malcolm E. Jewell has concluded that generally, the public is ill-informed and apathetic about matters concerning foreign policy, and that the few letters congressmen do receive may, and often do, distort true public feeling. But the Korean War was another matter, and eventually it aroused a deeply concerned public:

As the stalemate in Korea continued, the administration remained unable to convince a majority that its limited-war policy was wise. The bitterness engendered by the grim deadlock in Korea poisoned bipartisan relations, damaged other foreign programs, and, after it became an issue in

³¹Harlan Hahn, "Correlates of Public Sentiments about War: Local Referenda on the Vietnam Issue," The American Political Science Review, LXIV (December, 1970), 1186.

the 1952 election, forced an end to the war itself.³²

The public can wield a powerful hand, for nothing is closer to the lifeblood of a politician and office-holder than the support of his constituents. Realizing this, a few more comments are appropriate. For one thing, the public does not have access to all information regarding foreign policy; so while it does create a great pressure, this pressure may produce a wrong decision because the public tends to be ill-informed and parochial in its outlook.³³ Moreover, expressions of public will may indeed be merely the reflections of either the legislative or executive point of view, whichever branch has succeeded in manipulating the public mind through the media and in molding opinion. Jewell has written,

The President determines both the climate of public opinion on foreign issues and the extent and nature of public pressure on a senator. Through bold action in an emergency or through persistent efforts to explain the facts of international life to the citizens, the President can--on occasion--mobilize public support so strong that the senator becomes conscious of it and may hesitate to vote against presidential programs.³⁴

On the other hand, speaking of the obligation the Senate has to "guide" public opinion, Senator Jacob Javits has claimed,

A major function of the Congress with respect to the great issues of foreign policy

³²Malcolm E. Jewell, Senatorial Politics & Foreign Policy (Lexington: University of Kentucky Press, 1962), p. 178.

³³Walter Lippmann, Essays in the Public Philosophy (Boston: Little, Brown and Co., 1955), Chs. 1-3, 5.

³⁴Jewell, Senatorial Politics, p. 193.

and national security is that of shaping as well as articulating public opinion. In a democracy such as ours, governmental action is possible only within parameters defined by public attitudes and opinions. In the major Senate foreign-policy debates of the very recent past . . . we have learned that the development and public presentation of new information and interpretations bearing on the great issues is a vital Congressional function as well as a potent instrumentality in asserting legislative prerogatives and responsibilities.³⁵

Perhaps, then, it is the effectiveness of the campaigns of congressional and executive leaders alike to win over the public that has produced a fairly evenly-split public reaction as regards opinions concerning the conduct of the war in Vietnam; and if there is a stalemate in government, perhaps it is the outgrowth of a stalemate in conflicting public attitudes.

A final consideration, which might be thought to be an advantage to the legislative branch, is its constitutional grant of the appropriation power. In theory, this would give Congress ultimate control over implementing foreign policy decisions--in particular, the deploying of troops for combat. Realistically speaking, it is almost impossible for Congress to assume an affirmative role in the use of war powers by exerting its appropriation powers. As one authority has pointed out, "Congress may amend, reduce, trim, or withhold money for foreign policy projects, but it can rarely enlarge, increase, or raise

³⁵Jacob K. Javits, "The Congressional Presence in Foreign Relations," Foreign Affairs, XLVIII (January, 1970), 224.

them."³⁶ To give a more pointed example of how the appropriation power may be used, the case of the funding of the atomic bomb is cited. In 1944, the War Department realized that much more money than was already available in authorized funds or could be acquired by shifting budget items would be needed to continue research and building of the atomic bomb. The Department had to go to Congress with a request for more money. Department officials worked closely with Speaker Sam Rayburn, who then persuaded Majority Leader John McCormack and Minority Leader Joseph Martin to guide the appropriations bill through the House without any identification or debate. Similar tactics were employed in the upper chamber with the special help of Democratic leader Alben Barkley and Republican Styles Bridges. In this rare situation, leaders of the Appropriations Committees and a few others knew the executive plan but never divulged to their fellow congressmen the purpose of the money--another example of executive direction behind legislative action.³⁷ A use of the appropriation power other than raising money for military expenditures, however, and one which could be equally meaningful, would be to withhold funds in an effort to stop or slow down military activity. In matters of extreme urgency, that is, when hostilities are already underway (such as in Vietnam), it would be a serious political error for a congressman to show his opposition to those hostilities by

³⁶Robinson, Congress and Foreign Policy-Making, p. 193.

³⁷Ibid., p. 37.

trying to cut off support of American soldiers already in the field of battle.³⁸ In reviewing the strengths of the senatorial appropriation power, Senator Javits remarked skeptically,

Essentially, the constitutional role of the United States Senate in foreign policy is consultative. Our powers are not comparable to those of the Presidency. The one weapon we have, the control and authorization of appropriation--the power of the purse--must necessarily be used with the greatest discretion. It is my view that only in a situation in which the President is completely resistant to the national will, as expressed by an overwhelming vote of the Congress, should this power be brought to bear. For as we call upon the President to respect the rights of the Legislative Branch we must, even in times of stress, respect his. The use of such power in foreign policy through denying appropriations implies a rejection of the American President almost as stunning in its implications as a vote of no confidence under the parliamentary system--which thereby ousts the government.³⁹

Even if such a use were made of the appropriation power--that is, to cut off funds--an executive department has other roads it may follow to achieve its end; one is the practice of "treasury borrowing," or going directly to the treasury for a loan which must be reimbursed eventually. This borrowing must be authorized by Congress but such authorization bypasses the Appropriations Committees and demands only one act of Congress, thereby narrowing the possibilities for examination of the purposes for which the money is to be spent.⁴⁰

³⁸Schlesinger and de Grazia, Congress and the Presidency, p. 27.

³⁹Javits, "Congress in Foreign Relations," p. 233.

⁴⁰Robinson, Congress and Foreign Policy-Making, p. 209.

With these structural advantages accruing to the executive and taking the divisive nature of Congress into consideration, a general consensus of opinion emerges. The image of the President as a single individual appears to be the most logical locus of power in that he can view all problems, resources, and priorities in a national light and act (that is, decide whether or not to make war) in the national interest. A further development enhances this point of view. One observer feels that the main change in the relations between the two branches has been neither institutional nor constitutional, but rather

a change in the climate of politics and custom. The country now expects the president to have a program and to work hard for its enactment. He is more likely to be criticized in today's press for timidity and inertia than for resolution and activity. What the country expects, Congress also expects. Henceforth it will react with mild irritation rather than wild indignation to presidential attempts to goad it into action.⁴¹

Senator Javits reiterated this theory in 1970 when he wrote,

A "strong presidency" has evolved into a national institution welcomed in this century by most Americans. That welcome is a response to the quickened pace of communications and the apparent need for the country to act immediately and with decisiveness in the ever recurring crises of contemporary foreign policy.⁴²

Thus, the tendency of the executive branch to dominate the legislative branch, which has been criticized and regarded with some degree of fear by a few, has come to be seen as a duty by a great part of the country, citizens and legislators alike. This is

⁴¹Rossiter, "The Modern Presidency," p. 126.

⁴²Javits, "Congress in Foreign Relations," p. 221.

true in foreign affairs even more than in domestic matters. One could hardly blame a natural reaction to public demand on an overzealous, power-hungry President. The last twenty-five years have witnessed a most astounding growth in presidential responsibility for initiating and guiding through the legislative process bills pertaining to such matters.⁴³

In these years more and more attention has been directed toward the successes and failures of the executive and legislative branches to work together. Years past have seen first one and then the other step forward as the obvious leader, and the executive has now held that position for a considerable length of time. For this reason, many political scientists fear a concentration of power in a "democratic dictator," and have called for a reevaluation of the system, a restudy of sources of power and lines of influence between the two branches, and, in an effort to prove their fears are real, a candid disclosure of current relationships in the working out of foreign policy matters. Alfred de Grazia has done more than criticize what he regards as dangerous concentration of power in the office of the President and has offered several remarkable suggestions for revision of the current system:

His war powers should be modified. He should share the power to retaliate against foreign aggression with a congressman who would be elected by the whole Congress for this assignment. We should take away his key. He has more immediate problems to attend to without carrying around with him "the nuclear anxiety of the

⁴³Jewell, Senatorial Politics, p. 146.

world." His power to commit troops to combat should be limited by standing legislation, in lieu of a declaration of war, whichever he may prefer to employ or seek. The President needs to be protected from pressures towards engaging in foreign adventures. The President should not go overseas without the consent of Congress nor without a representation of Congress.⁴⁴

Some of these measures may strike one as extreme, particularly a censure of presidential travel abroad, but such an argument is indicative of how strongly some feel about the executive office. Most political scientists, however, whether opposed to or in support of presidential prerogatives, have avoided concrete proposals for change and have limited their efforts to researching the operations of the executive and legislative branches and proving or disproving their hypotheses relating to any liaison between the two. Several interesting conclusions are available from recent studies, one being that in spite of Congress' "legal advantage" of the right to declare war, that body is actually more likely to be involved in non-violent issues in foreign affairs rather than in violent issues (i.e., instances of hostilities and armed conflict.)⁴⁵ For example, as mentioned earlier, Congress' role in the Korean War was negligible. Truman, as Commander in Chief, directed United States involvement there; citizens and congressmen alike initially gained most of their information about that conflict from the newspapers! In fact, within the past twenty years, in

⁴⁴Schlesinger and de Grazia, Congress and the Presidency, p. 65.

⁴⁵Robinson, Congress and Foreign Policy-Making, p. 68.

two instances where United States forces have been deployed-- Korea and Berlin (and later a third and fourth, Vietnam and Cambodia)--not only has legislation from Congress not been requested by the executive, but neither has Congress been informed in advance of the activities.⁴⁶

Interestingly, however, case studies have indicated that when Congress did take the initiative in making a foreign policy decision, it was the congressional point of view which prevailed.⁴⁷ Initiation seems to be a vital part of influence, for the initiator chooses the issues to be considered and, essentially, fixes the limits of the discussions and prime alternatives. The importance of selecting alternatives for solutions has been stated before. Such a choice is a particularly difficult one in matters of international consequence:

In foreign policy perhaps even more than in national politics--because the terrain of the former is usually less familiar--policy alternatives are seldom "given." They must often be gropingly formulated in the context of a total situation in which disagreements will arise over which estimate of the situation is most valid, which alternatives exist, what consequences are likely to flow from various choices, and the values which should serve as criteria for ranking the various alternatives from most preferred to least preferred. . . . The essence of the process is a choice among possibilities--not an abstract or ideal choice but a practical one appropriate to the circumstances.

⁴⁶Ibid., p. 66.

⁴⁷Ibid., p. 68.

Rarely are policymakers confronted with the absolute and inescapable necessity of a single response, with no other alternatives conceivable.⁴⁸

Policymakers who most often set forth these alternatives in today's great nations, with the most resources at hand to guide their decisions, are executive officials.

Probably the greatest impediment to collaboration between the two branches of government (and even within the legislature itself, which has decreased its capability to act quickly and decisively) is partisan politics. There is a need for strength and unity in foreign policy-making, and this is hampered in the United States today by political parties. A political party is capable of creating a large and strong opposition to a decision; this could lead to deadlock in an area where action is essential--thus, another reason for a strong executive. Whether partisan politics are a real threat to cooperation between the two branches is another subject of a study by Jewell. He explains,

An administration that lacks domestic political strength or that is engaged in bitter domestic struggles with the opposition may find the political atmosphere not conducive to bipartisan cooperation in foreign affairs. Some foreign policies are so interwoven with controversial domestic questions, such as the level of the budget, that bipartisan agreement is difficult or impossible.⁴⁹

⁴⁸James E. Daugherty and Robert L. Pfaltzgraff, Jr., Contending Theories of International Relations (Philadelphia: J. B. Lippincott Company, 1971), p. 313.

⁴⁹Jewell, Senatorial Politics, p. 5.

Almost all of Jewell's findings reflect activity of the Senate alone; for although the responsibilities of the House of Representatives have been growing in the area of foreign affairs, the Constitution and practice have succeeded in boosting the Senate into a position of primacy. Moreover, there is some reason to believe that the Senate as a body has a personality which marks it as being more willing than the House of Representatives to stand independent of the President and his forces of influence. While the character of the House is such that the leadership therein has great control over the rank and file, it is not so with the Senate:

Senators, particularly those with years of experience, can be extremely inflexible. They take great pride in their independence and often think themselves better judges of public policy than the President.⁵⁰

But such feelings of independence do not always cross political party lines. A survey of the voting records of the senators over the past twenty-five years reveals that party members do stick together and square off along partisan lines on foreign policy questions. What is more, it seems that occupancy of the executive office has no little bearing on the attitude of each party toward who should wield the strongest hand. For example, while Truman was in office there were some legislative attempts to limit the President's role in foreign affairs.⁵¹ In these instances the Democrats in Congress made clear their opposition

⁵⁰Weiss, "American Foreign Policy," p. 679.

⁵¹Jewell, Senatorial Politics, p. 21.

to curbing executive power in this area and were successful in their stand against the Republicans. As the Eisenhower years came, however, the Democratic party gradually changed its attitude; and by 1954, the activity and debate promoting the Bricker Amendment indicated that "the Democrats had abandoned their devotion to strong presidential authority in foreign affairs."⁵² The Republican voting record, of course, demonstrates a like tendency to view the proper locus of power in foreign policy matters in different ways depending on their relation to the executive branch. One might then conclude that no valid argument as to who holds ultimate power may be found from strictly partisan sources--they will reflect merely the attitude of the current conditions and not a permanent answer.

In spite of all hindrances--partisan and otherwise--to the close cooperation of these two branches in working out foreign affairs' problems, and the great advantages aforementioned on the side of the executive as far as power is concerned, there is some degree of collaboration and some evidence that the legislative branch, after a period of dormancy, is making an effort to revitalize its role in this field. Recently, one senator has stated with confidence,

Today, debates about the Viet Nam war, the defense budget and domestic priorities are bringing about an even more powerful role for the Congress in foreign affairs. We have all seen this happening and most view it as a healthy sign; the probing, the questioning,

⁵²Ibid., p. 22.

the suggesting, the delving into national security requirements with the same scrutiny which Congress always has given to domestic affairs have met with general approval.⁵³

Again, it would be hard to say whether the growing resistance on the part of the legislature to presidential power reflects the genuine indignation of one branch of government against another or merely partisan prejudices. Actually, as Schlesinger has argued, "the question of the distribution of power between the President and the Congress, in foreign as well as domestic affairs, is a matter not of right or wrong but of practical results."⁵⁴ The growing executive role has been seen to be a natural and gradual one and in most ways the most sensible one for firm, positive action in a field beset with crises and urgency. Nevertheless, two authors have pointed out that "in modern democratic states, although many decisions must still be made within the area of executive discretion and beyond the effective reach of the public, the executive branch has experienced some limitation of its freedom by legislatures, political parties, interest groups, public opinion, and the mass media of communications."⁵⁵

Suddenly, in the Spring of 1970, the American Congress came alive in the wake of prolonged hostilities in Southeast

⁵³Javits, "Congress in Foreign Relations," p. 223.

⁵⁴Schlesinger and de Grazia, Congress and the Presidency, p. 27.

⁵⁵Daugherty and Pfaltzgraff, International Relations, p. 323.

Asia and such executive action as the sending of troops into Cambodia. A review will herewith be made of the startling steps by Congress at that time to regain some element of leadership, particularly relating to direction of armed hostilities, through a case study of the Cooper-Church Amendment and its implications for following congressional actions designed to develop new constitutional interpretations of the power to make war.

II. THE PRESIDENT ACTS

Nixon's Cambodian decision in late April, 1970, provoked the new surge in Congress for reclaiming some powers in foreign policy. The ensuing debate brought into focus all conceivable positions on the matter of delegation of the war powers. Events prompting that controversial executive determination related to the continuing Indochinese conflict.

When General Lon Nol assumed the position of head of state in Cambodia, he found himself in charge of a poorly trained, poorly equipped army which did not even march well, much less fight. At the same time, North Vietnamese and Vietcong forces (which had for some time been using the sparsely inhabited Cambodian regions bordering South Vietnam as sanctuaries, training and recuperation areas, and supply lines) were joined by some Cambodian troops. These Cambodians were former supporters of Sihanouk. Forming a coalition with the North Vietnamese and Vietcong, they suddenly turned from the border areas and began driving for the Cambodian capital, Phnom Penh. Regular Cambodian soldiers were no match for these insurgents; and by April 27, the aggressors were reported to have occupied three of the nation's seventeen provinces.¹ As the Communist

¹Newsweek, April 27, 1970, p. 37.

forces bore down on the capital and drew within twenty miles of it, Lon Nol sent cries for help to sympathetic chiefs of state, in particular, to President Nixon. As the press described "menacing movements of 40,000 Communist troops" inside Cambodia, it also referred to the dilemma with which the President was faced.² If he did not answer Premier Lon Nol's pleas, that government was sure to fall, which would certainly give the Communists more secure sanctuaries and a new front against South Vietnam. A stronger offensive on the West would lengthen the period of American involvement and drag the United States into a wider war, even though any American President would wish to avoid such a disaster. If Nixon did send aid, political protests at home would skyrocket.³ Washington had already arranged for the South Vietnamese government to send some

²Time, May 4, 1970, p. 14.

³In an address by Secretary of State William P. Rogers before the Cornell Alumni Association at New York City on April 18, entitled "Two Aspects of the Search for Peace," the Secretary probably unknowingly outlined the dilemma and foretold the conclusion. He said, in part, "The sharply increased fighting in Laos and the possibility of overt warfare in Cambodia have understandably caused concern among Americans. They ask if the war in Southeast Asia is widening rather than diminishing. They wonder if this means that the period of American involvement will be lengthened, rather than reduced.

"The objective of the Nixon administration is to avoid both these results.

"It is true, of course, that we cannot be indifferent to the military pressures by North Viet-Nam on the independence and neutrality of Laos and Cambodia. They affect the safety of our own forces in South Viet-Nam and the prospects for peace there. They also affect the future stability of Southeast Asia. We continue to believe that an ultimate settlement to the Viet-Nam war must take Laos and Cambodia into account." Printed in U. S. Department of State Bulletin, LXII (May 11, 1970), 608.

AK-47 Russian-made rifles captured from the North Vietnamese, but Lon Nol wanted much more.⁴

A horrible irony took shape during these days in the relations between Cambodia and South Vietnam. Since the largest component of Lon Nol's enemy consisted of North Vietnamese soldiers, he began drumming up a massive hate campaign against the Vietnamese people. Some half million ethnic Vietnamese who were living in Cambodia suddenly found themselves targets of the Communist soldiers approaching from the North and East; at the same time they were targets of government troops and Cambodian civilians trying to rid their country of the hated Vietnamese. In just one instance of war atrocities, eighty-two Vietnamese civilians were bound, slaughtered, and sent floating down the Mekong River.⁵ The irony was that in spite of the strain this caused on Phnom Penh-Saigon relations, their troops continued to work together in the border areas in attempts to discover the Communist sanctuaries. Up to this point, United States spokesmen in Washington and Saigon denied anything but minimum involvement in raids which carried troops across the Vietnam border and into Cambodia. United States advisers had permission to cross into Cambodia "to exchange pleasantries and protocol greetings" but could not take part in "substantive discussions."⁶

⁴William Beecher, "Rising Peril Seen: Nixon to Speak on T.V. Tonight--Action Is Termed Limited," New York Times, April 30, 1970, p. 1.

⁵Newsweek, April 27, 1970, p. 38.

⁶U.S., Congress, Senate, Senator Fulbright quoting Carl Robinson, Washington Post [April 10, 1970?], 91st Cong., 2d sess., April 16, 1970, Congressional Record, CXVI, 12160. (Unless otherwise indicated, subsequent references to this source refer to Senate proceedings.)

Although the South Vietnamese were already aiding Cambodia against the North Vietnamese, the United States was only examining requests for military aid.

Just the suggestion that the President was even giving consideration to Lon Nol's request brought an immediate reaction from the Senate. On Monday, April 27, the Foreign Relations Committee of the Senate summoned Secretary of State Willaim P. Rogers to clarify the role the United States was expected to take with regard to Cambodia's plight. In a closed session which lasted over two hours, Rogers reported to the group that the President had made no final decision on Lon Nol's urgent plea for help; but he spoke of the probable choices for action in such ambiguous terms that one senator left the meeting sure that the United States would send no aid to Cambodia, while another left with just the opposite impression.⁷ In any event, the Senate committee, with eleven of its fifteen members present, strongly advised the Secretary against furnishing any United States military aid to Cambodia. The fact that this strong opposition to further entanglements in Southeast Asia came from a bipartisan group with nearly unanimous backing should have been an early indication of how deeply the upper house would feel itself involved in the decision-making process. Even at this point, however, Secretary Rogers hinted at the attitude of the administration when he told the committee that while large amounts of supplies

⁷"Key Senate Unit Opposes Sending Cambodia Arms," New York Times, April 28, 1970, p. 5.

probably could not be sent to Lon Nol's government without congressional authorization, smaller amounts could be turned over without such approval under the military assistance program.⁸ Surely, because he did not know what events were to follow, Rogers in this instance grossly understated the liberties which President Nixon felt he was permitted. This Senate committee could have had no idea what little bearing their warning to the chief executive would have on the final decision. Senators from both sides of the aisle seemed of one mind and of firm conviction. In a speech delivered earlier in April, Democratic Majority Leader Mike Mansfield (Montana) had said,

President Nixon has made a wise start in pointing the national course away from our participation in the tragic war in Indochina. It is to be hoped that there will be no deviation from that course. The way to get out is not to go further in--in any way, shape, or form. The road out of Vietnam for this nation does not lead by way of arms support or any other involvement in this new extension of the Indochinese tragedy into Cambodia.⁹

A week later, J. W. Fulbright (Democrat, Arkansas, and Chairman of the Senate Foreign Relations Committee) left no doubt as to his position when he declared before the Senate,

Mr. President, frank disclosure by the executive branch to Congress of key foreign policy activities--in executive session if necessary--is one basic necessity for the continued functioning of our form of democratic government. . . .

⁸Ibid.

⁹Congressional Record, April 16, 1970, CXVI, 12137.

I would remind the administration that the Foreign Relations Committee expects to be consulted before this Government takes that first step [or any military assistance program in Cambodia]--however small it seems.

The history of Vietnam . . . reveals a pattern of constantly escalating involvements which grew uncontrolled from small steps first taken without full public debate of future consequences.¹⁰

That the President would not risk further entanglements in Southeast Asia by sending military aid to Cambodia appeared certain. This supposition was buoyed by White House statements on the situation which encouraged other Asian nations to come to the aid of their neighbor while not giving any indication of United States commitments. Further encouragement for non-involvement by the United States followed the announcement by Nixon on television of his timetable of withdrawal, which specified 150,000 American soldiers to be brought home within the next year, a figure considerably higher than had been expected. Both of these factors were interpreted by some as a "hands-off" policy toward Cambodia. It was, then, a complete surprise when on Wednesday, April 29, a statement from the United States command in Saigon made public the fact America would render aid to a South Vietnamese offensive across the Cambodian border in the "Parrot's Beak" (name by which this operation was known) region. "Aid" was defined as helicopters and tactical air support, artillery, medical evacuation teams, and combat advisers.¹¹ Although officials privately conceded that this move was an

¹⁰Congressional Record, April 23, 1970, CXVI, 12755-56.

¹¹Beecher, "Rising Peril," New York Times, April 30, 1970, p. 1.

