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Court, Congress, and Reapportionment

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COURT, CONGRESS, AND REAPPORTIONMENT

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In the United States, governmental power is divided vertically between nation and states and horizontally, at the national level, among the executive, legislative, and judicial branches. The Constitution leaves the lines of demarcation deliberately imprecise. Thus, from the beginning it was easy to predict that among those holders of power there would be tension (at least), conflict (probably), or total collapse (a possibility). The miracle of the American governmental system, with just this complexity and lack of definition, is the fact of its survival. It is not at all surprising that there have been a number of crises, some of which have seemed to imperil the whole edifice.

Difficulties have recurred at least since the time of the Virginia and Kentucky Resolutions in 1798, which seemed to argue for the right of any state to reject action by any branch of the national government that the state, on its own interpretation of the Consitution, might think an unwarranted exercise of power. Instances of resulting conflict bear such familiar names as the Hartford Convention of 1814, John Calhoun's theory of the "concurrent majorities," secession, and the "Court-packing" plan of 1936-1937.

Congressional attempts to restrict the jurisdiction of the Supreme Court of the United States, although surprisingly few in number, have been individually significant for their reflection of dissatisfaction with Supreme Court decisions, actual or anticipated.[1] As early as 1801, Congress postponed the convening of the Supreme Court for fourteen months in anticipation of adverse rulings on congressional action.[2] The post-Civil War case of *Ex parte McCardle*[3] was a dramatic illustration of congressional interference with Supreme Court action. More recently, congressional reaction to particular Supreme Court decisions boiled over in 1958 when the House of Representatives approved five bills which, if enacted, would have resulted in the most substantial restraint on the Court ever

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1. For a general review, see Elliott, *Court-Curbing Proposals in Congress*, 33 NOTRE DAME LAW. 597 (1958). See also Lewis, *The Supreme Court and Its Critics*, 45 MINN. L. REV. 305 (1961).

2. See 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 169-268 (1922). The postponed decisions, both ultimately rendered in 1803, were Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803), and Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. 74 U.S. (7 Wall.) 506 (1869). The relevance of that case to present issues will be discussed *infra*.

imposed by Congress. That result, however, was narrowly averted by the defeat or tabling of each of those proposals in the Senate.[4]

The most recent, and in some respects the most troublesome, challenge to the integrity of the judicial process began its potentially destructive course shortly after the decision in *Baker v. Carr*,[5] the first of the reapportionment cases decided by the Supreme Court between 1962 and 1964. Initially, Congress played no direct part in the challenge. The Council of State Governments advanced three proposals for amending the Constitution: one, prompted by the decision in *Baker*, proposed the abolition of all substantive guarantees against malapportionment, thus making action by the Supreme Court impossible and withdrawing the entire subject from the federal judicial power; a second would have established a "Court of the Union," composed of the fifty state chief justices, to meet in special cases to review decisions of the Supreme Court of the United States; and a third would have changed the method of amending the Constitution to give the power of initiating amendments to the legislatures of two thirds of the states.[6] At first there was not much public discussion, and a number of state legislatures promptly adopted one or more of the proposals. When the system-disrupting quality of the proposals was disclosed,[7] however, their further progress was abruptly halted. In a survey conducted by the Information Service of the American Bar Association and released in May 1964, it was revealed that only seventeen states had approved one or more of the proposals. It is possible that the failure of these proposals was due not so much to the cessation of state legislative concern over the future course of the apportionment issue (and, of course, other issues) as it was to the fact that these proposals were particularly ill-conceived.

Soon after the second round of reapportionment decisions was announced in June of 1964,[8] Congress, which had played little part

4. For that story, see MURPHY, CONGRESS AND THE COURT (1962).

5. 369 U.S. 186 (1962).

6. The text of the proposed amendments is set out, with an account of their origin, in *Amending the Constitution To Strengthen the States in the Federal System*, 36 STATE GOV'T 10 (1963).

7. See, *e.g.*, Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 76 YALE L.J. 952 (1963); Fordham, *The States in the Federal System—Vital Role or Limbo?*, 49 VA. L. REV. 666, 671-73 (1963); Freund, *The Supreme Court Under Attack*, 25 U. PITT. L. REV. 1 (1963); Warren, *Dedication of the New Duke Law School Building*, 1963 DUKE L.J. 387, 393.

8. Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

in the just-ending controversy over the proposals of the Council of State Governments, took the center of the stage in a graphic display of the hostility with which many members of Congress regarded the Court, particularly in the context of apportionment. The issue rang all the changes of potential conflict in the American federal system. It was Congress against Court in a straight separation-of-powers issue; and, it also seemed to array the national government—or at least one arm of it, the Supreme Court—against the pristine sovereignty of state power to ordain the composition of state legislatures without restraint by the Constitution of the United States.

When *Baker v. Carr* was decided in 1962, there was no indication that the heavens were likely to fall as a result of the ruling that the federal courts may—and indeed must—hear suits brought by properly qualified voters to challenge state legislative apportionments that allegedly denied them the equal protection of the laws.[9] Despite the strong dissents of Justices Frankfurter and Harlan, there seemed to be a general willingness to allow the federal courts (and presumably the state courts as well) to take a look at the concededly serious malapportionment that was then the rule in most states. Perhaps not many then saw, as did the dissenters, that the logic of permitting judicial intervention under the sponsorship of the equal protection clause was likely to lead to fairly drastic demands for revision of both houses of bicameral state legislatures. Or maybe there was, even in 1962, a tacit willingness on the part of the public as a whole to follow the leadership of the Court on these issues, wherever it might lead.

The notion that the general voting public was at least not unreceptive to judicial pronouncement of an equal-population standard gains modest confirmation from the immediate reaction to the reapportionment decisions in 1964. To appraise that reaction correctly it must be remembered that *Reynolds v. Sims,* on first reading, particularly if isolated passages are emphasized, appeared to be very strong indeed:

> "We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state."[10]

9. The editorial response was largely favorable. Newland, *Press Coverage of the United States Supreme Court,* Western Political Q., March 1964, pp. 15, 29-30.

10. 377 U.S. 533, 568 (1964).

What at first seemed the categorical command of that ruling was considerably softened by the Supreme Court's acknowledgment that "equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid."[11] Nonetheless, the initial reaction was directed more toward prompt compliance than toward efforts to seek out "equitable considerations" for delay. Even before the *Reynolds* decision, the Wisconsin Supreme Court had directed an apportionment based upon population in both houses, effective for the 1964 elections.[12] And, shortly after the equal-population standard was announced by the Supreme Court, apparently complete compliance was accomplished in several states, including Colorado,[13] Delaware,[14] and Michigan.[15] In addition, apparently good faith action toward reasonably prompt compliance was undertaken in a number of other states, including Connecticut,[16] Georgia,[17] Hawaii,[18] New Hamp-

11. *Id.* at 585.

12. On Feb. 28, 1964, the Wisconsin Supreme Court held that the then-existing apportionment formula was invalid and allowed the state until May 1 to enact a new plan. When the legislature failed to comply, the state court ordered a complete reapportionment of both houses. State *ex rel.* Reynolds v. Zimmerman, 22 Wis. 2d 544, 126 N.W.2d 551 (1964), 128 N.W.2d 16 (1964).

13. See Lucas v. 44th Gen. Assembly of Colo., 377 U.S. 713 (1964). On July 8, 1964, the Colorado Legislature reapportioned the state senate by legislation effective in 1964. N.Y. Times, July 9, 1964, p. 62, col. 3.

14. See Roman v. Sincock, 377 U.S. 695 (1964). On July 8, 1964, the Delaware General Assembly completed action on a reapportionment bill (promptly approved by the three-judge federal court), to establish an eighteen-member senate and a thirty-five member house, both based rather closely upon population. Wilmington Morning News, July 9, 1964, p. 1, col. 8.

15. See Scholle v. Hare, 367 Mich. 176, 116 N.W.2d 350 (1962), *cert. denied sub nom.* Beadle v. Scholle, 377 U.S. 990 (1964). On June 22, 1964, the Michigan Supreme Court approved a reapportionment plan for both houses of the Michigan Legislature, as proposed by the Michigan apportionment commission, effective for the 1964 elections. See *In re* Apportionment of the Mich. State Legislature, 372 Mich. 243, 128 N.W.2d 350 (1964). The plan is set forth in graphic form in the N.Y. Times, Aug. 16, 1964, p. E3, col. 1.

16. See Pinney v. Butterworth, 378 U.S. 564 (1964). In response to an order of the three-judge federal court on remand of that case, the Connecticut General Assembly was convened in special session on Aug. 5, 1964, to seek a formula for the 1964 elections. N.Y. Times, Aug. 2, 1964, p. 39, col. 1; *id.*, Aug. 23, 1964, p. 49, col. 1; *id.*, Sept. 3, 1964, p. 12, col. 5.