American decision, publicly it was described as a South Vietnamese offensive, aided by the United States.¹² Throughout the stormy days that followed, Nixon and his spokesmen repeatedly insisted that this was not to be considered an affirmative answer to Lon Nol's request for military aid--that this support was to South Vietnam and not to Cambodia. A headline in the New York Times stating "Move Stirs Opposition in Senate" represented a gross understatement.¹³

Initial reaction seems to have been shock that such a step was taken and then anger that it was done with no previous indication whatever to the Congress. In fact, due to the lack of communication between the White House and Capitol Hill, early comments from congressmen indicated a great deal of confusion as to what exactly was involved. Gradually, more statements from the executive offices, usually made by the Assistant Secretary of Defense for Public Affairs, Daniel Z. Henkin, declared that the action would be limited in time and scale, the numbers of advisers being estimated in the "low hundreds," and that the reason for this action was the fact that Vietcong and North Vietnamese troops in Cambodia had posed an increasing threat to American and allied troops in South Vietnam.¹⁴ Many senators, Republicans and Democrats alike, feared that this offering of military aid would only widen the war. They were

¹²Ibid.

¹³Ibid.

¹⁴Ibid.

not to be easily placated. Some observers felt that the administration had underestimated the critical reaction from Congress.

On the Senate floor, Jacob Javits (Republican, New York) declared, "The decision announced by the Pentagon on U. S. operations in Cambodia must be deemed to be the President's decision to expand the Vietnam war into Cambodia and to reject the advice given to the administration by the Senate Foreign Relations Committee just the other day."¹⁵ William Proxmire (Democrat, Wisconsin) said, "I am opposed to the President's action. We should stay out of Cambodia completely and wholly. I am unqualifiedly against intervention there."¹⁶ Slightly more anger was demonstrated by George McGovern (Democrat, South Dakota) when he exclaimed,

I am appalled at the news that we are intervening militarily in Cambodia. After all the tragic lessons of Vietnam, it seems a nightmare to me that our leaders are actually committing us to war in another Southeast Asian country. . . .

The inevitable result of this is a wider and bloodier conflict. . . .¹⁷

Charles E. Goodell (Republican, New York) echoed these sentiments when he submitted legislation preventing any military intervention in Cambodia. He commented, "This profoundly dangerous step was taken without consultation and without approval of the Congress. It now has become obvious that Congress must

¹⁵Congressional Record, April 30, 1970, CXVI, 13542.

¹⁶Ibid., p. 13546.

¹⁷Ibid., p. 13547.

swiftly adopt legislation to insure that no further steps are taken by the administration to embroil the nation in a Cambodian war."¹⁸ The growing defiance of the Senate was exhibited by the oratory of Stephen Young (Democrat, Ohio):

President Nixon has usurped the functions of Congress. He has disregarded the will and wishes of the American people. Responding to Gen. Earle Wheeler and other militants, to whom it now appears he is giving slavish devotion, he has ordered this invasion or raid by our Armed Forces with two regiments of our puppet Saigon militarist regime without first informing the American people and without informing the Congress.¹⁹

Perhaps the most eloquent introduction to the emerging conflict was to be found in the words of Senator Frank Church (Democrat, Idaho):

Mr. President, during my 13 years in the Senate, I have been a reluctant witness to the steady decline of Congress in the performance of the role assigned to it by the Constitution. The waning authority of Congress relates not only to peripheral matters, but reaches to the very core of its legislative responsibility--to the war power, the treaty power, and its power over the public purse.

The resultant ascendancy of the executive, built upon the steady erosion of congressional power over a long period of years, should command the urgent attention of all those who believe in balanced Constitutional government. It is not too much to say that the very preservation of the Republic, itself, is the ultimate issue at stake.²⁰

Of course, the strongest and most immediate opposition was to be found among the members of the Senate Foreign

¹⁸Ibid., p. 13551.

¹⁹Ibid., p. 13554.

²⁰Ibid., p. 13563.

Relations Committee, two of whom were John Sherman Cooper (Republican, Kentucky) and Senator Church. These two senators announced at once that they were planning to "offer an amendment to the pending Military Sales Act which would have the effect of barring the delivery of military equipment, personnel, instructors, and supplies to the new government of Cambodia in an effort to draw the line against a deepening American involvement in the widening Indochinese war."²¹ Immediately, Senators Mansfield and George Aiken (Republican, Vermont) announced that they would co-sponsor the amendment; and Mansfield added that he hoped it could be acted on in the next week.²² Thus the executive decision was quickly attacked by senators of both parties and senators who had generally supported the President's Vietnamization policy.²³

In the midst of this flurry of angry activity in the Senate, House reaction was considerably more restrained. On the following April 30, while the House was considering a \$20.2 billion military authorization bill, a floor fight did develop over whether to attach to this bill a restriction on the possible use of American soldiers in Cambodia, Thailand, and Laos. In the meantime, President Nixon had made public his

²¹Ibid., p. 13562.

²²John W. Finney, "Senators Angry: Some Seek to Cut Off Funds for Widened Military Action," New York Times, April 30, 1970, p. 1.

²³Senators Aiken, Cooper, Mansfield, and Norris Cotton (Republican, New Hampshire), who had previously backed Nixon's program for Southeast Asia, turned against him over Cambodia.

intention to speak to the nation on television explaining his decision and the position of the United States. Minority Floor Leader Gerald R. Ford (Republican, Michigan) was successful in convincing most of the House members to put off a decision on attaching a restriction to the bill until after the President's speech. In a relatively close 131 to 100 vote, the House decided to adjourn and leave that decision until the following Wednesday.²⁴

On Thursday evening, April 30, the nation awaited Nixon's address, scheduled for 9:00 p.m. Eastern Standard Time. Hours before the President spoke, the Senate Foreign Relations Committee held a special meeting to discuss what action should be taken in the face of this executive show of power. Subsequently, the committee issued a statement which had been unanimously adopted by its members:

The deepening American involvement in Cambodia is a grave development. . . .

American participation in South Vietnamese operations in Cambodia raises important questions concerning U. S. policy in the widening war in Indochina. These questions deeply concern the committee. They are being presented to the executive branch.²⁵

²⁴John W. Finney, "Key Congressmen Briefed; Reaction Called Favorable," New York Times, May 1, 1970, p. 5. See also Congressional Record, April 30, 1970, CXVI, 1378Qff.

²⁵Senate Report No. 91-865 of the Committee on Foreign Relations, Amending the Foreign Military Sales Act, May 12, 1970, p. 4. The Committee at this time also sent a letter to Secretary of State Rogers asking the following questions:

"1. Does the executive branch consider that the SEATO Treaty has any application to the current situation in Cambodia? Is the Tonkin Gulf resolution considered to be applicable?

"2. What authority is being relied upon to support the sending of U.S. forces into Cambodia? If it is to protect

Press observers felt that such a statement indicated that these senators had decided to delay any efforts to limit Presidential authority in Cambodia by restrictions on military appropriations. Senator Fulbright himself said that instead of resorting to "the ultimate power of the purse strings," he would try to "rely on persuasion and decent respect" between the two branches of government to influence policy.²⁶

In the meantime, President Nixon had been in isolation working on his speech. At 8:00 p.m., apparently aware now of

American forces in Vietnam, where will the line be drawn? It is considered that this authority would permit sending U.S. ground forces to knock out enemy bases in Cambodia? Air strikes in support of South Vietnamese or Cambodian troops? The defense of the Cambodian capital? If the enemy forces reestablish bases in another area of Cambodia, or a third country, does the executive branch believe it has authority to assist the South Vietnamese in attacking those bases?

"3. Does the administration plan to consult with the Committee on Foreign Relations concerning the sending of additional advisers or additional U.S. military forces of any kind into Cambodia? Is there any intention to ask the Congress to approve U.S. military involvement in Cambodia or the sending of military aid? Will the administration make public any agreement to provide military aid to Cambodia, directly or indirectly?

"4. Is the present operation unique or the beginning of a pattern?

"5. Why does the administration consider that eliminating the enemy bases in Cambodia is more important now than before the overthrow of Sihanouk? Was the existence of these bases an element in planning the Vietnamization strategy?

"6. Did either the United States or South Vietnam consult with and obtain the Cambodian Government's approval for conducting the current operation? If its approval was obtained, what, if any limits were imposed?

"7. What impact has this operation had, or is it likely to have, on the efforts by Indonesia and others to bring about an Asian conference to discuss the Cambodian problem?" Ibid., pp. 4-5.

²⁶Finney, "Reaction Favorable," p. 5.

the extreme disappointment among congressional members at not being consulted prior to his previous decisions, the President held a briefing in the Cabinet Room for some forty leaders and committee chairmen from both houses of Congress and the members of his cabinet as well. For almost all those present, this was the first news they had that not just supplies and technical advisers, but several thousand American combat soldiers as well, were crossing into Cambodia to drive Communist troops from their sanctuaries. This operation was carried out in the "Fishhook" area of Cambodia, some fifty miles northwest of Saigon; and it was expected to carry United States servicemen as far as twenty miles into Cambodia for a period of six to eight weeks. The President stated emphatically that the main objective was to seize supplies, not to kill the enemy and certainly not to occupy territory.²⁷ President Nixon summarized his prepared speech and set forth the rationale for this action. Just before going next door to the Oval Room where his words would be televised, he turned the briefing over to the Secretary of Defense, Melvin Laird, and to the Chairman of the Joint Chiefs of Staff, General Earle Wheeler; they were left to answer questions. The New York Times reported that as Nixon departed he received a "surprisingly favorable reaction. . . . Most everybody seemed quite impressed. . . . Most felt that something had to be done to eliminate the Communist sanctuaries."²⁸

²⁷Robert B. Semple, Jr., "Not an Invasion: President Calls Step an Extension of War to Save G. I. Lives," New York Times, May 1, 1970, p. 1.

²⁸Finney, "Reaction Favorable," p. 1.

The spontaneous applause received as he left the room seemed to reflect understanding, but subsequent statements made clear it was not the applause of approval. If Nixon at first felt the stunned men to whom he had spoken had reacted to his decision favorably and would support him in this most critical and dangerous choice, he was mistaking speechless amazement for approval. Not only were the more dovish members of Congress infuriated with this apparent escalation of the war, but also others were angered by again not being included in the decision-making process. In the face of Nixon's repeated promise that this was not an invasion, that it was a limited military action for the sole purpose of driving the enemy out of a neutral country and destroying the supplies he had stored there, and that American forces would be completely out of Cambodia by the end of June, Senator Mansfield opened the Senate's consideration of these events by stating his belief that "we are embarked on an ill-advised adventure and that there is grave danger the Parrot's Beak may well turn out to be an albatross before it is done."²⁹ Senator Young (Ohio) went so far as to introduce a resolution to censure the President,³⁰ and Tom

²⁹Congressional Record, May 1, 1970, CXVI, 13826.

³⁰Ibid., pp. 13828-29. The text of the resolution was as follows:

"Resolved, it is the sense of the Congress that the action of the President of the United States involving United States military forces in Cambodia and invading the sovereign territory of Cambodia constitutes an unconstitutional involvement of the United States in an undeclared war, a clear violation of Cambodian neutrality and the principles of international law.

"Section II. The Congress hereby censures the President of the United States for the actions he has taken in the furtherance of such involvement."

Eagleton (Democrat, Missouri) spoke of Nixon's decision as a "deeply disturbing gamble, in which the chips are American lives and the American conscience and, in a very real sense, the security and tranquility of our society."³¹ Senator Church added to the fire when he declared,

We have widened the front in such a way that this has become a war without end. Never was so much sacrificed for so little. It can only lead us to the border of China.³²

As senators tried to outmatch each other in criticism of the President's action, they were answered by White House spokesmen defending the President's right to act as he did, using as the basis for this right his constitutionally granted power as Commander in Chief,³³ the military aid provisions in the Foreign Assistance Act, and the Southeast Asia Treaty.³⁴

³¹Ibid., p. 13829.

³²U.S. News & World Report, May 11, 1970, pp. 18-19.

³³Actually, this was the only legal basis for action that the President himself mentioned in the text of his speech; he said, "I shall meet my responsibility as Commander in Chief of our Armed Forces to take the action I consider necessary to defend the security of our American men." (The Cambodia Strike: Defensive Action for Peace, A Report to the Nation by Richard Nixon, President of the United States, Department of State Publication 8529; East Asian and Pacific Series 189 [1970], pp. 6-7.) When asked later why he did not consult Congress, Nixon replied that he did not regard this action as an invasion or violation of Cambodian neutrality, so he felt no need to clear it with Congress. Because it was a limited military action, he felt he had sufficient authority as Commander in Chief. Furthermore, any discussion or debate would have caused great risk to the element of surprise and therefore to the success of the venture. See Newsweek, May 18, 1970, p. 35.

³⁴Newsweek, May 11, 1970, p. 25.

Even AFL-CIO President George Meany surprised many with his wholehearted endorsement of the executive directive when he said, "[The President] acted with courage and conviction on the basis of his clear obligation as commander in chief to protect American servicemen."³⁵ Nor was Nixon totally without support in the Senate. Len B. Jordan (Republican, Idaho) came to his defense by arguing,

[F]or the first time since Vietnam hostilities began, the President has launched a bold new offensive to strike the enemy headquarters sanctuary and staging centers across a border that for 5 long years has been neutral in name only. By so doing, he has broadened the war for the purpose of saving the lives of American soldiers already committed to action in South Vietnam.

I am in full agreement with his stated objective. Without better information than is now available to me I cannot challenge his judgment.³⁶

Further backing came from Strom Thurmond (Republican, South Carolina) who said,

[T]he bold and courageous action taken by President Nixon in ordering the destruction of North Vietnamese sanctuaries in Cambodia deserves the support of the Congress and the American people.

This move by the President was made in consideration of lives and safety of the 400,000 American troops in Vietnam. It will bring the war to an earlier end and allow continued withdrawals of American troops.³⁷

Nixon also received encouragement and words of approval from

³⁵"For the Record," National Review, May 19, 1970, p. 490.

³⁶Congressional Record, May 1, 1970, CXVI, 13839.

³⁷Ibid., p. 13889.

those nearly always loyal to him, including Republicans Robert Griffin (Michigan), Peter Dominick (Colorado), Edward Gurney (Florida), and John Tower (Texas). The latter said he was "encouraged by this action because it places anti-Communist forces in an improved military tactical position and because it will result in fewer American casualties in the long run."³⁸

On the following day the Senate Foreign Relations Committee asked for a conference with the President to discuss Cambodia. Because this was the first such request since Woodrow Wilson's administration, reports began circulating immediately about the grave constitutional crisis which was growing by leaps and bounds.³⁹ The committee acted unanimously again in making its request, and pointed up some similarities between the present situation and that of the Wilson administration. In 1919 the Senate was at odds with the President over the Treaty of Versailles and creation of the League of Nations. While the immediate issue in this instance was Southeast Asia, the underlying question concerned the authority of the President to go to war without the affirmation of Congress. In asking for the meeting with President Nixon, Senator Fulbright said that he was trying to avoid a constitutional battle and would seek to work with restraint within the constitutional system for a relationship between the legislative and executive

³⁸Finney, "Senators Angry," p. 3.

³⁹Newsweek, May 11, 1970, p. 25.

branches in foreign policy making that would demonstrate "persuasion."⁴⁰ In an obvious attempt to avoid a constitutional battle and the defeat that Wilson suffered, Nixon declined to receive the Senate Foreign Relations Committee alone. Instead, he invited that group along with members of the House Foreign Affairs Committee, who were sure to be more sympathetic to the President's action. First reports were that the angry Senate group would not go to a joint meeting "since it would not reflect the Senators' special responsibility, under the Constitution, in the area of foreign affairs."⁴¹ Angered by the prospect of meeting with the much larger House group which would result in more of a "briefing than a consultative exchange of views,"⁴² and with promises to continue seeking a private meeting, the Senate committee members reluctantly agreed to a joint conference. But their increasingly hostile mood was reflected in the strongly worded statement released by the panel at about the same time; it charged the executive branch with waging a constitutionally unauthorized war and criticized Nixon

⁴⁰ John W. Finney, "A Meeting on War Moves Asked by Fulbright Group," New York Times, May 2, 1970, p. 5.

⁴¹ Ibid., p. 1. A later report also said that the Democratic chairman of the House committee welcomed the Presidential invitation on behalf of his group, speaking of the shared and equal responsibilities of the Senate and House in this "vital matter." The thirty-eight member House committee seemed annoyed at the "presumptuousness" of the Senate committee. New York Times, May 5, 1970, p. 4.

⁴² John W. Finney, "President Assailed by Fulbright Panel," New York Times, May 5, 1970, p. 4.

for usurping the war-making powers of Congress by going into Cambodia without the consent or knowledge of Congress.⁴³

The rancor of the Senate Foreign Relations Committee mirrored that of many others in the Senate and of the most vocal elements of the nation as a whole, that is, the student demonstrators and the editorial writers. In large part both of these groups were solidly against the executive office, and mass demonstrations by student protestors culminated in the tragic killings at Kent State University. The editorial staff of the New York Times strongly opposed the move into Cambodia as "a tragic repetition of the mistakes of the past, a virtual renunciation of the President's promise of disengagement from Southeast Asia and of the principles of the Nixon Doctrine itself."⁴⁴ A later editorial spoke of the dangers of this step taken by the President and claimed that it "warrants the assertion by Congress of its constitutional powers of restraint on behalf of a people who have been asked once too often to swallow the military hallucination of victory through escalation."⁴⁵

Conflicting counts of public reaction in the form of polls, letters, and phone calls were reported. Immediately after his television address, the White House switchboard was

⁴³Ibid., p. 1.

⁴⁴Editorial, New York Times, April 30, 1970, p. 34.

⁴⁵Editorial, New York Times, May 1, 1970, p. 34, quoted by Senator Walter Mondale (Democrat, Minnesota) in Congressional Record, May 1, 1970, p. 13836.

said to have "lit up solidly"; and Press Secretary Ziegler rushed a battalion of fifty persons to telephones in order to answer calls, which he later said were running well over eighty per cent applauding the President's stand.⁴⁶ On the other hand, the Senate Foreign Relations Committee reported a total of approximately 1,650 telegrams in a two-day period reflecting disapproval by a margin of eight to one.⁴⁷ Polls taken early indicated that the general public tended to back Nixon. One private poll taken Friday after the President's address used a scientific sampling of 1,025 interviews showing sixty-five per cent support, twenty-two per cent disapproval, and thirteen per cent with no opinion.⁴⁸ Senator Mansfield, however, spoke of an "extraordinary outpouring" of telegrams which were ninety-five per cent opposed to the Cambodian operation.⁴⁹ On Sunday, May 3, the Columbia Broadcasting System conducted a nationwide television sampling in preparation for a television special and discovered among the 1,022 responses fifty-nine per cent favoring Nixon's handling of the situation, thirty-two per cent not favoring, and the remainder with no opinion.⁵⁰ A Gallup poll conducted on the same day reported

⁴⁶New York Times, May 1, 1970, p. 2.

⁴⁷New York Times, May 3, 1970, p. 3.

⁴⁸Ibid.

⁴⁹Ibid.

⁵⁰New York Times, May 4, 1970, p. 8.

general agreement with the President's action by a seven to five ratio.⁵¹

If it were true that the nation as a whole tended to support the chief executive, then proponents did not receive proportionate news space. The mass media overflowed with accounts of impending doom;⁵² and the New Republic reported "An abundance of new antiwar coalitions has flowered. . . ." ⁵³ Indeed, it seemed that moves to place restrictions on the President would get more backing in Congress than was originally supposed.⁵⁴ Even those senators who approved of the President's plans insisted that the White House should have consulted with them before making such important decisions.⁵⁵ The Senate coalition long opposed to Nixon's policy of Vietnamization now had an opportunity for a direct challenge to presidential prerogatives. From the outset, an effort to curb the chief executive's war powers, because of the circumstances of the Cambodian episode, was expected to get the backing of the liberal-to-

⁵¹Ibid.

⁵²Interestingly, only one editorial found by this researcher placed the situation in a perspective which turned out to be most accurate. Of course, at the time one could not have been sure if he were indeed correct or merely naive. The comment was by William Buckley and appeared in National Review, May 19, 1970, p. 501. He said, in part, "What is most fantastic about the response to this rather minor and routine military maneuver is its disproportion. From the hysteria in the Senate, the media, and the campuses, one would have imagined that the President had ordered, at the very least, the H-bombing of half of Asia, the conscription of all persons from eighteen to sixty, and the defoliation of the redwoods."

⁵³"An Antiwar Congress," New Republic, May 23, 1970, p. 5.

⁵⁴Ibid.

⁵⁵Newsweek, May 4, 1970, p. 22.

moderate majority in the Senate while it would be opposed by the minority of conservative Republicans and Southern Democrats. It seemed at times that the constitutional question of the legitimate boundaries of Presidential war powers was being intentionally raised,⁵⁶ if for no other reason than to provide a basis for the confrontation. Ironically, liberals who traditionally had supported constitutional interpretations that favored a strong executive found themselves on this issue fighting for a strong Congress;⁵⁷ and the conservatives who were traditionally strict constructionists found themselves arguing for a loose interpretation of the Constitution. In observing this situation, William F. Buckley concluded, "It is difficult not to be a little cynical about the 'constitutional arguments' when one noted that only senators opposed to the President's decision find it unconstitutional whereas all senators who support it defend its constitutional propriety, and when we further note than many of today's strict constructionists on Presidential powers were ready for anything when their men were in the saddle."⁵⁸

All accounts of the mood in the Senate, which by now had no less than five immediate measures before it to limit the President's war powers,⁵⁹ predicted it would deal quickly

⁵⁶Finney, "Senators Angry," p. 5.

⁵⁷New Republic, May 16, 1970, p. 8.

⁵⁸Editorial, National Review, June 2, 1970, p. 550.

⁵⁹U.S. News & World Report, May 25, 1970, p. 35. The five measures were as follow:

and affirmatively, probably by the end of the second week in May, with the Cooper-Church amendment. While Senator Mansfield said that because of the strong reaction to the President, some amendment curbing administrative power was sure to be adopted,⁶⁰ President Nixon said, "If Congress undertakes to restrict me, Congress will have to assume the consequences."⁶¹ Thus the battle lines were formed.

"1. An amendment which would forbid the use of any funds to keep United States ground troops or advisers in Cambodia. It would also limit United States aerial action above Cambodia. [Cooper-Church]

"2. A measure that would repeal the Gulf of Tonkin Resolution, voted in 1964 and interpreted by some as giving congressional approval to President Johnson's escalation of the war. [Dates from December, 1969.]

"3. A resolution defining the President's authority as Commander-in-Chief to use United States troops, and the power of Congress to declare war.

"4. An 'end the war' amendment which would cut off funds for military operations after December 31, 1970. Funds could be used, however, for 'the safe and systematic withdrawal of all United States military personnel.' [Hatfield-McGovern]

"5. A 'declaration of peace' amendment calling on President Nixon to outline a plan for complete withdrawal within eighteen months. Senate committees would be directed to take steps to meet this objective, including restrictions on military spending."

⁶⁰Finney, "Senators Angry," p. 3.

⁶¹Newsweek, May 18, 1970, p. 35.

III. THE SENATE REACTS

In May, 1970, the Senate Foreign Relations Committee had before it a bill to extend the Foreign Military Sales Act of 1968. This measure, labeled H.R. 15628, had been passed by the House on the previous March 24. It requires an annual authorization by Congress for both appropriations and credit sales of military equipment to foreign countries--that is, the establishment each year of a credit ceiling. Most of the countries which purchase arms under the credit sales program are, naturally, underdeveloped. Southeast Asian countries, excluding Vietnam, fall into this category. When the events of April 29 and 30 took place (described above in Chapter II), Senators Cooper and Church proposed an amendment to H.R. 15628 which would have the effect of using the Congress' power of the purse to limit the President in the extent to which he might direct activities in Cambodia. They were immediately joined by Senators Mansfield and Aiken as cosponsors, and the amendment was offered to the Committee on Foreign Relations for its consideration. On May 11, the committee held a hearing to receive testimony from executive branch witnesses on all proposed amendments to the House version of the bill. The executive representatives were Thomas Pickering, Deputy Director of the Bureau of Politico-Military Affairs of the

Department of State, and Lt. Gen. Robert H. Warren, U.S. Air Force, Director of Military Assistance and Sales, Department of Defense. Members of the Senate committee who were present included Fulbright, Church, Aiken, Cooper, Javits, Stuart Symington (Democrat, Missouri), Claiborne Pell (Democrat, Rhode Island), Clifford Case (Republican, New Jersey), and John J. Williams (Republican, Delaware).¹

Chairman Fulbright opened the discussion with a statement which left no doubt as to the mood his committee was in:

As the agent of the Senate this committee has the unique constitutional responsibility in the formulation of foreign policy. We believe that frank and open discussion between the executive branch and the Congress of important policies, particularly those relating to war and peace, is essential to the effective operation of our system of checks and balances.

Throughout the course of this tragic war from the deception used to obtain passage of the Gulf of Tonkin Resolution to the failure to consult with the Congress prior to the invasion of Cambodia, the executive branch has failed to follow the spirit, if not the letter, of the Constitution.

This committee has tried to create a constructive public dialogue with the executive branch on foreign policy matters. Recent developments concerning Cambodia illustrate that the committee's efforts have met with little success.²

¹U.S., Congress, Senate, Committee on Foreign Relations, Foreign Military Sales Act Amendment: 1970, 1971, Hearings, before the Committee on Foreign Relations, Senate, on H.R. 15628, 91st Cong., 2d sess., May 11, 1970, p. 73.

²Ibid., p. 75.

Unfortunately, for the sake of early success in appeasing the senators, the executive witnesses at this hearing were either unable or unwilling to answer adequately many of the questions put to them concerning the Cambodian operation in particular and the credit sales program in general. Neither did they acquiesce at any point with regard to the right of the President to act as he did by virtue of his constitutional authority as Commander in Chief.³

Also included in that hearing was the reading of a letter, dated the same day, from David M. Abshire, Assistant Secretary for Congressional Relations in the Department of State. The purpose of Abshire's letter was to express the department's view of the Cooper-Church proposal. The letter read, in part,

As a general principle we do not consider it desirable that actions of the Commander in Chief should be subject to statutory restrictions. In any case, no such amendment should restrict the fundamental powers of the President for protection of the armed forces of the United States. As it stands, however, the amendment might be so interpreted, thus limiting the President's authority to take actions which he finds to be essential for the defense of U.S. forces. Subject to this reservation, we have no objection to subparagraph 1. We believe, however, that subparagraphs 2 and 3 are subject to a great variety of interpretations which might adversely affect the President's policy on Vietnamization and steady replacement of American combat forces in Vietnam.

Since I do not believe that the framers of the amendment intend to diminish in any way the right of the President to act for the

³Ibid., pp. 83ff.

protection of U.S. forces, I urge that the committee consider revising the amendment to make it clear that the President is entitled to take action to protect the lives of American troops remaining with the Republic of Vietnam. We would also like the opportunity to assist in clarifying subparagraphs 2 and 3.⁴

That it would be difficult for Congress to impose its right to cut off funds when American troops were already in action was generally conceded from the outset. Even Cooper said, "The President is standing on the constitutional ground of protecting our troops. It can be questioned, but it is difficult to do anything practical about it."⁵ After the amendment's proponents were through speaking for it in committee proceedings, however, it was attached to the Sales Act by a nine to five vote.⁶ Before the committee favorably reported the entire bill to the Senate by an eleven to two margin, twenty-six other senators' names had been added as cosponsors.⁷ The original text of the amendment was as follows:

Sec. 7. The Foreign Military Sales Act is amended by adding at the end thereof the following new section:

"Sec. 47. Prohibition of assistance to Cambodia.---In order to avoid the involvement

⁴Ibid., p. 76.

⁵New York Times, May 2, p. 5.

⁶U.S., Congress, Senate, Committee on Foreign Relations, Amending the Foreign Military Sales Act, S. Rept. 91-865, 91st Cong., 2d sess., 1970, p. 5. Voting against were Thomas J. Dodd (Democrat, Connecticut), McGee, Karl Mundt (Republican, South Dakota), Sparkman, and J. Williams. See "Senate Opens Debate on U.S. Cambodian Involvement," Congressional Quarterly Weekly Report, May 15, 1970, p. 1274.

⁷For a complete list of those sponsoring the Cooper-Church amendment to the Foreign Military Sales Act of 1968, see Appendix A.

of the United States in a wider war in Indochina and to expedite the withdrawal of American forces from Vietnam, it is hereby provided that, unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended for the purpose of---

"(1) retaining United States forces in Cambodia;

"(2) paying the compensation or allowances of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnish military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;

"(3) entering into or carrying out any contract or agreement to provide military instruction in Cambodia, or to provide persons to engage in any combat activity in support of Cambodian forces; or

"(4) conducting any combat activity in the air above Cambodia in support of Cambodian forces."⁸

When on May 13 the Chairman of the Foreign Relations Committee, Senator Fulbright, placed H.R. 15628 with its amendments before the Senate, he set the stage for the lengthy debate that was to follow, saying, in part:

[T]he present administration is basing its claim to war powers on either a greatly inflated concept of the President's authority as Commander in Chief, or in some vague doctrine of inherent powers of the Presidency, or both. . . .

[T] Executive is conducting a constitutionally unauthorized, Presidential war in Indochina. The commitment without the consent or knowledge of Congress of thousands of American soldiers to fight in Cambodia . . . evidences a conviction by the Executive that it is at liberty . . . to take over both the war and treaty powers of Congress when congressional authority in these areas becomes inconvenient.⁹

⁸Congressional Record, May 13, 1970, CXVI, 15400.

⁹Ibid., p. 15399.

Fulbright went on to refer to Nixon's television address of April 30, noting that the President "did not think it necessary to explain what he believed to be the legal ground on which he was acting, other than to refer to his powers as Commander in Chief of the Armed Forces."¹⁰ The senator concluded that the acceptance of the "Church-Cooper-Aiken-Mansfield" amendment would do much to revitalize our constitutional system of checks and balances.

When Senator Church actually presented the text of the amendment, he sought first to smooth the way for its adoption by citing as a precedent an amendment to the military appropriations bill for 1970 which had the effect of disallowing any money for the purpose of introducing American troops into Laos or Thailand--an amendment which was adopted by the Senate.¹¹ Church explained that his amendment would do for Cambodia what the earlier one had done for Laos and Thailand insofar as limiting war was concerned.¹² Granted, in this case the troops

¹⁰Ibid. At least one editorialist believed Fulbright's description of Nixon's action as being based on a "greatly inflated concept of the President's authority as Commander in Chief" was an accurate description of this turn of events. James Reston, in an editorial entitled "Washington: President Nixon's Three Theories" (New York Times, May 13, 1970, p. 40) commented that Nixon's carrying out his theories of dealing with the Communists "without the knowledge of any but 2 or 3 of his closest advisers and without consultation with the Congress places enormous reliance on secrecy, the big strike, and on the judgment of the President alone. . . . All Presidents tend of course to take a highly personal view of their historic role . . . but few have been quite so personal about it as Mr. Nixon."

¹¹Congressional Record, May 13, 1970, CXVI, 15399.

¹²Ibid.

were already present and could not be prevented from entering another nation. Specifically, the purpose of the Cooper-Church amendment was two-fold: "To set the outer limits of American penetration into Cambodia," allowing no funds for keeping American forces in Cambodia once the original objective of clearing the sanctuaries was accomplished; and, "To lay down a legislative barrier" against a continuing military assistance program which might lead the United States into broadening ties with Cambodia from which it could not escape, much in the same way it was slowly and inescapably drawn into the war in Vietnam. The language of the amendment also made clear that, in the future, the President could not take similar action in Cambodia without first coming before the Congress with a request to do so and then receiving its consent.

The first argument was made on the following day by Senators James Eastland, (Democrat, Mississippi), John Stennis (Democrat, Mississippi), and Griffin (Minority Whip of the Senate). At the outset, these speakers seemed to center their case on the military angle of the Cambodian situation, citing the untimeliness in this critical period of applying direct limits to the President and bringing forth many statistics as to the amounts of enemy supplies captured up to that date in order to indicate the success of the operation. Senator Griffin did, at one point, approach the constitutional issue when he said,

The Constitution says Congress shall have power to declare war. Any Senator is perfectly within

his rights if he wishes to introduce a resolution to declare war, or to argue the point that war ought to be declared or ought not to be declared, because the Constitution does say that Congress has the power to declare war.

It should be noted, however, that a declaration of war is a very broad policy declaration on the part of Congress. On the other hand, the Constitution gives the President, as Commander in Chief of the Armed Forces, the responsibility for military decisions, strategy, tactics, and so forth. In Congress we cannot, and should not, attempt to make battlefield decisions regarding the time or scope of a battle, nor should we try to direct the Commander in Chief specifically with regard to how battles should be conducted, or exactly where they should be conducted. Such decisions are beyond the Constitutional powers of Congress and it would not be in the interests of the United States for the Congress to attempt to make such decisions. I am very much concerned that the amendment before us gets into that territory and that area of decision-making--areas which are appropriately and properly left to the Commander in Chief.¹³

The gist of the remaining remarks by Senator Griffin were that the question of declaring a war was really a moot one, that we were in fact in a war in South Vietnam and that our enemy there was the same one we were pursuing into Cambodia. Griffin insisted that we were not on the brink of war with Cambodia, challenging its government, doing battle with its troops, and indeed were not even on territory that the Cambodian government had occupied or controlled in recent years. He argued, therefore, that these movements across the Vietnamese border were tactical moves in an old war and involved military decisions by a commander; therefore they did not infringe upon Congress' war powers. He concluded, as the others had before him, that the

¹³Congressional Record, May 14, 1970, CXVI, 15553.

credibility of the President was essential to continued negotiations at that time, and that he needed backing by the Senate, not an open confrontation.¹⁴

Actually, the Cooper-Church amendment was only one of three amendments to this bill that had been reported favorably by the Foreign Relations Committee. At this point in the debate Senator Mansfield proposed that all three amendments be adopted en bloc and that they become a part of the original text of the Military Sales Act.¹⁵ Senators Griffin and Stennis objected to such a move and stated their preference for separate votes on each amendment, undeniably to allow debate of the Cooper-Church amendment specifically. Mansfield pointed out that customarily, as a courtesy to legislative committees and their work, committee amendments are offered and accepted en bloc. Stennis replied,

[I do] not want to unduly delay the matter, but simply to delay it for the sake of debate or understanding. This is a far-reaching matter. It has been out of the committee only a short time, and they have done a lot of fine work on it.¹⁶

¹⁴Ibid., p. 15554. To the recurring point that proposed senatorial action in this respect would damage American credibility abroad, an editorial writer in the New York Times (May 14, 1970, p. 36) replied, "By adopting the Cooper-Church amendment and thus reasserting its right to be consulted before the country is taken into war again, Congress will strengthen not weaken the American position in the world. What Vietnam has shown is that it is a war undertaken without popular consent that undermines American credibility abroad, not the opposite."

¹⁵Congressional Record, May 14, 1970, CXVI, 15554.

¹⁶As a matter of fact, a news report on page 1 of the New York Times, May 12, 1970, declared that "The amendment was rushed through the Foreign Relations Committee after one day of discussion."

So it is something we cannot agree to en bloc,¹⁷ or agree to have go by with just slight debate.

The Majority Leader retorted,

Mr. President, I think the Senator from Mississippi is under an illusion if he thinks we are trying to get by on the basis of a slight debate. We are not. We are facing up to a grave constitutional question, which I think the Senate should be unanimously behind, because it is the Senate's responsibility and authority, in my opinion, which are at stake. I am surprised that there are Senators who would place the position of this body in a secondary position.¹⁸

Then he abruptly called for the first amendment, so they were taken up separately.

The basic purpose of the Foreign Military Sales Act was to authorize continuation of the military credit sales program for fiscal years 1970 and 1971. Committee amendments were all aimed at stemming the flow of American weapons abroad. The first two amendments simply reduced the amount of money authorized in the House version of the bill for foreign credit sales. Both were approved unanimously in committee and handily passed after floor debate, the first by a margin of 70 to 3 (27 not voting) and the second by a margin of 64 to 7 (29 not voting).¹⁹ Following this action, the final amendment, Cooper-Church, was read to the upper house by the Legislative Clerk. The first line of questioning and comment dealt with definition of terms, particularly "excess defense articles," as used in this

¹⁷Congressional Record, May 14, 1970, CXVI, 15555.

¹⁸Ibid.

¹⁹Ibid., p. 15556.

amendment. Later in the day, however, Senator Robert Dole (Republican, Kansas) offered what he hoped would be an acceptable substitute for the Cooper-Church amendment. It read as follows:

In line with the expressed intention of the President of the United States, no funds authorized or appropriated pursuant to this Act or any other law shall be used to finance the introduction of American ground combat troops into Laos, Thailand, or Cambodia without the prior consent of the Congress, except to the extent that the introduction of such troops is required, as determined by the President and reported promptly to the Congress, to protect the lives of American troops remaining within South Vietnam.²⁰

Senator Dole repeatedly defended this wording on the grounds that in essence it said what the Cooper-Church proposal said, but at the same time it insured for the President a right which he has under the Constitution anyway--the right to act in any way he felt necessary to protect American troops.

Opposition to the "Dole Amendment" was led by Senator Church who declared that if adopted it would "render the Cooper-Church effort meaningless," and it was therefore completely unacceptable.²¹ He stated further that the Cooper-Church amendment was drafted with much care to insure that it in no way challenged any powers the President might have under the Constitution as Commander in Chief. In other words, no reference was made to presidential powers and their limits.²²

²⁰Ibid., p. 15559.

²¹Ibid.

²²Writing on this concept of "presidential powers" and what they should or should not include, Tom Wicker ("In the

Rather, the Cooper-Church amendment dealt with an area that is within the domain of the Congress as specified by the Constitution--the power of the purse. According to Church,

We have merely provided that the money appropriated by Congress shall not be available for the purpose of retaining American troops in Cambodia, or for the purpose of setting up an escalating military assistance program that could lead to an entangling alliance with the new Cambodian regime. These are the objectives of the amendment. They clearly fall within the power of Congress. They simply hold the President within the limits of his declared policy but, if he should decide later that these limits need to be exceeded, that the United States should extend its occupation of Cambodia, or enter into an obligation to come to the military assistance and defense of the Cambodian Government, then he would have to come back to Congress, present his case, and ask Congress to lift the limitations.

That kind of procedure reasserts the responsibilities the Constitution vests in Congress, powers which Congress should have been asserting down through the years.²³

The remainder of the debate at this point centered on the original stands taken by these two men--Senator Dole holding forth for wording which would without question grant to the President his constitutional right and moral duty to protect American troops in any way he might deem necessary; and Senator Church

Nation: Curbing the Man, Not the Office," New York Times, May 14, 1970, p. 9) wrote in part, "[A] clear distinction needs to be made between the powers of the Presidency, on the one hand, and the particular policy of a particular President, on the other. About the first, Congress can do nothing by statute; about the second, it can do much, if it will." In Wicker's opinion, the first should not be an issue in the Cooper-Church debate. That amendment only prohibits the use of appropriated funds for a particular presidential policy--keeping forces in Cambodia.

²³Congressional Record, May 14, 1970, CXVI, 15560.

insisting his amendment did nothing more than set limits with respect to the spending of public money, a constitutional duty of Congress. At one point in the afternoon's proceedings, Senator Church read an article from the May 14 edition of the Washington Post which examined "Presidential Wars." Its author took up the issue which was being discussed and wrote,

Of course Congress is at a great disadvantage when it tries to use its spending power to cut off a presidential war for which it has recklessly appropriated funds in the past. In these circumstances, the President is always in a position to complain that the result will be to endanger our boys at the fighting fronts. Congress seems to have discovered no sound answer to that warning.

But Congress could stop presidential wars before they begin by writing into the law firm prohibitions against the building of military bases in foreign countries and the dispatch of American troops to other countries without specific congressional approval.²⁴

This was the objective, said Church, of his amendment. Nevertheless, Senator Dole refused to back down from his stand that regardless of the words used in the amendment, it had the effect of "handcuffing" the President in his efforts. In this particular instance it placed restrictions on a President before one could be sure that he would abide by his own limitations. After all, in the past he had kept every promise with regard to reducing the number of American soldiers in Southeast Asia. Thus, in Dole's opinion, the Cooper-Church amendment was an action by Congress which would question the word of the President.²⁵

²⁴Ibid., p. 15566.

²⁵Ibid., p. 15565.

As the debate over the Dole amendment to the Cooper-Church amendment seemed to have reached a stalemate, Senator Albert Gore (Democrat, Tennessee) submitted an amendment to the Cooper-Church bill which struck the words "expedite the withdrawal of American forces from" and added in their place "facilitate a negotiated peace in."²⁶ Gore explained that his purpose was to "draw a clear distinction between a negotiated peace, on the one hand, and the policy of 'Vietnamization,' so called, which we have had since June of last year and which has not brought an end to the war and during the existence of which this country has suffered more than 50,000 casualties on the other hand."²⁷

The remainder of the first day's debate continued along the lines already set. In defending Nixon's operation as constitutionally sound, Senator Thurmond cited past instances of similar presidential action:

Many Presidents have committed American forces to combat in foreign countries without a declaration of war by the Congress. These operations, for the most part, did not involve an act of war by the United States against the country involved but were measures to protect American interests, personnel or troops. Most of these operations met with the approval of the governments whose territory was involved. And further, the vast majority of these operations were limited in nature and scope, as is our present involvement in Cambodia.

Our fighting men have moved into foreign territory many times. In recent history President Truman sent U.S. forces into Korea and we

²⁶Ibid., p. 15566.

²⁷Ibid.

fought there for several years without a declaration of war. President Eisenhower sent American forces into Lebanon and President Johnson sent them into the Dominican Republic and South Vietnam.

Generally accepted rules of international law support the President in the Cambodian operation. As a matter of international law when a neutral country like Cambodia cannot maintain its neutrality, and when the result threatens the lives of U.S. forces nearby, then the right of self-defense is clearly recognized.²⁸

Thurmond went on to cite figures of weapons and supplies already captured as an indication of how the enemy was being hampered, thereby reducing probable American casualties.²⁹ He stressed further his belief that while this amendment applied directly to the removal of United States troops from Cambodia, its provisions really went much further. Several chains of events which could possibly occur in the future were described with the explanation that prohibiting the President from returning American forces to any country for any purpose at any time was quite a dangerous one. Finally, Thurmond spoke of a "Committee on the Conduct of the War" which was formed in the Senate during the Civil War and which was said to have "hounded the President" on his management of the war in spite of all the burdens Lincoln was bearing.³⁰ Thurmond urged that this Senate not be

²⁸Ibid.

²⁹The front page of the New York Times, May 13, 1970, carried a report by Melvin Laird that several thousand American troops had already been withdrawn from Cambodia as further proof to support testimony that the operation was going as scheduled.

³⁰Congressional Record, May 14, 1970, CXVI, 155567.

remembered for similarly trying to dictate tactics and strategy to a Commander in Chief whom the people elected to manage those details.³¹ He concluded with the reminder that Nixon could not be thought to desire expansion of the war when he had in fact been reducing our involvement by bringing fighting men home.

A new day dawned on May 15, but with few exceptions arguments for and against the Cooper-Church bill followed the patterns established in the first day's debate. Senator Stennis, Chairman of the Armed Services Committee, spoke at some length in opposition to the amendment, often making reference to history and precedent in this matter, apparently in rebuttal to the sponsors' point that precedent for such a bill was set in the preceding session with regard to keeping United States troops out of Laos and Thailand. Stennis declared early in his remarks that, "under the circumstances, there is no precedent in all history for Congress to outline, or limit, or define the perimeter of a battlefield here in the halls of Congress. . . ." Further, he explained, "That is exactly what we will be trying to do, in this chamber, to form the perimeter of a battlefield where the battle is already in progress and men are dying

³¹Arguments that this amendment would "hamper the President in his constitutional responsibility to take action to protect American troops merely confuse the issue," maintained an editorial writer in the New York Times, May 14, 1970, p. 36. He went on to declare that nothing in the Cooper-Church amendment would prevent Nixon's carrying out his Cambodian mission. The measure simply stated that he could not retain troops there after June 30.

today. . . ."32 Stennis outlined numerous executive actions of the past as precedent for the Cambodian thrust³³ and argued that he thought it was generally understood that where the war powers are concerned, declarations of war were a thing of the past. He added,

Most of the thought behind all of these alliances that we signed up for, whereby we tried to underwrite everything all over the world, was based partly on the idea that declarations of war were old-fashioned and out of date. There is very much concern with it now. I am glad there is. I hope we can bridge the gap as a general proposition, but now it is too late with respect to South Vietnam.³⁴

The senator insisted that the amendment invaded areas of responsibility that the Constitution reserved for the President as Commander in Chief. Military decisions regarding the operation of the armed services, according to Stennis, should be made by the chief executive whom the people of the country elected. He asserted,

³²Congressional Record, May 15, 1970, CXVI, 15719-20.

³³In rebuttal to the recurring argument that Nixon was by no means the first American President to commit troops to combat without congressional authorization, Arthur Schlesinger, Jr. writing two years later, claimed that Nixon "indulged in presidential warmaking beyond a point that even his boldest predecessors could have dreamed of." He continued, "[I]n justifying the commitment of American troops to war in a remote and neutral country, Nixon cited no emergency that denied time for congressional action, expressed no doubt about the total legality of his own initiative and showed no desire even for retroactive congressional ratification." Arthur Schlesinger, Jr., "Congress and the Making of American Foreign Policy," Foreign Affairs, LI (October, 1972), 102.

³⁴Congressional Record, May 15, 1970, CXVI, 15721.

I find it difficult to believe that we really want to convert the Senate of the United States into a war room and to try to direct battle, prescribe tactics, control strategy, draw boundaries, and otherwise to usurp the responsibilities and the prerogatives of the President and our military leaders. This is not a proper function of the Congress, and it should not be.³⁵

Stennis explained that he found no argument with the fact that Congress has the power to withhold an appropriation. This amendment, however, had the effect of exerting much more power regardless of its wording. Stennis examined it thoroughly, pointing out the limits it would place on the President as a director of military operations. He was able to cite only one precedent which would have favored such an amendment, that one being the same bill the sponsors of this action had mentioned. Senator Stennis examined the previous measure's wording and demonstrated that it had fewer restrictions on the Commander in Chief than the current proposal and, more important, that when it was passed American forces were not already engaged in battle in Laos and Thailand; and he pointed out, "that is the big distinction, as a practical matter, from the conditions today."³⁶ Stennis concluded with the observation that "Reasonable men may very well disagree about the wisdom of his actions, but it would appear both from the Constitution and from historical precedents that the President has the power to send United States

³⁵Ibid., p. 15720.

³⁶Ibid., p. 15721.

military forces abroad when he deems it to be in the national interest."³⁷

Later discussion that day drew comment from Senator Gale McGee (Democrat, Wyoming) regarding the nature of hostilities in recent years:

To fend off the holocaust of nuclear warfare on the one hand and the ridiculousness of such a policy as "Fortress America" on the other, we thought it was better to learn from World War II, from the experiences with Japan, which began to nibble at Manchuria and then to dominate Asia, which involved us in war as a result of Pearl Harbor; from the experiences with Hitler, who nibbled away at the Versailles Treaty until he occupied the Rhineland in violation of that treaty, and involved us all in world war at such terrible cost. So it is understandable that our generation sought some alternative. That alternative was a limited war without a declaration.³⁸

Since the writers of the Constitution never envisaged this type of armed conflict, there are many questions left in that document as to the proper role of the Senate in the circumstances of an undeclared war. McGee's view of the situation was to admit our country was in a war and to abandon any attempts to

³⁷Ibid., p. 15722. Max Frankel, in a news analysis entitled "Capital's Constitutional Problem: Does Power to Make War Belong to President or Congress?" (New York Times, May 15, 1970, p. 22), explained, "Like most Presidents in this century, Mr. Nixon approaches the constitutional issue as a loose constructionist. Pleading emergency, or collective security, or the defense of American lives or property or simply the rights and duties of making foreign policy and being Commander in Chief, the two Roosevelts, Woodrow Wilson, Harry Truman, Dwight Eisenhower, John Kennedy, Lyndon Johnson and Richard Nixon have all moved American troops into action or across national frontiers with only the faintest nod toward Congressional sentiment."