17. In Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962), the three-judge court had held that the apportionment of the Georgia General Assembly violated the United States Constitution. The state senate was thereafter reapportioned (GA. CODE ANN. § 47-102). In a further order in the same case, the three-judge court, on June 24, 1964, enjoined the secretary of state from placing on the ballot in November 1964 a proposed new constitution until the legislature "is reapportioned in accordance with constitutional standards." Toombs v. Fortson, Civil No. 7883, N.D. Ga., June 24, 1964.

18. Although the Hawaii Supreme Court refused to intervene to effect a reapportionment effective in 1964, the Hawaii Legislature was convened in a special session on July 23, 1964. But it, too, had difficulty in agreeing upon an immediately effective plan. N.Y. Times, Aug. 2, 1964, p. 41, col. 1.

shire,[19] New Jersey,[20] New York,[21] Oklahoma,[22] and Vermont.[23]

If the opponents of the apportionment decisions were at first somewhat quiescent, they were not to remain so for long. By mid-July the Republican Party had been persuaded, perhaps unwisely from the standpoint of political advantage,[24] to protest the decisions, calling for constitutional amendment or limitation on the jurisdiction of federal courts. Meanwhile, various bills and resolutions were being filed in the Senate and House, seeking to postpone or deny the exercise of jurisdiction by federal courts in apportionment cases and proposing amendments to the Constitution. Representative Emanuel Celler of New York, chairman of the Judiciary Committee, reported that by August 19, 138 bills and resolutions had been offered in the House by ninety-nine authors and that, during the eight days of hearings, beginning on July 22, which were held before the Judiciary Committee, the Committee was unable to hear twenty-five members of Congress who wished to

19. On May 20, 1964, a three-judge court withheld decision in a suit challenging apportionment in New Hampshire because of the imminence of a state constitutional convention, but cautioned that there was serious doubt as to the validity of the existing plan. In July, the constitutional convention adopted a resolution calling for an amendment to the state constitution to reapportion the house of representatives on a population basis, the proposal to be voted on in November 1964. N.H. Convention To Revise the Constitution, Journal, July 7, 1964.

20. The New Jersey Attorney General filed a brief in the New Jersey Supreme Court urging the necessity for reapportionment to be completed in time for elections in 1965. N.Y. Times, Aug. 12, 1964, p. 18, col. 5.

21. See WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964). On remand of that case, the three-judge court ordered that the legislators chosen in the November 1964 elections hold office for only one year, rather than the normal two, and provide a new apportionment formula no later than April 1, 1965. N.Y. Times, July 16, 1964, p. 1, col. 8. Meanwhile, Governor Rockefeller had appointed a study commission to report back with recommendations before the end of 1964, although he later gave the commission until Dec. 1, 1964, to report its recommendations. *Id.*, July 24, 1964, p. 1, col. 5.

22. See Williams v. Moss, 378 U.S. 558 (1964), *affirming, modifying, and remanding* 220 F. Supp. 149 (W.D. Okla. 1963). On remand, the three-judge court invalidated primary and run-off elections already held and substituted a completely new formula, as proposed by the Oklahoma Attorney General, to be effective in the 1964 election. N.Y. Times, Aug. 1, 1964, p. 7, col. 3.

23. A three-judge federal court ordered that no business except apportionment be considered at the 1965 legislative session and that new elections be held thereafter. See 110 CONG. REC. 18956-58 (daily ed. Aug. 14, 1964).

24. In the subsequent debate in Congress on various proposals to restrain or postpone the exercise of judicial power in apportionment matters, the point was repeatedly made that Republicans would gain perhaps as many state legislative seats as they would lose if fair apportionment were to be accomplished everywhere. Senator Paul H. Douglas of Illinois, for example, suggested, as have many others, that Republicans could expect numerical gains in representation if suburban areas generally are given the representation to which they are entitled in terms of population, particularly in the South. He argued at some length that the same would probably be true even in his own state of Illinois, although Republicans seemed unpersuaded. *Id.* at 19002-03 (daily ed. Aug. 14, 1964). Senator Lee Metcalf of Montana made a similar point in connection with his state and suggested parallel possibilities elsewhere. *Id.* at 21042-44 (daily ed. Sept. 8, 1964).

be heard, let alone the multitude of public witnesses who had offered themselves.[25] During those hearings in the House, which were conducted with no more than "deliberate speed," the opponents of the reapportionment decisions suddenly came to legislative life in both houses. Observing how quickly action was being taken to comply with the letter and the spirit of the decisions and the improbability of congressional action during 1964, the opponents decided to take extraordinary measures.