³⁸Congressional Record, May 15, 1970, CXVI, 15730.

deal with the history of how it got there and why. He felt this was the wrong time to try to curb the President even as he was trying to withdraw. "The amendment," said McGee, "in effect, states that U.S. war power resides in the Congress, that the power of the purse may legitimately be extended in such a way as to shape the course of a war in which we are already deeply involved."³⁹ McGee's position was that such powers of Congress should be exercised before war has come about--not during war, such as was the case in Southeast Asia. In this situation, he insisted, it is the proper role of the Commander in Chief, not the Senate, to direct the military:

Never in our history has it been a function of the Senate to advise and consent on operational military decisions made by the Commander in Chief.

Never in our history have we conducted a war by committee.

And on many different occasions prior to World War II, U.S. Presidents have ordered undeclared acts of war.

The Congress is the greatest deliberative body in the world, but as a military leadership group, notoriously unable to arrive at rapid decisions, it could become a multi-headed monster if it attempted to second-guess the conduct of a war. . . .⁴⁰

In asking the Senate to reject the Cooper-Church amendment, McGee thanked its sponsors for reminding that body that it should shape a meaningful role for itself in the future direction of foreign policy while it left the executive in this instance to disentangle the United States from Southeast Asia.

³⁹Ibid., p. 15732.

⁴⁰Ibid.

Senator Church took the floor feigning confusion as to which amendment was being discussed since he did not feel the arguments he had heard spoke directly to his proposal. He reiterated its content and its purposes and concluded with a reminder of the unrest and indeed violence among the nation's youth inspired by the Cambodian episode. Senator Pell concurred in Church's expressed hope that the passage of this amendment would help to pacify the campus protesters.⁴¹ On this note Senator Robert Byrd (Democrat, West Virginia) was brought to his feet to state that while he might vote for the amendment, it would certainly not be "on that pretext."⁴² Church took the point well, and replied that he did not mean to suggest that Congress bend to threats, but that "the place to settle this question is in the Halls of Congress, not in the streets. . . ."⁴³ With these words the subject was dropped for that day.

⁴¹Ibid., p. 15736.

⁴²Ibid., p. 15737.

⁴³Ibid. Because the entire Cambodian episode had unleashed such a public outcry, the nature and potential political strengths of this dissent were topics for discussion not only in the United States Senate but also in administration circles. In the early stages of the Cooper-Church controversy, Max Frankel wrote an article, "Pressure on President," which appeared in the New York Times, May 13, 1970, p. 19. Frankel herein maintained that "The Nixon Administration has now reached a critical period of its tenure as it tries to pull the nation, and itself, back together again after a momentous fortnight of strain and tumult." Columnist Frankel went on to speculate that Nixon would seek now to unite all of Congress--and the nation--in a common defense of the presidency, a common guard against loss of powers to Congress, and a common effort to avoid discredit abroad. As for the political costs of the Cambodian move, Frankel reported that some observers felt good public relations would appease the voters and time would vindicate the President's policies. Others placed reelection prospects in a secondary position and were far

Only one other departure from what in two days had become the routine arguments occurred on the fifteenth of May: Senator Williams (Delaware) brought up the question of how soon the stipulations in the amendment would go into effect after passage. He was fearful lest soldiers who were in Cambodia after July 1 on orders from their government would, after passage of this amendment, suddenly find themselves in a position where they were drawing no pay and all family allowances likewise were stopped. After debate and explanation on this point at some length, Senator Fulbright replied in irritation,

I think this is the most irrelevant argument that one could make. I cannot imagine why anyone would make such an argument. I have never heard the Senator from Delaware, in the twenty years I have been in the Senate, make an argument with no more substance than that.⁴⁴

Fulbright offered some more comments, and this line of discussion was dropped.

Three days passed before the senators next engaged in debate over the Cooper-Church bill. In the intervening time the

more concerned with the current public mood when they indicated that "Mr. Nixon needs a broader base of support to govern than he needs to win elections, that he must regain the respect of alienated citizens even if he cannot gain their votes and that he must reexamine his methods to attain that respect." Frankel concluded that Nixon was aware of the antagonism and divisiveness he had aroused even while he was trying by this move to demonstrate the nation's strength. "But those who have seen him in the last seventy-two hours say they cannot yet determine the full extent of his introspection," the article stated. "He has reaffirmed his confidence in the decision to 'clean out' the Cambodian sanctuaries and is working hard to demonstrate its value."

⁴⁴Congressional Record, May 15, 1970, CXVI, 15725.

public, through the press, mulled over the last arguments of the opponents to the amendment: that its adoption at this time not only would severely restrict the Commander in Chief in his daily direction of military operations to best protect American fighting men, but also would offer a blow to American prestige in foreign affairs. On May 17, an editorial appearing in the New York Times declared,

Congress can help restore confidence at home and abroad on the direction of American foreign policy by beginning to reassert its own constitutional powers through adoption of the Cooper-Church amendment. Its goal of cutting off funds for future military involvement in Cambodia would not imperil the troops or undermine Presidential authority to carry out all of Mr. Nixon's stated objectives in the current drive there. Rather it would enable Congress to share with the Chief Executive, as it should, responsibility for ending a war that already has cost the United States far more than it could ever be worth.⁴⁵

On the following day, when the Senate resumed its consideration of Cooper-Church, the major topic under discussion was the economic consequences of the excursion into Cambodia.⁴⁶ Later in the afternoon, however, Senator Sam Ervin (Democrat, North Carolina) returned to the constitutional question when he arose to deliver a lengthy and patriotic argument against adoption of the amendment. He reiterated the now familiar argument that the conduct of any war, once begun, should be left to military leaders--ultimately, the President--and not to 535 men in Congress. He, as others, found justification for this stand

⁴⁵Editorial, New York Times, May 17, 1970, p. 18.

⁴⁶Congressional Record, May 18, 1970, CXVI, 15913ff.

in past actions of the legislature. Particular citation was made of that portion of the Gulf of Tonkin resolution (alternately called the Southeast Asia resolution) which appeared to constitute a declaration of war:

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Congress approves and supports the determination of the President, 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.

Consonant with the Constitution of the United States and the Charter of the United Nations and in accordance with its obligations under the Southeast Asia Collective Defense Treaty, the United States is, therefore, prepared, as the President determines, to take all necessary steps, including the use of armed force, to assist any member or protocol state of the Southeast Asia Collective Defense Treaty requesting assistance in defense of its freedom.⁴⁷

Senator Ervin thus explained that presidential action in repelling attacks on United States troops and South Vietnamese troops from areas in Cambodia--or anywhere, for that matter--was constitutionally justified by the Senate's acceptance of this Gulf of Tonkin resolution. A particularly interesting incident in history was revealed when Ervin reported a portion of the discussion which had taken place in the Senate when the Tonkin resolution was under consideration. At that time, Senator Cooper asked Senator Fulbright:

Mr. Cooper. Does the Senator consider that in enacting this resolution we are satisfying that requirement of Article IV of the Southeast Asia Collective Defense Treaty? In

⁴⁷Ibid., pp. 15925-26.

other words, are we now giving the President advance authority to take whatever action he may deem necessary respecting South Vietnam and its defense, or with respect to the defense of any other country included in the treaty?

Mr. Fulbright. I think that is correct.

Mr. Cooper. Then looking ahead, if the President decided it was necessary to use such force as could lead into war we will give that authority by this resolution?

Mr. Fulbright. That is the way I would interpret it. . . . If a situation later developed in which we thought approval should be withdrawn it could be withdrawn by concurrent resolution.⁴⁸

Such a disclosure of previous Senate debate suggests that had the Cambodian incident occurred about the same time as the adoption of the Tonkin resolution, it would not have met opposition on grounds of presidential usurpation of war powers, for such action was understood by the principals to be possible so long as the Tonkin resolution was in effect.⁴⁹ Understanding does not mean approval, of course, and the door was left open to withdrawal of the resolution. There was, however, no suggestion of challenging presidential powers on the constitutional grounds which were being invoked at this time.

Senator Ervin continued his address by attempting to refute every argument proponents of the amendment had put forward. As

⁴⁸Ibid., p. 15926.

⁴⁹On the matter of vacillating opinions of senators (and, of course, many others) in these affairs, Arthur Schlesinger, writing two years after this debate, cited several examples of this change of mind and several explanations thereof: 1) because of the extremely difficult nature of these issues of foreign policy, it is quite reasonable for individuals to change their position from time to time; 2) power looks more responsible from the inside than from without (see above, p. 29); 3) questions take on different shapes in different circumstances and in later years. See Schlesinger, "Congress and the Making of American Foreign Policy," pp. 105ff.

for charges of escalating the war, Ervin responded as follows:

Charges have been made that this was the initiation of a new war. I controvert that charge. This is just the same war with the same enemy. For 5 years the North Vietnamese have been using these sanctuaries along the border of South Vietnam. They have been sallying forth and making attacks, destroying American lives and destroying the lives of South Vietnamese troops and the lives of South Vietnamese civilians, and then running back to the sanctuaries where the United States had been giving them total exemption from the hot pursuit doctrine which prevails in wars.⁵⁰

In conclusion, Ervin argued,

I think that the Church-Cooper amendment is unconstitutional, in that it attempts to have Congress usurp and exercise some of the powers to direct the military forces in the theater of operations which belong, under the Constitution, to the President of the United States. . . .

I think it would not be edifying for the Congress of the United States to say that American troops cannot put a foot across the borders of Cambodia to destroy sanctuaries of the enemy, but that the enemy, as far as Congress is concerned, can use those areas as sanctuaries from which to make sudden surprise attacks upon American soldiers.⁵¹

At this point Senator George Murphy (Republican, California) rose to support Ervin in his position and to give a detailed account of the success of the Cambodian operation to that date in terms of enemy equipment, supplies, and personnel captured.⁵² Thus, the day ended with the opponents of Cooper-Church having been the most vocal, but in no way could it be said they had had the last word.

⁵⁰Congressional Record, May 18, 1970, CXVI, 15927.

⁵¹Ibid.

⁵²Ibid., p. 15930.

Senator Gore opened his discussion over Cambodia on May 19 with a strongly worded and moving oration against American involvement in Vietnam as a whole and secondarily stating his preference for adoption of Cooper-Church as one means of winding down the war. Gore's primary reference throughout his remarks was to the outpouring of dissent from the American public to the expansion of hostilities.⁵³

Senator Murphy countered with the old argument that the move into Cambodia was devised with no intent of expanding the war. On the contrary, it was made with the intent of a quicker and safer end to American involvement there. As for the public outcry, Murphy relied on the argument often advanced by conservatives that some of it could be attributed to the Communist tool of international propaganda. He stated,

Like all of us here in this Chamber, the enemy has read the headlines about the recent protests against the President's action in Cambodia, and I am sure that he has equated the enormous volume of news coverage given to our dissenters with what he thinks is the percentage of our people who are in opposition to the President's program.

Well, as it turns out, the poll which was taken by Dr. Gallup and lately released does not bear out that conclusion.

⁵³Congressional Record, May 19, 1970, CXVI, 16105ff. In this respect, a report by Peter Grose ("Senators Scored on War by Agnew," New York Times, May 18, 1970, p. 11) included remarks made by the Vice President in an interview with Metromedia radio news. Agnew said of the Cooper-Church proposal and similar efforts, "We see that Congress, because of the heat of public pressure, attempting--for political gain, mainly, in my judgment--to jerk the rug out from under the Commander in Chief and the troops, by denying them the military assistance that they need to function effectively. And I say this is a reprehensible attitude on the part of the Congress and those that support those resolutions."

The enemy has also followed the resolutions and amendments which have been offered, and others which may be introduced, in this Chamber. Once again, I know that he must feel that our United States are becoming hopelessly and perhaps fatally disunited. That would please him. He would have accomplished his purpose.

It was known as long ago as three years that the enemy understood he could not win militarily in Vietnam and that his whole plan was to do what is apparently now being done--to try to divide opinion at home by any means. . . .

There will be no need, if we continue down this path of divisiveness, for them to bury us. We will bury ourselves. And first we will tear ourselves apart, piece by piece. . . .⁵⁴

The days passed with little in the way of originality or new strategy in the Senate debates over Cooper-Church.⁵⁵ On May 20 Speaker Mansfield returned to the theme of the need for Congress to reassert its responsibility in the field of foreign affairs. He made a point of emphasizing that if the Senate adopted the Cooper-Church amendment, it would not be acting against the President, but "in concert" with him. "The Cooper-Church amendment will reinforce President Nixon's announced

⁵⁴Congressional Record, May 19, 1970, CXVI, 16114.

⁵⁵At this point in the proceedings, the fact that so seemingly radical a move as Cooper-Church to limit unchecked executive action had so far withstood all efforts to tone it down came as somewhat of a surprise to many political observers. This lasting strength was further evidence of the bipartisan nature of the attempt. In the May 22, 1970, issue of the New York Times (p. 30), an editorial "No More Cambodias" declared that "The firmness with which Senators of both parties are resisting efforts to kill or cripple the Cooper-Church amendment on Cambodia is encouraging evidence of a new determination in Congress to restore the constitutional balance in reaching vital decisions on war and peace." The writer went on to say that the Cooper-Church proposal did not "create a constitutional crisis, but implies that the President could precipitate one. . . ."

expectation that the troops will be removed from Cambodia and that they will not be ordered--without congressional sanction--back into that nation," said Mansfield.⁵⁶ Minority Leader Hugh Scott (Republican, Pennsylvania) expressed his delight at Mansfield's reference to the bill as one in concert with the President's intentions and added that he hoped it would continue to be regarded in that light--and not as a limitation to the executive--as the discussion continued.⁵⁷

Senator Griffin entered the conversation to reaffirm his contention that whether or not war should be declared was an issue wholly separate from the one at hand. When President Nixon took office, the United States was in fact in a war with North Vietnam. He maintained that the Cooper-Church resolution as worded at that time had the effect of limiting the President as he made battlefield decisions and for that reason only was unacceptable.⁵⁸ To this, Mansfield replied that, in reality, it was the President himself who set the limits as to distance into Cambodia and the time for withdrawal.⁵⁹ The amendment merely restated that United States forces would not go beyond twenty-one miles and would be out of Cambodia by July 1. Griffin asked, "Will the Senator agree that there are other substantive limitations in the Cooper-Church resolution which go beyond what the President said?"⁶⁰

⁵⁶Congressional Record, May 20, 1970, CXVI, 16316.

⁵⁷Ibid.

⁵⁸Ibid., p. 16317.

⁵⁹Ibid.

⁶⁰Ibid.

"No;" answered Mansfield, "only to the extent that there will not be a reentry in Cambodia after July 1, 1970."⁶¹ Church then interjected that he had heard the President say he would not enter Cambodia again but would leave similar missions to the South Vietnamese in the future.⁶² Seemingly, no portions of the Cooper-Church bill imposed restrictions on the President he had not already set. Church added that he would rather refer to this measure as an accommodation than as a compromise between the two branches in defining their respective war powers:

What we are trying to reach, really, is an accommodation; not a compromise. The purpose of the amendment is neither to undercut the President, nor to question his powers under the Constitution to discharge his responsibilities as Commander in Chief. Indeed, even if we wanted to do it, we could not reduce or diminish his constitutional power anyway.

Rather, this amendment seeks to assert a congressional responsibility to share with the President the burden of defining the outer limits of this operation in Cambodia.

We have drawn those limits exactly where the President fixed them. If some change in language seems to be desirable in order to make the intention perfectly clear, without in any way affecting the substantive thrust of the amendment, then certainly as one sponsor, I would be most amenable. Remember, this is a bipartisan effort.⁶³

The first proposal for modified wording came in the next thirty seconds when Senator Scott asked for clarification that in the process of withdrawing from Cambodia the President clearly had the power to protect those troops as they were leaving.⁶⁴

⁶¹Ibid.

⁶²Ibid.

⁶³Ibid.

⁶⁴Ibid.

The rest of the day saw new speakers reiterating old arguments as Senator Young of Ohio delivered an inflamed tirade against the Cambodian mission but more against the United States as a participant in Vietnam's Civil War.⁶⁵ Senator Hiram Fong (Republican, Hawaii) made equally distorted charges as to the dangerous effects of passage of this bill.⁶⁶ Senators Wallace Bennett (Republican, Utah) and Barry Goldwater (Republican, Arizona) spoke in opposition to its acceptance, describing the nature of guerrilla warfare (and the dependence of the enemy on these sanctuaries) and the decline in world opinion and trust the United States would suffer if she did not support the South Vietnamese to the fullest extent feasible.⁶⁷ Shortly thereafter, Senator Alan Cranston (Democrat, California) labelled this amendment being pushed by all liberals and some moderates in the Senate as an "essentially conservative document based on a strict constructionist view of the Constitution of the United States."⁶⁸ On the following day Senator Tower suggested that if indeed the Cooper-Church bill were pursuant to presidential policy as its supporters maintained, then it was redundant and unnecessary. There must, therefore, be something more involved than mere repetition of the President's own limits.⁶⁹

⁶⁵Ibid., pp. 16318ff.

⁶⁶Ibid., pp. 16374ff.

⁶⁷Ibid., pp. 16365ff.

⁶⁸Ibid., p. 16388.

⁶⁹Congressional Record, May 21, 1970, CXVI, 16533. Great numbers of people in the Senate and the nation could not abandon their fear that this mission into Cambodia would lead to long

As the days passed and time ran out on Senator Mansfield's expressed hope that some bill could be passed within two weeks,⁷⁰ the debate struggled on. More and more, speakers seemed to lose sight of exactly what was at issue. Senator James Allen (Democrat, Alabama) challenged the authors of the amendment on the grounds that it presented impediments to swift, decisive presidential action for all time:

The Senator from Idaho has emphasized the fact that the amendment does not question the warmaking power of the President as Commander in Chief. I should like to ask the Senator from Idaho if it is not a fact that the amendment applies not only to the present Cambodian conflict but also it applies ad infinitum, that it does restrict the President in taking emergency action to protect the interests of this country if at some future time he deems that to be necessary; and, is it not a fact, that while no question is raised as to his power to have started the present military action in Cambodia, the effect of the amendment is to say to the President, "In the future, we will not support with our resources or with appropriations any future action on your part in Cambodia as Commander in Chief of the armed forces to take emergency

term commitments. (For example, see Robert H. Johnson, "Vietnamization: Can It Work?" Foreign Affairs, XLVIII [July, 1970], pp. 629-47.) Although this article was published after the total withdrawal of American troops from Cambodia, thereby rendering some of the material incorrect, it was obviously written earlier. Herein Johnson speculated on all the reasons the United States might become indefinitely involved in a wider war: 1) If the Cambodian venture is too successful, United States troops might be sent into other Southeastern Asia countries where surely sanctuaries exist; 2) Once the strength of U.S. presence is felt in Cambodia, Lon Nol's wavering non-Communist government may make enticing appeals to stay and support him against the Red threat, as the U.S. was supporting South Vietnam; 3) Even if the United States leaves Cambodia now, should South Vietnam decide to undertake this task again she may implore the United States to help her once more. Ibid., pp. 632-33.

⁷⁰See above, p. 42.

action in the best interests of the country in the future?⁷¹

Senator Church then engaged in a lengthy argument with Allen, saying in part,

It is next to impossible to draw a precise line between the powers of the President under the Constitution and the powers of Congress in the matter of war. A gray area exists between the two. So, the amendment was drafted in such form as to avoid that gray area as much as possible.

It is one thing to conjure up a situation in which the President might act reasonably, owing to the immediate needs of our troops in the field. Even if his action were not in strict accordance with the letter of the amendment, I am sure that if the circumstances showed the action was necessary for the protection of our troops, no one in Congress would raise a question . . . but if, on the other hand, the President were to say that the protection of the American troops we have sent to South Vietnam required us to invade North Vietnam--a far more important sanctuary of the enemy--or, to think of a more extreme case, if the President were to say, as Commander in Chief, "I have decided that the adequate protection of our troops in South Vietnam necessitates the bombing of China or an all out attack on the Soviet Union," well then, I doubt anyone in the Senate would argue that the President has inherent power, in order to protect our troops in South Vietnam, to start a third world war or initiate a nuclear exchange that could bring an end to civilization.

No, it is a question of reasonable interpretation of power. . . .

Mr. President, it is not properly within the President's power as Commander in Chief to commit the United States to the defense of the new regime in Cambodia.

If Congress has any power at all under the Constitution of the United States, it has the right to determine the necessity of such an action, and the Senate itself has the power to ratify or to reject treaties that go to this very question. And we have no treaty with Cambodia.⁷²

⁷¹Congressional Record, May 25, 1970, CXVI, 16910.

⁷²Ibid., pp. 16910-11.

Senator Allen tried to bring the discussion back into context when he commented, "Mr. President, I am not talking about protecting the government of Cambodia. I am talking about protecting the lives of American servicemen."⁷³ Church countered, "But this amendment relates to support for Cambodian forces and support for the Cambodian Government."⁷⁴ The reply from Allen was, "That is not what it says. It says retaining American forces in Cambodia. It does not say for what purpose."⁷⁵

Immediately thereafter Senator Williams of Delaware was recognized, and he delivered an appeal to the Senate to reconsider the entire military sales act and strike it down. It was, he contended, just one instrument given to the President by Congress enlarging his powers immensely. Williams preferred to have the President come to the Senate for approval of each credit sale to each foreign country. However, in taking this position, Williams, who certainly opposed the President's accumulation of war powers, sounded as though he were arguing against the Cooper-Church amendment. He declared,

The criticism of the President's usurping the powers of Congress is not the President's fault. It is because we in Congress have delegated to the President many of these powers which we should have kept right here in the Congress and discharged ourselves.

.

I do not think Congress will get control of this until we stop this delegation of authority. The irony of the present situation right here is that Congress under the Cooper-Church

⁷³Ibid., p. 16911.

⁷⁴Ibid.

⁷⁵Ibid.

amendment would be questioning the word of the President. I cannot get away from the fact that approval of the amendment . . . would write into law that the troops must be out by July 1, which is an indication that we are accepting the President at his word but are not quite sure he means it and that therefore Congress is going to write into law a penalty if he does not keep his word. Immediately thereafter, the next vote would be to delegate to the President broad powers to sell \$600 million in military equipment anywhere in the world--Thailand, Taiwan, Israel, or even Red China if he desired. Yes, any nation in the world? Does this make sense?

.
How can we say: "We don't quite trust you, so we're going to write something in the law to make sure you do it. But we do trust you with the sale at your sole discretion of \$2 billion of equipment that you can send to any nation in the world except Cambodia. . . ."

In the bill before us Congress would delegate to the President authority to sell or guarantee payment of \$600 million in military equipment to any country anywhere in the world . . . there is no prohibition except that the President cannot make the equipment available to Cambodia.

.
The time has come for Congress, especially the Senate, to stop criticizing the President for usurping the powers of Congress or else to stop delegating those powers. Let us assert our own responsibility by acting on these amounts as line items, as we would for any other project.⁷⁶

Senator Fulbright attempted to bring Williams back into line by agreeing with him, but pointing out that

the Senator is confusing two very different things. One is the sale of military weapons. The second is the question of this President's right to go into Cambodia without coming to Congress.⁷⁷

Williams, however, remained unmoved on his insistence to forget Cooper-Church and to concentrate instead on defeating the entire

⁷⁶Ibid., pp. 16914-16.

⁷⁷Ibid., p. 16917.

military sales act. As a matter of fact, on June 12 he proposed a measure to that effect in the form of an amendment to Cooper-Church which was defeated.

The first amendment to the original Cooper-Church bill to come up for a vote was a recommended change in the wording of the preamble and was sponsored by Senators Cooper and Church themselves. They seemed to have taken their cue from the discussion on May 20,⁷⁸ for the new preamble read as follows:

Sec. 47. LIMITATIONS ON UNITED STATES INVOLVEMENT IN CAMBODIA.--In concert with the declared objectives of the President of the United States to avoid the involvement of the United States in Cambodia after July 1, 1970, and to expedite the withdrawal of American forces from Cambodia, it is hereby provided that unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended after July 1, 1970 for the purposes of--⁷⁹

Thus two important changes were made. First, the date July 1, 1970, was inserted into the amendment to assure it would not go into effect, should it pass, before the President's deadline had been met. Secondly, the preamble now made it clear that its proponents were "neither questioning the President, nor are we challenging his prerogatives as Commander-in-Chief. Indeed, we expressly acknowledge that the amendment is 'in concert with the declared objectives of the President of the United States.'"⁸⁰

⁷⁸See pp. 83-84 above.

⁷⁹Congressional Record, May 26, 1970, CXVI, 17083.

⁸⁰Ibid.

Cooper and Church hoped by this perfecting wording to allay the fears of those who felt the President's rightful constitutional powers and duties were being threatened. Some were not swayed. Senator Gurney declared, "that this is some slight improvement in the Church-Cooper amendment is true; but I must say that here is one Senator, the Senator from Florida, who cannot support even this slight improvement to this amendment, because I feel so strongly the Senate is in error in passing this amendment in any form."⁸¹ Gurney spoke for the minority, however, for the roll call vote was an easy victory for the modification by 82 to 11.⁸² Following this action, reports began circulating that some administrative aides and congressional Republicans (including Secretary of Defense Laird and Senator Hugh Scott) were urging the President to accept the Cooper-Church amendment. They feared a widened breach in the Republican party, already begun by bi-partisan support of this measure.⁸³ That Nixon would not drop his hardline opposition soon became apparent. Evidently he was strengthened in his resolve by assurances from House members that this measure would never pass there.⁸⁴

Two days later, a series of proposed amendments to Cooper-Church (eighteen of which were eventually voted on) began when

⁸¹Ibid., p. 17065.

⁸²Ibid., pp. 17083-84.

⁸³John W. Finney, "Nixon Aides Split on Senate Curbs," New York Times, May 24, 1970, p. 5.

⁸⁴Ibid.

Senator Ted Stevens (Republican, Alaska) raised a new question with regard to just a portion of the proposed amendment. He cited all the countries to which the United States was then giving some form of military aid or training--a total of forty-seven. He questioned

why we should cut off from Cambodia the training we are giving to so many other nations to increase their own ability to defend themselves. I can understand full well why some of the other provisions of the Cooper-Church amendment were offered, but I do not understand the prohibition against military instruction to Cambodian forces or military instruction in Cambodia.⁸⁵

Stevens then submitted an amendment to Cooper-Church which was not an addition of words, but actually a deletion from the original of the following phrases:

(1) Sec. 47, subsection 2. ". . . furnish military instruction to Cambodian forces or . . . "

(2) Sec. 48, subsection 3. ". . . to provide military instruction in Cambodia, or . . . "⁸⁶

Stevens' comments drew no response (and his proposal never came up for a vote), but immediately thereafter Dole opened discussion on his new amendment to Cooper-Church which centered around his concern for the prisoners of war. His proposal was to insert the figure "a" after "Sec. 7" in the original, and then to add a new subsection "b" between lines 18 and 19 which would read: The provisions of subsection (a) of this section shall be inoperative during any period that the President

⁸⁵Congressional Record, May 28, 1970, CXVI, 17405-406.

⁸⁶Ibid., p. 17405.

determines that citizens or nationals of the United States are held as prisoners of war in Cambodia by the North Vietnamese or the forces of the National Liberation Front."⁸⁷ In a fragment of the debate over the Dole amendment, Church replied, "Mr. President, the Dole amendment is a travesty. Its adoption would not help a single American prisoner of war."⁸⁸ The matter came to a vote on June 3, and was defeated 54 to 36.⁸⁹

On the evening of June 3, President Nixon again went before television cameras to address the nation on the situation in Cambodia. His remarks included a review of what had transpired in the past April and May and a progress report of the military operation itself. His speech was accompanied by film showing the war material which had been captured, including millions of rounds of ammunition, thousands of weapons, and millions of pounds of rice.⁹⁰ He stated further,

The success of these operations to date has guaranteed that the June 30 deadline I set for withdrawal of all American forces from Cambodia will be met. General Abrams advises me that 17,000 of the 31,000 Americans who entered Cambodia have already returned to Vietnam. The remainder will return by the end of this month. This includes all American air support, logistics, and military advisory personnel.⁹¹

⁸⁷Ibid., p. 17406.

⁸⁸Congressional Record, June 2, 1970, CXVI, 17848.

⁸⁹Congressional Record, June 3, 1970, CXVI, 18015.

⁹⁰U.S., Department of State, Cambodia in Perspective: Vietnamization Assured, an Interim Report by Richard Nixon, President of the United States, June 3, 1970, p. 3.

⁹¹Ibid., p. 4.

The President reminded the nation that when the operation began his critics charged "that it would increase American casualties, that it would widen the war, that it would lengthen our involvement, that it might postpone troop withdrawals. But the operation was undertaken for precisely the opposite reasons-- and it has had precisely the opposite effect."⁹² Nixon then summarized what the mission had insured: that the war material captured would not be used against American soldiers; that time was won for the training of the South Vietnamese; that the withdrawal program of American forces would continue on schedule.⁹³

Senatorial reaction to the President's statement on the following day was overwhelmingly favorable, with one notable exception. Senator Edmund Muskie (Democrat, Maine) declared,

Mr. President, in his television address to the nation last evening, President Nixon made far-reaching claims as to the military success of the Cambodian invasion. I question those claims and their relevance to our long-term interests and objectives in Southeast Asia. . . . [C]aptured weapons and supplies may give the appearance of military victory, but that cannot obscure the fact that we have widened the war and added to the uncertainty as to our prospects in Southeast Asia.⁹⁴

After Muskie's remarks, Senator Griffin reported in much more detail than had the President the figures of all material captured in Cambodia.⁹⁵ Later in the day Senator Dole spoke in defense of Nixon's efforts and said, in part,

⁹²Ibid.

⁹³Ibid., pp. 4-5.

⁹⁴Congressional Record, June 4, 1970, CXVI, 18291.

⁹⁵Ibid., pp. 18299-300.

I detected in the statement by President Nixon perhaps an effort by the President to extend at least the tip of the olive branch to Congress. It was a very conciliatory message. . . .

[T]he amendment of the senator from West Virginia (Mr. Byrd) is an improvement. If the Byrd amendment could be agreed to, while the President might not endorse the Cooper-Church amendment, he might not oppose it. The Byrd amendment makes it very clear that the President would have the right--as he should have, and as he does have under the Constitution--to protect American forces. . . .

I do not believe the timing of the so-called Church-Cooper amendment is particularly appropriate, again because President Nixon has kept his faith with the American people, again because President Nixon is deescalating the conflict in Southeast Asia, and again because he is Commander in Chief and has the inherent right under the Constitution to protect American forces.

.
If President Nixon had escalated the war, if President Nixon had invaded another country to make war against that country, whatever, the country, then we could question his credibility, we could question his powers; but it is clear that he has charted a course for peace. . . .⁹⁶

Senators Russell Long (Democrat, Louisiana) and Clifford Hansen (Republican, Wyoming) also endorsed the Byrd amendment, the latter reading directly from the amendment that portion which he felt best brought to light the basic issue the Senate should focus on in this conflict:

Except that the foregoing provisions of this clause shall not preclude the President from taking such action as may be necessary to protect the lives of United States forces in South Vietnam or to facilitate the withdrawal of United States forces from South Vietnam.⁹⁷

⁹⁶Ibid., p. 18335.

⁹⁷Ibid., p. 18349.

Hansen expressed his belief that the President's purpose in Cambodia was now clearly to protect American forces in Vietnam, and not to expand the war. The modification of the Cooper-Church proposal by the Byrd amendment would make clear that this was the understanding of the entire Senate. With these remarks on June 4, the attention of the upper chamber and the whole debate over limiting the President in Cambodia was shifted to Byrd's amendment to the Cooper-Church amendment. This new conflict was not to end until June 11.

In the intervening time a letter was received by Minority Leader Scott from the President, and read to the Senate. It indicated Nixon's approval of the Byrd amendment in that it "reaffirms the Constitutional duty of the Commander in Chief to take actions necessary to protect the lives of United States forces and is consistent with the responsibilities of my office. Therefore, it goes a long way toward eliminating ny more serious objections to the Cooper-Church amendment."⁹⁸ Among those who adamantly supported Byrd's offering was Senator Hansen who found a great inconsistency in the actions of those who opposed the Byrd amendment on the one hand and at this same time had signed a letter urging the President to send much needed jets to Israel on the other hand. He argued,

The matter we are debating today goes far beyond the borders of Vietnam, Cambodia, Laos, or Thailand. When we cast our vote on the Cooper-Church amendment we will be making policy which is going to have a direct effect on our position in Latin America, and most certainly Israel.

⁹⁸Congressional Record, June 5, 1970, CXVI, 18549.

Looming in the backdrop of this amendment is the question of how far the Congress will go in restricting the President in the next international clash.⁹⁹

As the days passed, Senator Dole continued the argument in support of revising Cooper-Church. He spoke at length of the historical precedents, as had often been done before by others, justifying the President's actions. He cited in particular the Gulf of Tonkin resolution and concluded by stating,

I would say to my friends and the sponsors of the Cooper-Church amendment that if they sincerely believe that nothing in that amendment ties the hands of the President and that there is nothing in the amendment to prevent the President from protecting American forces, then agreeing to the amendment of the Senator from West Virginia (Mr. Byrd) would strengthen the Cooper-Church amendment; it would be a recognition of the President's right, power, and obligation to protect American forces and a recognition by this body that the President has that right, and that we expect him to use that power and to carry out his obligation. . . .¹⁰⁰

Following Dole's comments, Scott made reference to subsection (1) of the Cooper-Church amendment to which the Byrd provision was to be attached. In urging the Senate to accept this slight revision, Scott maintained,

Those opposing the perfecting amendment apparently do so on the theory that the United States should not become embroiled in a new war, unless Congress has so authorized. I would agree that we should not become involved in a new war which would sap our human, financial, and moral resources, unless Congress determines that such a commitment is in the national interest. Congress does have a constitutional role to play in the decision as to whether combat

⁹⁹Ibid., p. 18595.

¹⁰⁰Congressional Record, June 9, 1970, CXVI, 18894.

should be initiated with foreign nations. That, however, is not the issue here.

Cambodia does not raise the question of initiating a new war with a new enemy. This is vitally important to recognize, and I believe that it is this point which is at the very heart of the dispute between those who support the Cooper-Church amendment as now constituted and those who, like myself, believe that Senator Byrd's perfecting amendment is absolutely necessary. The fighting in Cambodia is not a new war. Cambodia is but an extension of the South Vietnamese battlefield.¹⁰¹

At last Senator Church was given the opportunity to respond, and he did so in quite colorful and strong terms. He pointed out that the fact that President Nixon supported the Byrd amendment should surprise no one, for it gave him what amounted to a blank check in Cambodia. Church likened this revision to a second Gulf of Tonkin resolution, which would open the way for Nixon to take any step in Cambodia that he might desire in the future, so long as he claimed it was for the purpose of protecting American troops in South Vietnam.¹⁰² Senator Church declared,

If the Senator's amendment were approved and the Cooper-Church amendment subsequently adopted, the Senate would have said, on the one hand that we should get out of Cambodia and stay out and, on the other hand, that we really do not mean it--that the President can go back in whenever he chooses.

Instead, Mr. President, of taking a historic step in the process of beginning to restore the Senate to the role the Constitution intended, we would have acted, not like a great forum, but like a fudge factory and rendered the Cooper-Church amendment so largely meaningless that it would then be questionable whether we should proceed to adopt it, in its modified form, at all.

I say to the Senate in all sincerity that the adoption of the Byrd amendment would blow a hole in the Cooper-Church amendment large enough

¹⁰¹Ibid., pp. 18895-96.

¹⁰²Ibid., p. 18900.

to drive a whole new war through, without the President ever having to return to Congress for authority or consent.¹⁰³

Majority Leader Mansfield whole-heartedly seconded Church's objections to the Byrd amendment and added that its acceptance would not only mean condoning the actions of the current executive in Cambodia, but also any similar actions of his successor or his successor's successor. In Mansfield's words,

That is the nub of the Byrd-Griffin modification. It would establish for the Cambodian policies of the executive branch the same legal basis that the Tonkin Gulf resolution fashioned for the Vietnamese involvement 6 long years ago. The Byrd-Griffin modification says that Cooper-Church will not apply unless the

¹⁰³Ibid., p. 18901. Church's efforts to fight what he considered a dangerous accumulation of power in the hands of the executive in no way waned following the Cooper-Church battle. Four months later he authored an article which examined why Congress has yielded powers to the President in the area of foreign affairs through the years. The first answer he found to this question--that in this nuclear age, if the United States should be suddenly attacked, one man must have the authority to make a quick decision--Church did not fault. He explained that the power of the executive to repel direct attacks without going to Congress was understood to be the intent of the framers of the Constitution. On the other hand, wrote Church, "The second argument, which sells surprisingly well, is that foreign policy has become so complex it can only be mastered by the experts who serve the president. Surely this myth that the chief executive is the fount of all wisdom in foreign affairs lies shattered on the shoals of Vietnam. . . . The executive branch is populated with specialists and experts. These men have added greatly to the government's skill in diplomacy, but they have also shown a certain arrogance, purveying the notion that anyone who is not an expert, including congressmen, senators and ordinary citizens, is simply too uninformed to grasp the complexities of foreign policy. "This view is patently false. Clemenceau said that war is too important to be left to the generals; similarly, the basic decisions of foreign policy are too important to be left to the diplomats." Frank Church, "Of Presidents and Caesars," American Association of University Women Journal, LXIII (November, 1970), 32.

executive branch decrees that it should apply. Under Byrd-Griffin, the statutory wall of Cooper-Church against the spread of our involvement into Cambodia stands or falls on a word from the White House.¹⁰⁴

As for Nixon's letter indicating endorsement, Mansfield reminded the Senate that while his opinions deserved careful consideration, the decision at hand was the sole responsibility of the Senate. The President's responsibility to accept or reject a measure begins once it has passed both houses of Congress, but not before.¹⁰⁵

In defense of the Byrd amendment, cosponsor Griffin countered that Mansfield had "reached a long way" to find arguments against this proposal:

I wish to emphasize that the Byrd amendment touches only one of four subsections of the Church-Cooper amendment; so it could not be said that it goes so far as to nullify the Church-Cooper amendment. But even if one were to give the widest and most far-reaching interpretation to the Byrd modification, the most that it could possibly be said to do is that it would nullify the Church-Cooper amendment. Certainly to nullify the Church-Cooper amendment is not to adopt a Gulf of Tonkin resolution, which the majority leader indicated was tantamount to a declaration of war.¹⁰⁶

In the interplay between the two men which followed, Mansfield at one point contended,

The President has unilateral constitutional powers as Commander in Chief to take measures to protect the lives of U.S. servicemen, not only in Vietnam, but also U.S. citizens, including servicemen, anywhere in the world. He does not need congressional sanction for that

¹⁰⁴Congressional Record, June 9, 1970, CXVI, 18905.

¹⁰⁵Ibid., p. 18906.

¹⁰⁶Ibid.

purpose because he already has that power, authority, and responsibility. But the executive branch does not have the unilateral constitutional power to commit this Nation to an involvement which requires a continuing input of men and money in a country, even in the name of defending U.S. forces, or for some other objective in a second country.¹⁰⁷

As that day's discussion approached an end, Griffin concluded,

the Byrd amendment would not approve in advance any action that the President might take. Adoption of the amendment would not indicate approval of particular actions. It would merely declare that if the President, as Commander in Chief, does have the authority to protect the lives of our forces in South Vietnam, the Church-Cooper amendment, as it would be amended, would not take it away. That is the extent of the effect and the purpose of the amendment. . . .¹⁰⁸

With the argument over the Byrd amendment nearing an end and the prospects of the final vote appearing to be fast-approaching, the discussion became more heated. Cooper inserted the new thought that the Byrd amendment had great appeal because it spoke of "protecting the lives of U.S. forces in South Vietnam," and hinted that a vote against it was a vote against this desirable aim. He felt such reasoning should be dismissed.¹⁰⁹ Senator Birch Bayh (Democrat, Indiana), clearly against the Byrd amendment, argued that if it were "simply a restatement of the President's constitutional powers as Commander in Chief," as its proponents defended it, then it was unnecessary. "[J]ust as Congress cannot legislate restrictions on the President's

¹⁰⁷Ibid., pp. 18906-907.

¹⁰⁸Ibid., p. 18908.

¹⁰⁹Congressional Record, June 10, 1970, CXVI, 19156.

constitutional authority as Commander in Chief, it cannot expand those powers by statute. I recognize the President's responsibility to protect our forces in the field, but I do not believe he needs Congressional approval for this," said Bayh.¹¹⁰ In opposing the Byrd amendment further, Javits maintained that the President's open endorsement of it was proof of the historical significance of the Cooper-Church bill without modification in reasserting congressional authority in foreign affairs.¹¹¹

Finally, after what appeared from his remarks to be much agonizing reconsideration, thought, and consultation with fellow senators, Senator Byrd requested permission to modify the wording in his amendment. Now when inserted into the language of the Cooper-Church bill, the whole read as follows:

Unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this Act or any other law may be expended for the purpose of--

(1) retaining United States forces in Cambodia except that the foregoing provisions of this clause shall not preclude the President from taking only such action as is necessary, in the exercise of his constitutional powers and duties as Commander in Chief, to protect the lives of United States forces in South Vietnam or to facilitate the withdrawal of United States forces from South Vietnam; and the President is requested to consult with Congressional leaders prior to using any United States forces in Cambodia if, as Commander in Chief, he determines that the use of such forces is necessary to protect the lives of United States forces in South Vietnam or to facilitate the withdrawal of United States forces from South Vietnam; . . .¹¹²

¹¹⁰Ibid., p. 19161.

¹¹¹Ibid., p. 19168.

¹¹²Ibid., p. 19171.

Byrd stressed his sincerity in trying to find the language "which would meet the legitimate concerns" of his own and those of fellow members over this first portion of the Cooper-Church amendment.¹¹³ He found no objection with subsequent sections, but without some revision of the first one he could not in good conscience vote for the bill.

Following Byrd's presentation of his modified amendment, Fulbright declared, "The Senator's amendment guts the Cooper-Church proposal."¹¹⁴ The other side had not been won over.

On the following day Byrd opened his remarks with a third and final proposed wording for his revision of Cooper-Church. With the new changes, subsection (1) would read,

(1) retaining United States forces in Cambodia, except that the foregoing provisions of this clause shall not preclude the President in the exercise of his constitutional authority, powers and duties as Commander in Chief, from taking only such temporary action as is clearly necessary to protect the lives of United States forces in South Vietnam or to facilitate the withdrawal of United States forces from South Vietnam, in which circumstances the President is requested to first consult with Congressional leaders; . . .¹¹⁵

Byrd defined in detail every clause of his amendment so that the record might show clearly, if it were adopted, the intent of its author and of the Senate body which passed it. Thus no broad sweeping powers could derive from it in the future.

Opposition abounded still. Senator Joseph Tydings

¹¹³Ibid., p. 19182.

¹¹⁴Ibid., p. 19181.

¹¹⁵Congressional Record, June 11, 1970, CXVI, 19410.

(Democrat, Maryland) called for rejection on the grounds that the Byrd amendment would "give the President practically carte blanche authority to make war in Cambodia, . . ." ¹¹⁶ and Senator Cooper had the final say in the debate in the following manner: "It will be reassuring to the people of the United States if the Senate shall refuse to approve the Byrd amendment and if it shall approve the amendment offered by Senators CHURCH, AIKEN, MANSFIELD, and COOPER." ¹¹⁷ The yeas and nays were then ordered by Senator Church, and the roll call vote on the Byrd amendment ensued. Only five votes separated the final tallies, and those five were on the side of rejection. Thus, the Byrd amendment was defeated by a count of 52 to 47--not a very comfortable majority for the supporters of the Cooper-Church measure, but a majority nevertheless. ¹¹⁸

Shortly thereafter and on the same day, Senator Mansfield introduced an amendment to the Cooper-Church measure which was cosponsored by Senator Dole. It was to be attached to the same subsection (1) and stated quite simply, "Nothing contained in this section shall be deemed to impugn the constitutional power of the President as Commander in Chief." ¹¹⁹ In the light of the previous five weeks activity, the Mansfield-Dole amendment enjoyed remarkably light treatment, for that very afternoon the roll call vote was taken. It passed by an overwhelming 91 votes

¹¹⁶ Ibid., p. 19418.

¹¹⁷ Ibid., p. 19424.

¹¹⁸ Ibid.

¹¹⁹ Ibid., p. 19425.

with none opposed.¹²⁰ A few days thereafter, Senator Jack Miller (Republican, Iowa) could not constrain himself from saying,

The other day, by a vote of 91 to 0, we adopted the Mansfield amendment, which says that the Cooper-Church resolution, whatever it says, shall not be interpreted to impugn the powers of the President as Commander in Chief. In a colloquy with the Senator from Idaho, who was managing the resolution at the time, I brought out from him--and he was quite frank and fair about it--that the proponents of Cooper-Church have no intention whatsoever, under this amendment, to criticize the President for his action in the Cambodian sanctuary operation; and of course they could not, because he was taking the action as Commander in Chief.

I must say at this stage, with the Cooper-Church amendment here and with the Mansfield amendment having been adopted, I do not know what we have been doing for the last 5 weeks except having a lot of wind eminate from the Senate, making a lot of copy for the reporters to write about, and unduly delaying legislative programs this country needs very badly. . . .¹²¹

Exactly seven more days passed; still, the stalemate between those who supported the Cooper-Church amendment as it was modified by the Mansfield amendment and those who sought some additional revision along the lines proposed by Senator Byrd was not resolved. Additional support from those who were partially sympathetic with Cooper-Church was necessary if the measure were to pass at all. On June 18, however, Byrd came forth with a second amendment, this one to be added to the already adopted Mansfield revision. The whole new item would then read, "Nothing contained in this section shall be deemed

¹²⁰Ibid., p. 19438.

¹²¹Congressional Record, June 15, 1970, CXVI, 19689.

to impugn the constitutional power of the President as Commander in Chief, including the exercise of that constitutional power which may be necessary to protect the lives of United States armed forces wherever deployed."¹²² In defending his current proposal, Byrd admitted, upon looking back, that his first amendment included some wording which permitted loose interpretations as to presidential power, though such had not been his intent. He stated, regarding this newest one,

Now, I want to make it clear beyond reasonable doubt that the Byrd amendment is not intended to relieve the President of the necessity of consulting with the Congress whenever it is possible to do so before taking what might otherwise be a controversial action--even though he may have the constitutional power and authority to do so. As I have said repeatedly, I believe that the President's failure to consult with congressional leaders in advance of the April 30 Cambodian operation was an error of political judgment. It was a congressional relations mistake, and it subjected him, quite rightfully, to some of the criticism which has been directed at him following the action he took. I do not believe, however, that his action to protect the lives of American servicemen in South Vietnam was an abuse of constitutional authority, but that is a little bit beside the point. The point I am making here and now is that the President should consult with Congress about these matters whenever it is possible for him to do so, and, in looking back, I think that it was possible in respect of the Cambodian operation.¹²³

Adoption of the Byrd amendment was cinched when Senator Church stood to speak for it, saying in part,

[I]f the Senate adopts the present Byrd amendment every substantive subsection of the Cooper-Church amendment, dealing with

¹²²Congressional Record, June 22, 1970, CXVI, 20738.

¹²³Ibid., p. 20740.

restrictions on the use of public funds, will remain intact. The Byrd addition to the Mansfield amendment explicitly recognizes the President's powers as Commander in Chief. These are not within the reach of Congress. Yet, money is within the reach of Congress, and the limitations imposed by the four subsections of the Cooper-Church amendment remain intact, operative, and whole.¹²⁴

Thus, the final vote was seventy-nine in favor of adopting the second Byrd amendment and five opposing it: Fulbright, Goodell, Harold Hughes (Democrat, Iowa), Javits, and McGovern.¹²⁵

Immediately following adoption of the second Byrd amendment, other action took place which was somewhat unusual as it related to the overall picture of the emerging mood in the Senate to reassert its powers in the field of foreign affairs. The measure being spoken of was the Dole proposal to repeal the Gulf of Tonkin resolution. At this time Dole said, "While care should be taken to avoid actions which would appear to limit or transgress upon the President's prerogatives in this field, Congress, the Senate in particular, has a significant role to play in establishing policy objectives and guidelines. By repealing the Tonkin Gulf resolution we can exercise our powers and fulfill our responsibilities in a positive and meaningful way."¹²⁶ The strangest feature of Dole's suggestion of repeal was that it was presented in the form of an amendment to the pending Cooper-Church measure in lieu of waiting for it to come up as a

¹²⁴Ibid., p. 20744.

¹²⁵Ibid., p. 20745.

¹²⁶Ibid., p. 20746.

concurrent resolution from the Senate Foreign Relations Committee as it was already scheduled on the calendar. Even staunch presidential defender Ervin exclaimed, "I cannot view it as anything but intellectual and constitutional schizophrenia that the administration should stand here and fight the Church-Cooper amendment for all these weeks and then make through its spokesman the proposal on the floor of the Senate that the Senate repeal the only action taken by Congress which gives the President authority to use the Armed Forces of this country in combat in Southeast Asia."¹²⁷ Fulbright urged that Dole's amendment be tabled, explaining that it was improper procedure and adding, "I do not blame the Senator, in view of his brief attendance here, for not having learned all of the proper procedures. . . . After he has been here awhile, I think he will come to appreciate the procedures of the Senate."¹²⁸ However

¹²⁷Ibid., p. 20791.

¹²⁸Ibid., p. 20796. Fulbright favored repeal through a concurrent resolution which had been proposed the preceding December and was the method for repeal named in the Tonkin resolution itself. In reference to such action, see Doyle W. Buckwalter, "The Congressional Concurrent Resolution: A Search for Foreign Policy Influence," Midwest Journal of Political Science, XIV (August, 1970), 434-58. The author states in this work that "Congress is not without its powers and resources to greatly influence or control the committing of finances or armed forces abroad," and suggests that the concurrent resolution is one such resource. He summarized, however, that "an operationalization of the power, against Presidential plans, would precipitate a major confrontation over the authority in foreign policy." In a survey of congressmen concerning this procedure, Buckwalter discovered that a good number felt it had no authority in law--that it was more an expression of the "sense of the Congress."

Fulbright's motion to table the bill failed by a 67 to 18 vote. As one might imagine, the debate over the repeal of this measure continued, complicated by the unusual circumstances of its proposal and the possible motives of the executive branch in backing such a repeal. The issue finally came to an end on June 24, when the call for repeal of the Gulf of Tonkin resolution passed, 81 favoring and 10 opposing.¹²⁹

In the meantime, concern was developing among those who voted against the second Byrd amendment over its possible effects. On June 26, Jacob Javits introduced still another amendment to the Cooper-Church measure in order to "clarify the situation created by the adoption of amendment 708--the so-called second Byrd amendment."¹³⁰ Javits feared that this Byrd amendment had left open the possibility of too broad an interpretation of presidential power. The Javits amendment sought to affirm congressional power. It stated, "Nothing contained in this section [Section 47 of the Sales Act] shall be deemed to impugn the Constitutional powers of the Congress including the power to declare war and to make rules for the government and regulation of the Armed Forces of the United States."¹³¹ When the vote was taken, 73 senators approved and none voted against it.¹³² The Senate had now come full-circle and completely side-stepped its original mark. The Cooper-Church amendment had inspired

¹²⁹Congressional Record, June 24, 1970, CXVI, 21132.

¹³⁰Congressional Record, June 26, 1970, CXVI, 21651.

¹³¹Ibid., p. 21654.

¹³²Ibid., p. 21675.

weeks of debate, had been itself amended so as to assert the President's prerogatives, and had thereby inspired another amendment assuring congressional authority. The latter was the whole purpose of Cooper-Church, which was yet to be put to the test.

The rash of amendments to Cooper-Church continued.¹³³ On June 29, Senator Griffin read an Associated Press dispatch from Saigon which said, "The last American combat troops in Cambodia returned to South Vietnam this afternoon, in effect completing the U.S. withdrawal one day ahead of President Nixon's deadline."¹³⁴ This report prompted Griffin to question the need for the Cooper-Church amendment at all. Without a doubt, though, Cooper-Church would not be dropped. Griffin subsequently proposed an amendment to subsection (3) adding the words "United States personnel" in two places. His modification, if adopted, would render that portion of Cooper-Church to read as follows:

No funds authorized or appropriated pursuant to this Act or any other law may be expended after July 1, 1970 for the purpose of--

(3) entering into or carrying out any contract or agreement to provide a military instruction

¹³³ Attempts by administration supporters to put off a vote on Cooper-Church until after June 30 included a series of amendments to Cooper-Church which would necessitate continued discussion and were in themselves confusing. At one point, in fact, Senator Gordon Allott (Republican, Colorado) offered the McGovern-Hatfield "end the war" amendment to be attached to Cooper-Church. See "Senate Votes to Curb Future U.S. Action in Cambodia," Congressional Quarterly Weekly Report, XXVIII (July 3, 1970), 1671-72. See also Appendix B.

¹³⁴ Congressional Record, June 29, 1970, CXVI, 21952.

in Cambodia by United States personnel or to provide United States personnel to engage in any combat activity in support of Cambodian forces; . . .¹³⁵

This would make clear, Griffin explained, that Cooper-Church did not disallow United States aid to other Asian nations which were supporting a neighboring country--in particular, Cambodia.¹³⁶ Griffin was defending the so-called Nixon Doctrine when he argued that the Cooper-Church bill, in seeking to prevent further direct United States involvement in Cambodia, had gone too far. He claimed,

First, it is in the interest of the United States that the non-Communist nations of Asia be able to carry the primary burden of their own defense. In practical terms, this would be impossible if those who receive U.S. military assistance are not allowed to turn to one another for aid and support.

Second, to enact subparagraph 3 as it now stands would set a precedent that will give alarm to our friends and allies elsewhere around the world whose mutual cooperation we have been encouraging for the past 25 years.¹³⁷

Senator Church took issue with Griffin on two points: first, that the Nixon Doctrine by its own wording applied only to those countries with whom the United States had treaty commitments, and Cambodia was not one of these; second, that the idea behind the Griffin amendment suggested that the United States hire guns and pay foreign mercenaries to fight other countries' wars.¹³⁸ Church added, "The Cooper-Church amendment

¹³⁵ Ibid., p. 22037.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid., pp. 22040-41.

would not prohibit the hiring of mercenaries, if that is to be the American policy in Cambodia. Our amendment would prohibit that policy from taking effect without the Congress being first informed by the President and without his receiving congressional consent."¹³⁹ After a great deal more discussion on the subject of mercenaries, Senator Scott countered,

The Griffin amendment simply permits Asians to help Asians and clarifies the fact that there should be no legislative amendment to an Executive doctrine, the Guam doctrine.

The Griffin amendment, after all, is in keeping with our desire to remove the American presence as soon as may be possible from Southeast Asia. We cannot remove the Asian presence from Southeast Asia. They will be there after we have gone. . . .

Why do we call Asians who want to help other Asians mercenaries?¹⁴⁰

On the following day a vote was taken on the Griffin amendment. When the results were announced, 47 had voted for it and 46 had voted against it.¹⁴¹ With such a close vote, questions were inevitable. Senator Mansfield moved that the vote be reconsidered.¹⁴² Several senators, including Senator Scott, moved that the Mansfield motion be tabled.¹⁴³ A vote was taken on the motion to table, and failed, 46 to 47.¹⁴⁴ The question

¹³⁹Ibid., p. 22041.

¹⁴⁰Ibid., p. 22045.

¹⁴¹Congressional Record, June 30, 1970, CXVI, 22240.

¹⁴²Ibid.

¹⁴³Ibid.

¹⁴⁴Ibid.

to reconsider the original vote was then taken up and passed by three votes, 49 to 46.¹⁴⁵ When the Griffin amendment met its fourth test, it met ultimate defeat, a reversal of the original vote, by a count of 45 to 50.¹⁴⁶

Shortly thereafter discussion ensued over an amendment proposed by Senator Henry Jackson (Democrat, Washington). He sought to insert the word "direct" before the word "support" in subsection (4) of the Cooper-Church action.¹⁴⁷ Jackson hoped thereby to distinguish between direct air support of Cambodia, which this amendment would prohibit, and defensive support of our forces and those of the South Vietnamese in this general area. When the vote was finally taken, the Jackson amendment was adopted--69 votes for and 27 against.¹⁴⁸

At long last the time neared for the Senate vote on the Cooper-Church amendment as it had been modified through the past weeks. The final arguments included summaries of all that had transpired throughout the hours of debate on this issue. Majority Leader Mansfield exclaimed,

Reject Cooper-Church and, in my judgment, the Senate will have acquiesced in an indefinite continuance of the involvement in Southeast Asia and in a relentless accretion in U.S. casualties and cost in Indochina. That is, I know, not wanted by the President. Nor is it wanted by any Member of the Senate. But that is what we are going to get. . . .

Reject Cooper-Church and, I say in all soberness, it would be wise for the Senate to

¹⁴⁵Ibid., p. 22241.

¹⁴⁶Ibid.

¹⁴⁷Ibid.

¹⁴⁸Ibid., p. 22244.

anticipate other Cambodias and other Vietnams, elsewhere in the world. They may be expected under any kind of administration.

Cooper-Church is not a guarantee of noninvolvement in Cambodia or anywhere else. It is an attempt, it is not a certainty. However, if it passes, we will have made clear, at least, that the Senate is prepared to try to act with the President to forestall other Vietnams which the President--any President--may be under pressure to undertake. . . .

In my judgment, therefore, it is of the greatest significance that Cooper-Church is not designed to conflict--and it is not--with the President's constitutional powers as Commander in Chief. Rather, it is designed to permit the constitutional powers of both Congress and the President to be meshed in a common effort to extricate the Nation from the misbegotten situation in Southeast Asia.¹⁴⁹

Following other remarks for and against the amendment, Mansfield called for the yeas and nays. After countless hours of deliberation and innumerable efforts to modify the amendment, a few more moments would spell victory or defeat. The result was an astounding victory, 58 favoring Cooper-Church, 37 opposing, and four not voting.¹⁵⁰ Shortly thereafter the senators were summoned for one more vote, this one on the Military Sales Act as amended. Passage was never doubted, though a few final comments were made by Senator Thurmond regarding the crippling effects the amendments to the act would have on the success of American foreign policy.¹⁵¹ The final vote was 75 approving the Foreign Military Sales Act as a whole and 20 against it.¹⁵²

¹⁴⁹Ibid., p. 22247.

¹⁵⁰Ibid., p. 22251; text printed in Appendix C

¹⁵¹Ibid., p. 22261.

¹⁵²Ibid.

Senator Fulbright then moved that the Senate insist upon its amendments to the House version of the Foreign Military Sales Act.¹⁵³ His motion was approved; and Senators Fulbright, Sparkman, Mansfield, Church, Aiken, Case, and Cooper were appointed as Senate representatives to a conference committee.¹⁵⁴ In thanking those senators who had worked so hard for this measure's passage, Mansfield had the final word:

Mr. President, having spent over 7 weeks on this one piece of legislation, it is impossible to single out any particular Senator for commendation; the Senate as a whole has participated in a truly historic event. The issue of the separate responsibilities of the Congress and the executive branch have never been more fully explored; the final action on this bill marks a significant breakthrough in the reassertion of the responsibilities of the Senate in the essential decisions affecting the foreign policy of this country as well as the issue of war and peace.¹⁵⁵

¹⁵³Ibid.

¹⁵⁴Ibid.

¹⁵⁵Ibid.

IV. ANALYSIS

In attempting to analyze the voting behavior of one hundred senators in response to Cooper-Church, this researcher selected fifteen of the most important roll call votes which took place during the debate on the amendment. The senators were then grouped geographically to determine whether any regional patterns of voting appeared.¹ Following are the divisions used:²

<u>West</u>	<u>North Central</u>	<u>Northeast</u>	<u>South</u>
Alaska	Illinois	Connecticut	Alabama
Arizona	Indiana	Maine	Arkansas
California	Iowa	Massachusetts	Delaware
Colorado	Kansas	New Hampshire	Florida
Hawaii	Michigan	New Jersey	Georgia
Idaho	Minnesota	New York	Kentucky
Montana	Missouri	Pennsylvania	Louisiana
Nevada	Nebraska	Rhode Island	Maryland
New Mexico	North Dakota	Vermont	Mississippi
Oregon	Ohio		North Carolina
Utah	South Dakota		Oklahoma
Washington	Wisconsin		South Carolina
Wyoming			Tennessee
			Texas
			Virginia
			West Virginia

¹For a definition and defense of the effects of regionalism in American politics, see Ira Sharkansky, Regionalism in American Politics (Indianapolis: The Bobbs-Merrill Company, Inc., 1970).

²These are the geographical groupings suggested in Sharkansky's Regionalism in America (n. 1 above, p. 31) and employed by the U.S. Bureau of the Census as seen in Statistical Abstract of the United States: 1972 (93d ed.; Washington, D.C.: Government Printing Office, 1972), p. xii.

A summary glance at the overall voting record (see Table 1 on the following page) reveals that four senators, (Dodd, Mundt, Russell, and Nelson) were noted more as not voting than voting. At least three of these (Dodd, Mundt, and Russell) were seriously ill during this time.

The first vote involved a lowered ceiling on expenditures allowable and was not in itself controversial. In fact, only three men (Tower, Thurmond, and Ervin) voted against this revision. They were staunch conservatives, termed "hawks" by most, all southerners and two of them Republicans. The second vote involved a similar reduction of the money left to the discretion of the executive office in making credit sales. It was, likewise, relatively non-controversial; though this time four more senators registered a negative vote. Of the four, three (Allott, Curtis, Smith of Maine) were Republicans, each from a different region of the country. The fourth (Eastland) was a southern Democrat. Three of these had voted yes on the first vote, so they made a definite switch at this point. Smith of Maine had not voted on the first amendment. Considering the entire group of seven, five were Republicans, apparently falling in line behind the executive branch, and four were southerners. This minority of seven might be expected to stand firm behind the executive throughout the controversy, since they had registered a negative vote on even these minor changes in the Foreign Military Sales Act.

A modified preamble was the subject of the first recorded vote on amendments to Cooper-Church. Because it was offered by

TABLE 1

RECORD OF SENATE ROLL CALL VOTES ON FIFTEEN SELECTED ISSUES*

Names	Party	State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Aiken	R	Vt.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Allen	D	Ala.	y	y	n	y	y	y	y	n	y	y	n	y	y	n	n
Allott	R	Colo.	y	n	n	y	nv	y	y	y	y	y	n	y	y	n	y
Anderson	D	N. Mex.	y	y	y	n	y	y	y	y	y	y	n	y	y	y	y
Baker	R	Tenn.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Bayh	D	Ind.	nv	nv	y	n	nv	y	nv	y	n	nv	y	n	y	y	y

Source: U.S., Congress, Senate, 91st Cong., 2d sess., May 14-June 30, 1970, Congressional Record, CXVI, pp.15556-22261.

*Key for identification of roll call issues:

1. Amendment to Sales Act to reduce ceiling from \$275 million to \$250 million for 1971 (May 14): 70y-3n.
2. Amendment to Sales Act to reduce credit sales by \$50 million (May 14): 64y-7n.
3. Amendment to preamble of Cooper-Church amendment (May 26): 82y-11n.
4. First Byrd amendment (June 11): 47y-52n.
5. Mansfield-Dole amendment (June 11): 91y-0n.
6. Second Byrd amendment (June 22): 79y-5n.
7. Javits amendment (June 26): 73y-0n.
8. Repeal of Gulf of Tonkin (June 24): 81y-10n.
9. First vote on the Griffin amendment (June 30): 47y-46n.
10. Motion to table motion to reconsider vote on Griffin amendment (June 30): 46y-47n.
11. Motion to reconsider vote on Griffin amendment (June 30): 49y-46n.
12. Second vote on Griffin amendment (June 30): 45y-50n.
13. Jackson amendment (June 30): 69y-27n.
14. Cooper-Church amendment as revised (June 30): 58y-37n.
15. Foreign Military Sales Act as amended (June 30): 75y-20n.

y-yea

n-nay

nv-not voting

pa-present but against (giving a live pair)

pf-present but for (giving a live pair)

TABLE 1--Continued

Names	Party	State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Bellmon	R	Okla.	y	y	y	y	y	y	y	n	y	y	n	y	y	n	y
Bennett	R	Ut.	nv	nv	y	y	y	y	y	y	y	y	n	y	y	n	y
Rible	D	Nev.	y	y	y	y	y	nv	y	y	y	y	n	y	y	y	y
Boggs	R	Del.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Brooke	R	Mass.	nv	nv	y	n	y	y	y	y	n	n	y	n	y	y	y
Burdick	D	N. Dak.	y	y	y	n	y	y	nv	y	n	n	y	n	y	y	y
Byrd	D	Va.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Byrd	D	W. Va.	y	y	y	y	y	y	y	y	y	pf	pa	pf	y	y	y
Cannon	D	Nev.	nv	nv	y	y	y	nv	y	y	y	y	n	y	y	y	y
Case	R	N.J.	y	y	y	n	y	y	y	y	n	n	y	n	n	y	y
Church	D	Ida.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Cook	R	Ky.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	n
Cooper	R	Ky.	y	y	y	y	y	y	y	y	n	n	y	n	n	y	y
Cotton	R	N.H.	y	nv	y	y	y	y	y	y	y	y	n	y	y	n	n
Cranston	D	Calif.	y	y	y	n	y	y	y	y	y	n	y	n	y	y	y
Curtis	R	Neb.	y	n	y	y	y	y	y	y	y	n	y	n	y	n	y
Dodd	D	Conn.	nv	nv	nv	y	y	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv
Dole	R	Kan.	y	y	y	y	y	y	y	y	y	y	n	y	y	y	y
Dominick	R	Colo.	y	nv	y	y	y	nv	y	y	y	y	n	y	y	n	n
Eagleton	D	Mo.	y	y	nv	n	y	y	y	y	n	n	y	n	n	y	y
Eastland	D	Miss.	y	n	n	y	y	y	y	n	y	y	n	y	y	n	n
Ellender	D	La.	y	y	n	y	y	y	nv	nv	y	nv	y	n	y	n	n
Ervin	D	N.C.	n	n	n	y	y	y	y	n	nv	y	n	y	y	n	n
Fannin	R	Ariz.	y	y	y	y	y	y	y	y	nv	y	n	y	y	n	n
Fong	R	Haw.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Fulbright	D	Ark.	nv	nv	y	n	y	n	y	n	n	n	y	n	y	y	y
Goldwater	R	Ariz.	nv	nv	nv	y	y	y	nv	y	y	y	n	y	y	n	n
Goodell	R	N.Y.	nv	nv	y	n	y	n	n	n	n	n	y	n	y	y	y
Gravel	D	Alas.	nv	nv	y	n	y	y	y	pf	n	n	y	n	y	y	y
Griffin	R	Mich.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	n
Gurney	R	Fla.	y	y	n	y	y	y	y	y	y	y	n	y	y	n	n
Hansen	R	Wyo.	y	y	nv	y	y	y	y	y	y	y	n	y	y	n	n
Harris	D	Okla.	nv	nv	y	n	y	y	y	y	n	n	y	y	n	y	y
Hart	D	Mich.	nv	nv	y	n	y	y	y	y	n	n	y	n	n	y	y

TABLE 1--Continued

Names	Party	State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Hartke	D	Ind.	y	y	y	n	y	y	y	nv	n	n	y	n	y	y	y
Hatfield	R	Oreg.	y	y	y	n	y	nv	y	y	n	n	y	n	y	y	y
Holland	D	Fla.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	n
Hollings	D	S.C.	y	y	y	y	y	y	y	n	n	n	y	n	y	y	y
Hruska	R	Neb.	y	y	y	y	y	y	nv	y	y	y	n	y	y	y	y
Hughes	D	Ia.	y	y	y	n	y	n	nv	y	n	n	y	n	n	y	y
Inouye	D	Haw.	y	nv	y	n	y	y	y	y	n	n	y	n	n	y	nv
Jackson	D	Wash.	y	y	y	n	y	y	nv	y	y	y	n	y	y	y	y
Javits	R	N.Y.	y	y	y	n	y	n	y	y	n	n	y	n	n	y	y
Jordan	D	N.C.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Jordan	R	Ida.	y	y	y	y	nv	y	y	y	y	y	n	y	y	n	n
Kennedy	D	Mass.	nv	nv	y	n	y	y	y	y	n	n	y	n	n	y	y
Long	D	La.	nv	nv	n	y	y	y	y	n	pf	y	n	n	y	pa	y
Magnuson	D	Wash.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Mansfield	D	Mont.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Mathias	R	Md.	nv	nv	y	n	y	y	y	y	n	n	y	n	n	y	y
McCarthy	D	Minn.	nv	nv	y	n	y	y	nv	nv	n	n	y	n	n	y	y
McClellan	D	Ark.	y	y	y	y	y	nv	y	n	y	y	n	y	y	n	n
McGee	D	Wyo.	y	y	y	y	y	y	y	n	y	y	n	y	y	n	y
McGovern	D	S. Dak.	y	y	y	n	y	y	y	n	y	y	n	n	n	n	y
McIntyre	D	N.H.	y	y	y	n	y	nv	y	y	n	n	y	n	y	y	y
Metcalf	D	Mont.	nv	nv	y	n	y	y	y	y	n	n	y	n	n	y	y
Miller	R	Ia.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Mondale	D	Minn.	nv	nv	y	n	y	y	nv	y	nv	n	y	n	n	y	y
Montoya	D	N. Mex.	nv	nv	y	n	y	y	nv	y	n	n	y	n	y	y	y
Moss	D	Ut.	y	y	y	n	y	y	y	y	n	n	y	n	n	y	y
Mundt	R	S. Dak.	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv
Murphy	R	Calif.	nv	nv	y	y	y	y	nv	y	y	y	n	y	y	n	y
Muskie	D	Me.	y	y	y	n	nv	nv	y	y	n	n	y	n	n	y	y
Nelson	D	Wis.	y	y	y	n	y	y	y	y	nv	nv	nv	nv	nv	nv	nv
Packwood	R	Oreg.	y	y	y	n	y	nv	y	y	y	y	n	y	y	y	y
Pastore	D	R.I.	y	y	y	n	y	nv	y	y	n	n	y	n	y	y	y
Pearson	R	Kan.	y	y	y	y	y	y	nv	y	y	y	n	y	y	y	y

TABLE 1--Continued

Names	Party	State	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15
Pell	D	R.I.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Percy	R	Ill.	y	y	y	n	nv	nv	y	y	y	y	n	y	y	y	y
Prouty	R	Vt.	y	y	y	y	nv	y	y	y	y	y	n	y	y	n	y
Proxmire	D	Wis.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Randolph	D	W. Va.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Ribicoff	D	Conn.	nv	nv	y	n	y	pa	nv	y	n	n	y	n	y	y	y
Russell	D	Ga.	nv	nv	y	y	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv	nv
Saxbe	R	Ohio	nv	nv	y	n	y	y	nv	y	n	n	y	n	n	y	y
Schweiker	R	Pa.	y	y	y	n	y	y	y	y	n	n	y	n	n	y	y
Scott	R	Pa.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	y
Smith	R	Me.	nv	n	n	n	y	y	y	y	n	n	y	n	y	n	y
Smith	R	Ill.	y	y	y	y	nv	y	nv	y	y	y	n	y	y	y	y
Sparkman	D	Ala.	y	y	y	y	y	y	nv	y	y	y	n	y	y	n	y
Spong	D	Va.	y	y	y	n	y	y	y	y	n	n	y	n	y	y	y
Stennis	D	Miss.	nv	nv	y	y	y	y	nv	n	y	y	n	y	y	n	n
Stevens	R	Alas.	y	y	y	y	y	y	y	y	y	y	n	y	y	y	y
Symington	D	Mo.	y	y	y	n	y	y	y	y	y	n	y	n	y	y	y
Talmadge	D	Ga.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	n
Thurmond	R	S.C.	n	n	y	y	y	y	y	y	y	y	n	y	y	n	n
Tower	R	Tex.	n	n	nv	y	y	y	nv	y	y	y	n	y	y	n	n
Tydings	D	Md.	y	y	y	n	y	y	nv	y	y	y	n	y	y	y	y
Williams	R	Del.	y	y	y	y	y	y	y	y	y	n	y	n	y	n	n
Williams	D	N.J.	nv	nv	y	n	y	y	nv	y	n	n	y	n	n	y	y
Yarborough	D	Tex.	nv	nv	y	n	y	nv	nv	nv	n	n	y	n	n	y	y
Young	R	N. Dak.	y	y	y	y	y	y	y	y	y	y	n	y	y	n	n
Young	D	Ohio	y	y	y	n	y	y	y	nv	n	n	y	n	n	y	y

the sponsors of the original proposal and was in substance conciliatory to the administration, it had great appeal to both sides--thus passage by 82 to 11. With such a broad base of support, no alignment could here be discerned as to support or opposition for the Cooper-Church amendment. Discussion prior to the vote indicated that those who would vote "nay" on the modified preamble were strong administration backers who wanted no part of Cooper-Church, softened or not. Subsequent voting shows that all of them except Mrs. Smith from Maine later did vote for those amendments which might modify Cooper-Church to the executive's advantage. (Her votes were not consistently for the administration or in opposition to it.) In the end, without exception, these original eleven negative voters also voted "nay" on Cooper-Church.

In the opinion of this researcher, the first real test for pro- and anti- administration forces came in the fourth vote, which was the first Byrd amendment. A "yea" vote could be considered a vote for the administration, and a "nay" vote was an early indicator of who supported restrictions on the executive--specifically, Cooper-Church. In regard to partisan alignments, the administration drew big support from Republicans-- 29 of 43 Republicans voting "yea," or over one half. Only 18 of 57 Democrats voted "yea," or around one third. Looking at the affirmative vote regionally, one can see a definite trend of strong support in the South and West. Of the 18 Democratic votes, 14 were from the South, 3 from the western states, and only 1 (Dodd, Connecticut) from elsewhere. (Interestingly,

Dodd was on the Foreign Relations Committee and voted against Cooper-Church even in committee proceedings. Had his health permitted, he would probably have cast a pro-administration vote in every instance.) Of the 29 Republican votes, 18 were from the South and West. Those 14 Republicans who crossed party lines and voted against the Byrd amendment were aligned regionally in northeastern and north central portions of the nation. The largest regional backing of the Byrd amendment came from the South where 22 of the 32 southern senators voted for it. At this point in the debate, then, the administration's strength appeared to lie with the Republicans, particularly those from southern and western states, and with southern Democrats.³

The Mansfield-Dole amendment (item 5 on the table) was innocuous. It stated that which was desired by all opponents of Cooper-Church, but it was worded very mildly. The fact that it was sponsored by Mansfield had great appeal to all proponents of Cooper-Church. Quite understandably, then, 91 voted for it, none against it. The other 9 senators were not present.

Like the Mansfield-Dole measure, the vote on the second Byrd amendment demonstrates little or nothing in the way of a trend in regional or partisan voting behavior. This measure was a much milder endorsement of presidential powers than the

³Other interesting features of this vote include the fact that Arkansas' McClellan split with Fulbright as he did throughout most of the voting. McGee, one of the three western Democrats supporting the Byrd amendment, like Dodd, voted against Cooper-Church even in committee proceedings. He consistently opposed any measures to curb presidential powers in this instance.

first Byrd amendment. It was attached to the already agreeable Mansfield-Dole proposal and was endorsed by Senator Church. With these characteristics, it won the votes of senators on both sides of the issue--79 in all. Only five senators opposed the measure. They were Fulbright, Goodell, Hughes, Javits, and McGovern--the upper chamber's most outspoken "doves."

A more interesting vote was taken on the Javits amendment on June 26 (item 7 on the table). This amendment might at first glance appear to have been an anti-administration measure, since it was sponsored by one of the five men who could not bring themselves to vote for the second Byrd amendment. If one expected those who were firmly backing presidential prerogatives to vote "nay" on the Javits amendment, however, a surprise was in store. Not a single negative vote was cast. Seventy-three senators voted for it. The remaining 27 members were not present (including two others of the five negative votes on the preceding item, Hughes and Goodell). Of the 73 "yea" votes, 35 had voted "yea" on the first Byrd amendment (including Minority Leader Scott), which, in the opinion of this researcher, marked them as strong backers of Nixon's Cambodian venture. This illustrates, then, something of the personal dilemma of many of the senators. Although they supported strong presidential prerogatives in matters of this sort, they did not really favor a weakened Senate. A more accurate interpretation of the "yea" vote on this item, then, might be to describe it as "pro-Senate" rather than "anti-administration."

Item number 8, the repeal of the Gulf of Tonkin

resolution, was so thoroughly confusing in its hidden implications, its style of introduction, its supporters and opponents, that it almost defies analysis. The motion to repeal the Gulf of Tonkin resolution was hard to label as either "pro-" or "anti-" administration. Such action would remove the basis for American involvement in armed conflict in Vietnam used by former President Johnson and other members of the executive branch. However, by his own explanation, this resolution was not the basis for Nixon's conduct of the war there. In fact, he favored its repeal. Because he did, many strong administration supporters voted for repeal: Tower, Thurmond, Goldwater, Scott, and Griffin among them. Some of the other baffled senators who also favored the administration's direction of the war voted against such a move for they felt the Gulf of Tonkin resolution was a valid and necessary measure to legitimize the continuance of United States troops in South Vietnam: Eastland, Stennis, Ervin, Allen, and McClellan, to mention a few. Of course, one would expect Senate "doves" to vote its repeal--and they did. Along with administration supporters, this produced a strange coalition of 81 votes. Then there was Fulbright, one of the most outspoken of the "doves." Without a doubt, he wanted the resolution repealed, but not by this procedure. Almost as though he resented administration forces using an unorthodox approach to take the initiative in this instance, he defiantly voted against its repeal. Only nine other negative votes were cast, eight of them by southern senators (and the other by McGee). Probably this was an historical moment when Fulbright

voted with Eastland, Ervin, Long, McClellan, and Stennis on an issue involving America's involvement in Southeast Asia.

In the opinion of this researcher, not until June 30, with the round of votes on the Griffin amendment, did the second real test of power come (and for all practical purposes, the final test). Debate on Griffin's modification of Cooper-Church centered on the issue of mercenaries and the right of the United States to aid other Asian nations regardless of their ties with Cambodia. A "yea" vote could be considered a pro-administration vote. On the first roll call vote, the measure passed by one vote, 47 to 46. Noteworthy is the fact that pro-administration forces in pulling 47 votes polled exactly the same number they secured on the first Byrd amendment. With very few exceptions, they were the same 47 votes,⁴ which meant support for great executive discretion in this matter still came from Republicans in the South and West and from southern Democrats.

The very next vote was on the motion to table

⁴The administration lost the votes of Russell and Dodd due to illness, and Long's vote because he was paired and could not vote (though otherwise he would have voted "yea"). Not present and therefore not voting was Fannin, who had voted for the first Byrd amendment. Senator Hollings voted "nay" on the Griffin amendment, indicating he had been won over to the side of a strong Cooper-Church amendment since the first Byrd vote. In spite of these five losses, the administration picked up votes from Anderson, Jackson, Packwood, Percy, and Symington, all of whom voted "nay" on the first Byrd amendment. Either they had been won over in the intervening nineteen days to the side of the opponents of Cooper-Church or approved of this measure solely on its own merits. (Subsequent votes indicated the latter to be the case.)

reconsideration of the first vote, so a "yea" vote would be a vote for the administration. One might expect columns 8 and 9 to be identical--and they almost were. Proponents of the Griffin revision to Cooper-Church lost a vote from Byrd of West Virginia, who was paired for the measure but could not vote. They lost another vote from Ellender, who was absent and therefore not voting; but they picked up votes from Fannin, who was absent on the preceding roll call, and from Long, who was "paired for" before. Their net loss was in the switch by Senator Symington, who must have realized the error of his ways on the first vote and now voted "nay."

On the motion to reconsider the vote on the Griffin amendment, the same 46 senators who wanted to table this motion of course opposed it now. Strong Cooper-Church advocates picked up two more votes (those of Bayh and Ellender), thereby increasing their total to 49 for reconsideration as opposed to 46 against.

With the second vote on the Griffin amendment, it was defeated. Byrd of West Virginia was still paired and could not vote, though Griffin proponents had picked up Fannin's vote. Their net losses, however, were in the votes of Symington and Ellender, who voted "nay" now but had voted "yea" in the first instance.⁵ Unexplainable was Long's "nay" vote when only

⁵Thereafter Ellender continued to oppose Cooper-Church, as he had from the outset. It is therefore unclear why he opposed this Griffin amendment when such a close vote was obvious unless he voted in error or was genuinely opposed to this one measure in particular.

moments earlier he had voted not to reconsider the vote by which the measure had passed. Those disapproving of Griffin's rewording of Cooper-Church also picked up Mondale's vote. The final count was 45 for and 50 against.

Fast on the heels of the four votes on the Griffin amendment came the Jackson amendment to Cooper-Church. This assured United States air support for hostilities near the Cambodian border. A vote for it might have been regarded as a vote for the war effort and therefore for an administration which seemed inclined to escalate the war, but it was a relatively minor point and encountered little opposition. Apparently the strongest Senate "doves" made up the 27 negative votes. Included in the 69 affirmative votes were 3 of the 4 original sponsors of Cooper-Church: Church, Aiken, and Mansfield.

At long last came the vote on the Cooper-Church amendment itself, as modified by some revisions. A vote "yea" was most certainly a vote against the accumulated war powers in the executive branch as interpreted by Nixon in sending troops to Cambodia. Undoubtedly some of those 47 senators who voted for the first Byrd amendment had been won over by subsequent amendments to Cooper-Church and by the fact that now the vote was at hand, the crisis was past and the troops were out of Cambodia. Of the 37 stalwart "nay" voters, 26 were Republicans. Twenty-eight of the negative voters were, as might be expected, from the South and West. The remaining 9 voters from the north central and northeastern parts of the country were all Republicans. Most interesting is the discovery that actually very few

minds had been changed since the votes on the first Byrd amendment. (Perhaps the entire two months of debate had accomplished little in the way of persuasion but had only reinforced original attitudes.) Opponents of Cooper-Church had lost a net 10 votes since the first Byrd vote. (They gained the negative vote of Smith of Maine.) Two of the losses were due to illness and resultant absence (Dodd and Russell). One (Long) was present and paired against the measure, another "nay" vote had it counted. Senators Byrd of West Virginia and Dole of Kansas each voted for Cooper-Church although they had originally been skeptical of the measure; but after all, they had each sponsored amendments to it which had passed and therefore modified it somewhat. The remaining 6 losses were Bible and Cannon of Nevada, Stevens of Alaska, Pearson of Kansas, Smith of Illinois, and Hollings of South Carolina.

The last column illustrates the vote on the entire Foreign Military Sales Act with the Cooper-Church amendment attached. Failure of the entire act on the basis of this amendment would be unusual, but one might reasonably expect some negative votes because Cooper-Church was so controversial. Of the 75 senators voting for the Military Sales Act, 17 had voted against Cooper-Church.⁶ The 20 "nay" votes were not the votes of Senate "doves" who opposed any encouragement to military

⁶The seventeen senators who voted against Cooper-Church but then voted for the Sales Act were Allott, Baker, Bellmon, Bennett, Boggs, Byrd (Virginia), Curtis, Fong, Griffin, Hruska, McGee, Miller, Murphy, Prouty, Scott, Smith (Maine), and Sparkman.

sales around the world, but of Senate "hawks" who would rather see the Sales Act fail than to so weaken the powers of the executive.⁷

Taking the Cooper-Church amendment at face value, one can only conclude that the United States Senate in this instance epitomized futility and folly. In seven and one-half weeks of exhaustive debate and declamation, these able representatives finally succeeded in passing a bill which insisted that all those soldiers who had left Cambodia yesterday had to leave Cambodia by tomorrow. The inconsistencies and omissions in the strongest arguments of the proponents prompt this researcher to conclude that the purest motivation behind the Cooper-Church proposal was not the Cambodian episode but was in reality the entire relationship of the United States and Vietnam. Although the reminder cropped up from time to time that this measure worked only through the Senate's rightful power of the purse, it was never presented continuously and seemed to come as an after-thought when it best suited the purposes of persuasion of those arguing for the bill. The truth of the matter is that Cooper-Church did indeed have far-reaching limitations on executive direction of hostilities regardless of its wording--a fact proudly proclaimed and defended by its promoters. This is not to say whether that goal is in itself worthy or not, but to insist that it be recognized as the goal of Cooper-Church.

⁷For a similar analysis of the roll call votes on somewhat different amendments to Cooper-Church, see "Senate Votes to Curb Future U.S. Action in Cambodia," Congressional Quarterly Weekly Report, XXVIII (July 3, 1970), 1675.

What was astounding to this writer is that time and time again the proponents of Cooper-Church declared that they were taking the President at his word and believed he was going to meet his own objectives and return the troops across the Cambodian border; yet they could never accept the contention that if this were true, then their bill was superfluous, redundant, totally unnecessary (as in the end it proved to be). In their weaker moments, however, the proponents expressed their true fears that this was a move on Nixon's part to expand the war--completely missing or ignoring the actual purpose of the Cambodian venture.⁸ In this regard, the writer found what seemed to be the best analyses of the situation at that time in the remarks of Senators Hansen and Howard Baker (Republican, Tennessee) on June 4. Senator Hansen said in part,

Because the President does keep his word, there is no credibility gap in the Nixon administration. The President has the confidence of a majority of the American people. This is evidenced in the nationwide polls which indicate strong approval of the wisdom in the President's decisions. . . .

The President has the confidence of the majority of the American people, and he has their support. In my opinion, it will be most appropriate for Congress likewise to express its confidence in the President--the confidence of the people's elected representatives.

For Congress to do otherwise is to give the world a misleading picture of the courage,

⁸Many quotations from the Congressional Record attest to this contention, the most explicit comment being one from Senator Church who suddenly exclaimed at one point, "But this amendment relates to support for Cambodian forces and support for the Cambodian Government." (See p. 89, Chap. III above.) Most assuredly, he was not "taking the President at his word" if this were the fear behind his amendment.

the patriotism and the fortitude of the great majority of the American people. In my view, the passage by either the House or the Senate or any legislative proposal designed to discredit, in an unusual manner, the foreign policy decisions of our President, decisions that have proved successful, will confuse foreign nations.⁹

Senator Baker continued,

Time and time again I have asked students and faculty members who came to my office to discuss these issues and these developments, whether they believed that American troops would be withdrawn from Cambodia by July 1.

To my astonishment, almost invariably, they replied that they did not. Almost invariably, they replied that they did not believe the representations made by the President of the United States.

On some occasions, I have asked on what basis they asserted this disbelief that the previous representations which had been made by the President of the United States had not been kept, or kept only partially, which gave them enough of an intellectual basis for thinking that this representation was untrue or would not be kept.

I asked why they did not believe the explicit statements of fact or intention that were made by the President of the United States.

I found, on almost all occasions, that their skepticism about the accuracy of the representations of the President was far more emotional than it was rational.

They answered that the Government has been less than candid in the past, and, more often than not, they referred to the past as extending beyond January 1, 1969.

Therefore, it follows necessarily that the new President taking office at that time and the administration over which he presided cannot be believed, either.

It seems to me, Mr. President, that this situation which I found not once, but on a number of occasions, and with different groups who visited my office expressing concern over the American involvement in Southeast Asia, and Cambodia in particular, is strictly illogical.

⁹Congressional Record, June 4, 1970, CXVI, 18336.

While I do not question the depth of feeling that the critics of the President exhibit about him personally, and about his policies in Indochina, I do question the objectivity and the fairness with which they approach these complex and difficult public issues.¹⁰

If the truth were accepted that this military operation was against the same enemy we fought in South Vietnam, that we were merely pursuing him where he led us, then this amendment certainly was a limitation on the making of battlefield decisions by the Commander in Chief; but it was clothed in words and shrouded in arguments to conceal this attempt in an effort to make it more appealing to at least moderates on the war issue. Of course, that is the privilege and duty of legislators: to win as many votes as possible by persuasive argument. The proponents of Cooper-Church were successful in this. Looking back, however, it was in reality a confrontation between those who opposed United States involvement in Vietnam and those who approved, with a somewhat contrived issue of "the war powers" at stake. The final vote was taken with the limits to each branch of those powers never having been defined.¹¹

¹⁰Ibid., p. 18340.

¹¹Actually, there are those who strongly believe the precise limits to each branch in their exercise of the war powers should never be defined. Among them is George Ball, former Under Secretary of State from 1961 to 1966. When legislation attempting to make such delineations of power was pending in the summer of 1971, Ball delivered testimony to the Senate Foreign Relations Committee specifying his feelings. He declared that Congress should play a special role in the day to day conduct of foreign policy to assure that the United States would not again inch itself into an unpopular war. Ball felt Congress was justified in carrying out this supervisory role because it is the best representation of the whole people in government.

One further blow to the arguments for Cooper-Church was brought to mind by Mansfield's last words referring to the spending of "over 7 weeks on this one piece of legislation."¹² He might well have concluded, though he did not, "We have proved that the Senate is not capable of dealing quickly and decisively with those matters pertaining to armed conflict that demand rapid, secretive action." Imagine if the President actually had consulted with the upper chamber and had placed the question in their laps! Although the President would have endeared himself to Fulbright, Church, et al., the enemy would have cleared

But, he told his listeners, they must realize that Congress is not infallible, that it may make errors in judgment just as may the executive. He referred to the neutrality legislation from 1935 to 1937 as a probable contribution to the coming of World War II because it prevented the steadying influence of the United States in the shakey political atmosphere of Europe. Ball also recognized that the executive is not infallible either, and that it often gets so involved in what he termed "operational problems that instead of asking whether we should commit more forces to secure certain given objectives--or indeed whether those objectives are worth the cost already incurred--he instead asks how can we utilize more resources to do the job." The former member of the executive branch concluded, "For this reason it is essential that the Executive and Congress work closely together not only in the actual conduct of a war but, even more, in shaping the policies that help create the situations that lead to conflict--and, finally, in the hard decision as to whether, when a crisis comes, the United States should react with military means." But Ball stressed that the inherent weaknesses of both branches really discourages any codification of the war powers unless it allows sufficient flexibility for the executive. He warned against repeating the mistake of the 1935 legislation and stated his preference for each branch getting with the other and establishing a "modus operandi" for cooperation in foreign affairs--although, given the nature of past mutual dealings, he admitted that such a suggestion was probably idealistic. See "On the Decision to Make War," Wall Street Journal, August 5, 1971, p. 6.

¹²See above, p. 116.

his own sanctuaries after seven weeks. Even if Nixon had consulted only senatorial leaders, he would have been confronted with two points of view and ultimately would have been forced to make his own decision. Clearly, as the experts had known before the Cooper-Church bill was introduced, time works against the Senate in matters of this sort.

On the surface, then, Cooper-Church portended much more than its proponents claimed for it in the way of limiting executive action, was very costly in time expended, and in the end proved itself unnecessary. Beneath the surface, however, lies the positive significance of this episode in the developing constitutional history of the nation. In the long hours of debate accompanying Cooper-Church are to be found some of the most valuable efforts to date in the separation and definition of the respective war powers in terms of historical research, analysis, and reasoning. Such thorough disclosure was made of all scholarship and opinion on this matter that similar conflicts thereafter would find arguments ready at hand and significant points still fresh in the minds of most senators. Moreover, at last the Senate had spoken loudly and clearly (although slowly and cautiously). The upper chamber of Congress had gone on record by a 58 to 37 vote as demanding a part in decision-making on issues of foreign affairs as well as domestic policies. In the opinion of this writer, Congress' role should be asserted, perhaps not in the particular fashion of Cooper-Church--not to redress what has already been done--but to look ahead, as the executive branch must, to possible alternatives of the future and to establish guidelines for those choices. The suggestion that

in the future the Senate of the United States would act positively and forcibly was the prime importance of Cooper-Church. Proponents of legislative power co-equal with that of the executive had won. Surely the sense of victory was pleasing. Surely the idea of invigorated prestige in foreign affairs found favor even among those senators reluctant to endorse Cooper-Church. Surely future battles would not be so long in the winning, with Cooper-Church behind them. Only time would tell.

V. EPILOGUE

No time at all was necessary to determine that the House of Representatives was not of the same mind as the Senate. As the conference committee set about the task of ironing out the differences between the two chambers over H.R. 15628, it soon became apparent that the House was not the least inclined toward accepting the Cooper-Church amendment. In his Conference Report on H.R. 15628 before the Senate on December 31, 1970, Senator Sparkman referred to the fact that Cooper-Church had been the "principal obstacle" to agreement between the conferees, and so it was put aside.¹ Thus the constitutional standoff between executive and legislature that might have been provoked had Cambodia ever been reentered did not and would not come to pass. As a victory point for Senate "doves," however, Senator Dole made special note of the fact that his amendment repealing the Gulf of Tonkin resolution was endorsed by the House.² Seven and one-half months after its initial proposal,

¹Congressional Record, December 31, 1970, CXVI, 44513.

²Ibid., p. 44514. Senator Fulbright might not have considered this as a victory, personally. The reader will recall that he opposed Dole's amendment on the grounds that it was procedurally unorthodox. Under his direction the original proposal for repeal of the Tonkin Gulf resolution, SCR 64 (seven months old now), came before the Senate for a vote on July 10, 1970. At this point, Senator Allott remarked, "Mr. President, things are becoming, as Alice said in Wonderland, 'curiouser and curiouser.'" Unless my eyes and ears deceive me, we are about to

the Senate heard the last of the Cooper-Church amendment, and the last word was defeat.

Anti-war sympathizers in the Senate pressed on, frequently repeating the pattern of victory in the Senate only to be followed by defeat in the House. On July 14, 1970, Chairman Stennis of the Senate Armed Services Committee submitted H.R. 17123 to the upper chamber: "a bill to authorize appropriations during the fiscal year 1971 for procurement of aircraft, missiles, naval vessels, and tracked combat vehicles, and other weapons, and research development, test, and evaluation for the Armed Forces, and for other purposes."³ Attached to this bill was the McGovern-Hatfield amendment which had been first offered on April 30, immediately following the news of military assistance in Cambodia. This amendment had undergone several revisions since that time. When it finally came up for consideration on August 26 as a part of the debate over H.R. 17123, its introduction was accompanied by a unanimous consent order that no more than six hours of controlled debate be devoted to McGovern-Hatfield and the vote be taken on September 1.⁴ The amendment stipulated that no money be authorized

repeal a resolution that we have recently repealed." (Congressional Record, July 10, 1970, CXVI, 23745.) The final vote was 57 in favor of repeal, 5 opposed. (Ibid., p. 23746.) So the House had before it two measures from the Senate calling for repeal of the Tonkin resolution. In choosing to endorse the Dole amendment to Cooper-Church, the House virtually ignored Fulbright's preferred bill.

³Congressional Record, July 14, 1970, CXVI, 24114.

⁴Congressional Record, August 26, 1970, CXVI, 30080.

for military use in South Vietnam for troop strength over 280,000 after April 30, 1971, and it called for the "orderly termination of military operations there and the safe and systematic withdrawal of remaining armed forces by December 31, 1971."⁵ Following close on the heels of Cooper-Church, much of the same rhetoric could be heard as Senator Cranston declared, "[I]n revising the amendment, great care and wisdom have been exercised in removing language that might have led to the feeling in some quarters that there was some challenge to the President's responsibilities as Commander in Chief. There is nothing in the amendment that does that in any way in its revised form."⁶ Shortly thereafter McGovern said that his amendment "seeks to reassert the declining role of Congress in decisions whether or not to commit American forces to battle."⁷

As the voting hour approached on September 1, stirring speeches were heard on each side. Senator Dole, rattling off a detailed timetable of the past decade's events during which a Democratically controlled Congress allowed or encouraged the war to escalate, ended by saying,

⁵Ibid. The date April 30, 1971, and troop strength 280,000 were consistent with the scheduled withdrawal rate already announced by President Nixon. In this and other respects the final version of McGovern-Hatfield was more lenient than the original. A detailed comparison of the two may be found on p. 30080 of the August 26, 1970, issue of Congressional Record. The complete text of the amendment is printed on p. 30083.

⁶Congressional Record, August 26, 1970, CXVI, 30081.

⁷Ibid., p. 30082.

Where were those voices of "peace now" in the 1960's?

The fact is, Mr. President, those voices carping against the President today belong largely to the same persons who must share the blame for the disasters of the 1960's.

They not only let it happen; they abetted it.

Now they have seen their failures. And now they cannot stand to see the President's successes.

Mr. President, it will not work. The Nation has seen what happened in the 1960's. They have seen what the President has done in the 1970's.

There are those who would not give him the chance to complete the task of undoing the errors of the past.

But the American people will not be fooled, and most of the Members of Congress will not be fooled."⁸

Senator McGovern countered,

I have lived with this vote night and day since last April 30--the day before the Cambodian invasion--the day this amendment was first submitted.

I thank God this amendment was submitted when it was, because, as every Senator knows, in the turbulent days following the invasion of Cambodia and the tragedy at Kent State University, the amendment gave a constructive rallying point to millions of anguished citizens across this war-weary land. . . .

Every Senator in this Chamber is partly responsible for sending 50,000 Americans to an early grave. This Chamber reeks of blood. . . .

And if we do not end this damnable war, those young men [the injured and maimed] will some day curse us for our pitiful willingness to let the Executive carry the burden that the Constitution places on us.

So before we vote, let us ponder the admonition of Edmund Burke, the great parliamentarian of an earlier day:

"A conscientious man would be cautious how he dealt in blood."⁹

⁸Congressional Record, September 1, 1970, CXVI, 30681.

⁹Ibid., p. 30682.

When the vote was taken, only 39 senators voted for McGovern-Hatfield, 55 opposed it, and 5 were not present.¹⁰ Arguments had varied little from those during the Cooper-Church debate; issues were still fresh in the senators' minds. Apparently McGovern-Hatfield was just too strong for those moderates who had supported the previous measure.¹¹

The selective service bill, H.R. 6531, was introduced in the House on March 23, 1971, by Representative F. Edward Hébert (Democrat, Louisiana), Chairman of the House Armed Services Committee.¹² This measure for the purpose of extending the draft and increasing salaries of military personnel passed handily in the House, surviving several unsuccessful attempts by a weak anti-war group in that chamber to attach demands for troop withdrawal from South Vietnam.¹³ H.R. 6531 was to realize a different fate in the Senate, however. Debate

¹⁰Ibid., p. 30683.

¹¹Seventeen senators voted for Cooper-Church but against McGovern-Hatfield. They were: Aiken (Republican, Vermont); Allott (Republican, Colorado); Bible (Democrat, Nevada); Byrd (Democrat, Virginia); Cooper (Republican, Kentucky); Dole (Republican, Kansas); Gore (Democrat, Tennessee); Hollings (Democrat, South Carolina); Jackson (Democrat, Washington); Jordan (Democrat, North Carolina); Pearson (Republican, Kansas); Percy (Republican, Illinois); Randolph (Democrat, West Virginia); Saxbe (Republican, Ohio); Smith (Republican, Illinois); Spong (Democrat, Virginia); and Stevens (Republican, Alaska).

¹²U.S., Congress, House of Representatives, 92d Cong., 1st sess., March 23, 1971, Congressional Record, CXVII, 7641.

¹³Congressional Quarterly Weekly Report, XXIX (April 1, 1971), 798.

in the upper house began on May 10, 1971.¹⁴ In the following weeks, almost thirty amendments to the bill were adopted by the Senate. Many more were proposed, debated, and rejected. Six of these measures were attempts to curb the President's direction of hostilities in Southeast Asia. On May 25, the Senate voted on two amendments to restrict the powers of the President to use draftees in combat. The first was a proposal by Senator Nelson stating that no draftee could be sent into combat in South Vietnam unless he volunteered for such a role or reenlisted. His amendment made this mandate effective December 31, 1971.¹⁵ The proposal was defeated, 52 to 21.¹⁶ Senator John Tunney (Democrat, California) offered a modification of that action, adding to the exceptions for which a draftee could be sent into combat congressional authorization for such. Tunney explained that he felt Congress should direct the President in matters involving the lives of draftees. His measure, too, was defeated by an overwhelming 61 to 7.¹⁷ Throughout the debate, Stennis, as the sponsor of H.R. 6531, argued that the "draft extension bill should not be confused with issues surrounding the Indochina war."¹⁸ Three weeks later the subject

¹⁴Congressional Record, May 10, 1971, CXVII, 14029.

¹⁵Congressional Quarterly Weekly Report, XXIX (May 28, 1971), 1157.

¹⁶Ibid.

¹⁷Ibid.

¹⁸Ibid.

was broached again when, on June 10, Senators McGovern and Hatfield sought to attach their 1970 amendment to this bill. In this instance the deadline for withdrawal of U.S. troops was set for December 31, 1971.¹⁹ The vote came on June 16. Just ninety minutes before it was scheduled, Senator Lawton Chiles (Democrat, Florida) offered a modified version of that same effort, which would extend the deadline for troop withdrawal to June 1, 1972, with the stipulation that all prisoners of war were to be released by April 1, 1972, or the measure would be nullified. McGovern and Hatfield threw their support to this more lenient amendment. The final vote, however, was 44 in favor, 52 opposed.²⁰ When the vote was taken on the McGovern-Hatfield amendment, it lost as well, 42 to 55.²¹

On June 22, the highly controversial Mansfield amendment was scheduled for a vote. This proposal called for a phased withdrawal of United States troops from Vietnam by not later than nine months after the enactment of H.R. 6531, contingent upon the release of all prisoners of war.²² No

¹⁹Congressional Quarterly Weekly Report, XXIX (June 18, 1971), 1295.

²⁰Ibid.

²¹Ibid. No one who voted for McGovern-Hatfield in 1970 voted against it on this occasion. Proponents of these moves did pick up four votes of senators who had voted against McGovern-Hatfield the preceding session. Senators Jordan (North Carolina), Percy, Stevens, and Young (North Dakota) voted for the Chiles amendment. All but Stevens voted for McGovern-Hatfield. The arguments leading up to each vote differed very little from those in 1970.

²²Congressional Quarterly Weekly Report, XXIX (June 25, 1971), 1362.

specific dates were set, but words such as "urge the President" and "request the President" were used to sway his compliance with this measure. In an unexpected chain of events following a series of "six consecutive roll-call votes on a tangle of troop withdrawal amendments and modifications"²³ that day, the Senate suddenly reversed its position and adopted the Mansfield amendment by a 57 to 42 vote. A motion for reconsideration was passed, and the second and official vote was 61 favoring, 38 opposing.²⁴

Two days later Senator Humphrey proposed another amendment to H.R. 6531 combining the previous Nelson and Tunney measures. Apparently he felt the changed attitude of the Senate would mean success for this measure as well. His amendment was defeated, however, 66 to 23.²⁵ On that same day the Senate passed the draft extension bill with its modifications by a vote of 72 to 16.²⁶

With some twenty-eight differences from the House

²³Ibid.

²⁴Ibid. The Democratic senators who had voted against McGovern-Hatfield but suddenly switched to an affirmative vote for the Mansfield amendment (on the first tally of 57 to 42) were Lloyd Bentsen (Texas), David Gambrell (Georgia), Byrd (West Virginia), Bible, Cannon, Hollings, McClellan, Randolph, Spong, and Talmadge. Republicans who reversed their positions were Aiken, Jordan (Idaho), Pearson and Stevens. On the second vote four more senators decided to vote "yea" when passage of the amendment became obvious. All were Republicans: Baker, Cook, Cooper, Packwood. Ibid., p. 1363.

²⁵Congressional Record, June 24, 1971, CXVII, 21968.

²⁶Congressional Quarterly Weekly Report, XXIX (July 2, 1971), 1420.

version, the big source of controversy was from the outset the Mansfield amendment. A struggle took place in the House over the instructions to be given the conferees. Hébert, in urging that the House turn down the Mansfield bill, said,

[T]he matter in contention is what is commonly known as the Mansfield amendment. This amendment has nothing in force, it is a statement of policy, but it does indicate to the people of the world that the Congress has told the President to do that which he may or he may not want to do. In other words, the language is meaningless, but the psychological and the propaganda effect is terrific. It is a repudiation or will be a repudiation of the President in laying down some direction for the President.²⁷

Shortly thereafter, Representative Charles Whalen (Republican, Ohio), leading the move to accept the Mansfield amendment, made a motion that the House conferees be instructed to do just that. A critical vote came on Hébert's move to table Whalen's motion. Hébert won by a vote of 219 to 175.²⁸ House anti-war sympathizers had lost again.

The conference committee was deadlocked over the Mansfield amendment from June 28 until July 30.²⁹ When the compromise work of the committee was revealed, the controversial item had been watered down to a "sense of Congress" resolution and the nine months' deadline had been removed. Instead, wording was substituted urging the President to negotiate for a cease-fire in

²⁷U.S., Congress, House of Representatives, 92d Cong., 1st sess., June 28, 1971, Congressional Record, CXVII, 22413.

²⁸Ibid., p. 22429.

²⁹Congressional Quarterly Weekly Report, XXIX (September 25, 1971), 1973.

Vietnam and withdrawal of American troops after the release of prisoners of war "as soon as possible."³⁰ This conference report was adopted in the House on August 4.³¹ Senate "doves," however, were successful in delaying acceptance by that body until September 21, having passed an unprecedented two months and twenty-one days with no draft. The final vote in the Senate was 55 in favor of H.R. 6531, and 30 opposed.³²

In the meantime, the Senate was in the process of attaching essentially the same Mansfield amendment to another bill--H.R. 8687. This was the defense procurement authorization bill which had passed the House on June 17 by a 332 to 58 vote.³³ An attempt in that chamber by Representatives Lucien Nedzi (Democrat, Michigan) and Whalen to prohibit the use of any weapons purchased under H.R. 8687 to be used in Indochina after December 31, 1971, failed by a vote of 254 to 158.³⁴ A surprisingly high vote in favor of their amendment, however, was indicative of the growing dissatisfaction even in the House with the direction of the war.³⁵ Senators took up debate on H.R. 8687 on September 10. After three weeks' debate, on September 30, the Senate voted 57 to 38 to adopt the Mansfield amendment, with

³⁰Ibid.

³¹Ibid.

³²Ibid.

³³Congressional Quarterly Weekly Report, XXIX (June 25, 1971), 1365.

³⁴Ibid.

³⁵This was the first time that a majority of House Democrats voted for such a measure (135 to 105).

the time limit for withdrawal of United States troops from South Vietnam having been reduced from nine months to six months.³⁶ Six days later the Senate passed the defense procurement bill 82 to 4.³⁷ For the first time the House conferees were unsuccessful in substantially weakening the Mansfield amendment. They attempted, again, to rewrite it as a "sense of Congress" resolution, but failed. They did, however, delete the six-month deadline and substitute the words "at a date certain." But anti-war senators and representatives regarded the conference report and adoption by both houses as a breakthrough in their efforts to secure legislation curbing the President.³⁸ Of special interest, however, was the statement made by President Nixon upon signing H.R. 8687 on November 17, 1971:

To avoid any possible misconceptions, I wish to emphasize that Section 601 of this Act--the so-called Mansfield amendment--does not represent the policies of this administration. Section 601 urges that the President

³⁶Congressional Quarterly Weekly Report, XXIX (October 2, 1971), 2049. A breakdown of this Senate vote (p. 2059) shows the Republicans voting against it 15 to 27, and the Democrats voting for it 42 to 11. (Northern Democrats voted 33 to 2 for the Mansfield amendment while southern Democrats split 9 to 9.)

³⁷Congressional Quarterly Weekly Report, XXIX (October 16, 1971), 2148.

³⁸House leadership tried in vain to delete three of the Senate amendments to their original version--the Mansfield amendment being one of them. At last, on November 10, the bill as amended and reported by the conference committee passed in the House by a voice vote. On November 11, the Senate adopted the conference report on H.R. 8687 by a 65 to 19 roll call vote. Congressional Quarterly Weekly Report, XXIX (November 20, 1971), 2376.

establish a "final date" for the withdrawal of all U.S. forces from Indochina, subject only to the release of U.S. prisoners of war and an accounting for the missing in action. Section 601 expresses a judgment about the manner in which the American involvement in the war should be ended.

However, it is without binding force or effect and it does not reflect my judgment about the way in which the war should be brought to a conclusion. My signing of the bill that contains this section, therefore, will not change the policies I have pursued and that I shall continue to pursue toward this end.³⁹

Throughout this session of Congress, the Senate Foreign Relations Committee was in the process of reviewing a series of measures to define exactly what actions the President may take in committing troops to combat and what authorizations are left to Congress. Such bills would fill in the gaps in this area left by the Constitution. Not until February 9, 1972, did that committee report S2956, the "war powers bill."⁴⁰ Debate on that legislation began on March 29. Many felt the measure had a good chance for approval in the Senate because of the broad base of support it enjoyed, including among its cosponsors Javits, Bentsen, Eagleton, Jordan (North Carolina), Spong, Robert Taft, Jr. (Republican, Ohio), and--most remarkably--Stennis.⁴¹ The most important portion of S2956 specified in

³⁹Ibid., p. 2371.

⁴⁰Congressional Quarterly Weekly Report, XXX (March 25, 1972), 658.

⁴¹Ibid., p. 661. Stennis had proposed a war powers resolution the year before, many features of which had been adopted into S2956. On the previous occasion, Javits had remarked that the Senate was "witnessing a miracle." For the text of Stennis' original resolution, see Congressional Record, May 11, 1971, CXVII, 14334.

which "emergency" situations the President could commit troops to hostilities without prior congressional consent. They were as follows:

To repel or prevent an armed attack on the United States.

To repel or prevent an armed attack on U.S. forces stationed outside the United States.

To protect and evacuate U.S. citizens and nationals in foreign countries if their lives were threatened.

As specifically authorized by Congress in law.⁴²

The bill went one step further and placed a thirty-day limit on such commitments unless Congress authorized an extension. Congress could, upon reviewing the situation, terminate the activity before the thirty days were up. After only seven days of debate the Senate voted 68 to 16 on April 13 in favor of this war powers bill, marking the first time in history either house had attempted to codify the war powers of either branch.⁴³ Of course the administration fought this measure; but, as the vote indicates, support from both Republicans and Democrats insured its success. Of added importance was the fact that any and all attempts to make it applicable to the on-going Vietnam conflict were defeated. United States involvement in Southeast Asia at that time was exempted from S2956--it was a bill for the future.⁴⁴

⁴²Congressional Quarterly Weekly Report, XXX (March 25, 1972), 661.

⁴³Congressional Quarterly Weekly Report, XXX (April 15, 1972), 827.

⁴⁴Ibid. A summary of the debate and proposed amendments to S2956 may be found on pp. 827-30.

S2956 was reported by the House Foreign Affairs Committee on August 3 with amendments. Debate began on August 14, revealing that the amendments amounted to a complete substitution for the Senate bill of HJR1, which had passed in the House on August 2.⁴⁵ Compared to the Senate version, this wording was extremely weak, consisting of a "sense of Congress" resolution that the President should consult with Congress before committing U.S. troops to hostilities, including no enumeration of emergencies in which he would be permitted to take such action, and mentioning no limits for commitments. The main body of the bill dealt with details of a written report which the President must submit to both houses when troops were sent into battle.⁴⁶ The vote was taken on that day and the bill passed as amended, 344 to 13.⁴⁷ Seventy-five representatives did not vote. This researcher could find no evidence of the bill having been reported out of a conference committee.

For the most part, the remainder of congressional efforts to limit presidential prerogatives in the matter of armed conflicts in 1972 seemed to stem from Nixon's decision to mine the North Vietnamese ports and to increase the bombing of the North. These plans were made public on May 8, in a series of events which were almost a replay of the Cambodian

⁴⁵U.S., Congress, House of Representatives, 92d Cong., 2d sess., August 14, 1972, Congressional Record, CXVIII, H7573.

⁴⁶For the text of the House version of S2956, see Congressional Record, August 14, 1972, CXVIII, H7572.

⁴⁷Ibid., p. H7576.

episode. The decision had been made and implemented again without prior congressional authorization or even consultation. One hour before his announcement on television, Nixon called in Democratic and Republican leaders of both houses and gave them the news for the first time. Again furious at having been passed over in this apparent escalation of the war, a series of attempts to curb the executive took shape in the form of amendments such as the Mansfield measure or the McGovern-Hatfield bill attached to any number of major acts under consideration. House majorities maintained the status quo by defeating all major threats to presidential authority. At length, with the Christmas season came the promise of peace; and in January, 1973, that promise became a reality.

One might suppose with the horrors of Vietnam coming to an end and the immediate threat of executive usurpation of power receding that the Senate would shift its attention to other matters. On the contrary, that chamber appears to be taking care to avoid similar incidents in the future. On January 18, 1973, Senator Javits introduced S440, a war powers bill almost identical to S2956 of the year before.⁴⁸ With the backing of fifty-three other senators, this "War Powers Act" has enjoyed early support in the upper chamber. Perhaps with the emotions of pro-war and anti-war feelings subsiding, this bill will have a better chance even in the more conservative House to establish clearly in law the proper powers of the executive and the Congress in times of conflict and in the absence of a

⁴⁸Congressional Record, January 18, 1973, CXIX, S870.

formal declaration of war. To win passage, however, such a bill would have to overcome the fear many have of placing any limitations on the constitutional power of the President to protect American lives and interests at home and abroad.

APPENDIX A

COSPONSORS OF COOPER-CHURCH AMENDMENT*

<u>Name</u>	<u>Party</u>	<u>State</u>
Aiken	Republican	Vermont
Bayh	Democrat	Indiana
Brooke	Republican	Massachusetts
Case	Republican	New Jersey
Church	Democrat	Idaho
Cooper	Republican	Kentucky
Cranston	Democrat	California
Fulbright	Democrat	Arkansas
Goodell	Republican	New York
Harris	Democrat	Oklahoma
Hart	Democrat	Michigan
Hatfield	Republican	Oregon
Javits	Republican	New York
Mansfield	Democrat	Montana
Mathias	Republican	Maryland
Mondale	Democrat	Minnesota
Moss	Democrat	Utah
Pearson	Republican	Kansas

*U.S., Congress, Senate, 91st Cong., 2d sess., May 13, 1970, Congressional Record, CXVI, 15400.

<u>Name</u>	<u>Party</u>	<u>State</u>
Pell	Democrat	Rhode Island
Proxmire	Democrat	Wisconsin
Ribicoff	Democrat	Connecticut
Saxbe	Republican	Ohio
Schweiker	Republican	Pennsylvania
Symington	Democrat	Missouri
Tydings	Democrat	Maryland
Williams	Democrat	New Jersey
Young	Democrat	Ohio
McGovern	Democrat	South Dakota
Hughes	Democrat	Iowa
Gravel	Democrat	Alaska

APPENDIX B

AMENDMENTS PROPOSED TO COOPER-CHURCH, 1970*

<u>Proposed by</u>	<u>Purpose</u>	<u>Date Accepted</u>
Cooper and Church	soften preamble	May 26
Mansfield	nothing to "impugn" powers of President	June 11
Byrd (second time)	assure powers of President to protect troops	June 22
Dole	repeal of Tonkin resolution	June 24
Javits	nothing to "impugn" powers of Congress	June 26
Gravel	prohibit funds for transport of chemical munitions	June 29
Stevens	suspend economic aid for South Korea	June 30
Jackson	air activity only in "direct" support of Cambodian troops curtailed	June 30

<u>Proposed by</u>	<u>Purpose</u>	<u>Date Rejected</u>
Dole	disregard Cooper-Church when POW's held in Cambodia	June 3
Byrd (first time)	President may take any action to protect U.S. troops	June 11

* Congressional Quarterly Weekly Report, XXVIII (July 3, 1970), 1676-77.

<u>Proposed by</u>	<u>Purpose</u>	<u>Date Rejected</u>
Williams	strike all sections authorizing funds; set \$300 million ceiling on whole program	June 12
Williams	no congressional support for arms to Israel	June 12
Thurmond	U.S. may provide aircraft to Thailand	June 17
Dominick	increase \$35 million ceiling on excess defense articles to \$150 million	June 18
Miller	countries not required to pay in local currencies	June 24
Dominick	decrease valuation of excess defense articles, thereby doubling ceiling	June 25
Allott	substance of McGovern-Hatfield amendment	June 29
Hartke	prohibit any funds to Greece	June 29
Griffin	specify only "U.S. personnel" barred from activity in Cambodia	June 30

APPENDIX C

FINAL TEXT OF THE COOPER-CHURCH AMENDMENT*

In concert with the declared objectives of the President of the United States to avoid the involvement of the United States in Cambodia after July 1, 1970, and to expedite the withdrawal of American forces from Cambodia, it is hereby provided that unless specifically authorized by law hereafter enacted, no funds authorized or appropriated pursuant to this act or any other law may be expended after July 1, 1970, for the purpose of--

(1) retaining United States forces in Cambodia;

(2) paying the compensation or allowances of, or otherwise supporting, directly or indirectly, any United States personnel in Cambodia who furnish military instruction to Cambodian forces or engage in any combat activity in support of Cambodian forces;

(3) entering into or carrying out any contract or agreement to provide military instruction in Cambodia or to provide persons to engage in any combat activity in support of Cambodian forces; or

*Congressional Quarterly Weekly Report, July 3, 1970, XXVIII, 1674.

(4) conducting any combat activity in the air above Cambodia in direct support of Cambodian forces.

Nothing contained in this section shall be deemed to impugn the constitutional power of the President as Commander-in-Chief, including the exercise of that constitutional power which may be necessary to protect the lives of U.S. armed forces wherever deployed.

Nothing contained in this section shall be deemed to impugn the constitutional powers of the Congress including the power to declare war and to make rules for the government and regulation of the armed forces of the United States.

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