The first, most dramatic, and most irregular action was taken in the Senate where S. 11380, the foreign aid assistance bill, had become the order of business on July 31. Thereafter it was laid aside each day until August 7 for the consideration of other business. Meanwhile, on August 4, Senator Everett Dirksen of Illinois, the minority leader, had introduced S. 3069 (Representative William M. McCulloch of Ohio introduced an identical bill in the House), which was designed to postpone the exercise of jurisdiction by all federal courts over all apportionment matters for a period of up to four years in some states. The operative text of S. 3069 was as follows:

> "Upon application made by or on behalf of any State or by one or more citizens thereof in any action or proceeding in any court of the United States, or before any justice or judge of the United States, in which there is placed in question the validity of the composition of either house of the legislature of that State or the apportionment of the membership thereof, such action or proceeding shall be stayed until the end of the second regular session of the legislature of that State which begins after the date of enactment of this section."[26]

Senator Dirksen was completely candid as to his plans:

> "I trust that [the bill] will be referred forthwith to the Committee on the Judiciary. That committee will meet tomorrow morning, and I apprehend that, even without the benefit of witnesses, we may be able, as an emergency matter, to have the bill reported forthwith. Then I shall undertake to have it taken off the calendar and, in the form of an amendment, offer it to a bill in which I think it will have the best chance."[27]

Thus Senator Dirksen launched a proposal for a drastic and mandatory limitation upon the jurisdiction of all federal courts to deny the fulfillment of constitutional rights as defined by the Supreme Court of the United States, suggesting that it be done without

25. *Id.* at 19605 (daily ed. Aug. 19, 1964).
26. *Id.* at 17189 (daily ed. Aug. 3, 1964).
27. *Id.* at 17190.

any hearings whatsoever and proposing that it be added as a rider to important, but unrelated, legislation. Anticipating the indignant response this method would produce, Senator Dirksen merely indicated that there was "no time in the present session to do anything with a constitutional amendment,"[28] and that "we are dealing with a condition, not a theory."[29] Accordingly, recognizing that there was not sufficient sentiment in Congress at that time to secure approval of a constitutional amendment by the necessary two-thirds majority in both houses, he proposed that the status quo be frozen by immobilizing federal courts in order to permit the mounting of a campaign in Congress and throughout the country to reverse the decision of the Supreme Court. In short, Senator Dirksen was alarmed that there had been so prompt and favorable a response to the reapportionment decisions; therefore, he thought it necessary to resort to extraordinary measures in order to halt abruptly the already demonstrated willingness to comply with the equal-population principle. The case would not have been materially different if those who feel that the first amendment is dangerously libertarian would have proposed that Congress suspend its enforcement in the courts for a period long enough to allow them to seek its modification or repeal. In one respect the Dirksen proposal was even more cynical, for his suggestion was that, after the period of enforced noncompliance, Congress should approve a constitutional amendment to be ratified by the very state legislatures that are invalidly constituted under present apportionment formulas.

Alarmingly enough, Senator Dirksen was successful in the initial stages of his bold maneuver. True to his prediction, the Judiciary Committee solemnly deliberated the matter on August 4 for forty-five minutes (presumably denied more expeditious action by the objections of Senators Quentin N. Burdick of North Dakota and Philip A. Hart of Michigan, who alone dissented) and reported S. 3069 favorably on that day.[30] Senator Dirksen then promptly made his decision to attach S. 3069 as a rider to the foreign aid authorization bill (H.R. 11380), the pending business of the Senate, which had been clearly designated as "must" legislation.

There were immediate protests about the absence of hearings and the use of the rider device on such important legislation. The *New York Times*, for example, editorialized:

28. *Id.* at 17189.
29. *Id.* at 17190.
30. The vote was ten to two. Senator Keating abstained, and two committee members were absent. N.Y. Times, Aug. 5, 1964, p. 1, col. 1.

> "Whatever may be said in favor of Senator Dirksen's move for a Congressional mandate delaying application of the Supreme Court order to reapportion state legislative districts on a 'one man, one vote' basis, there can be no question that he is wrong in seeking to stampede it through Congress without full consideration of its damaging potentialities."[31]

Two speakers before the Conference of Chief Justices, although differing in their appraisal of the reapportionment decisions, agreed that the Dirksen amendment should be defeated;[32] and fifteen law school deans and professors advised Senators Mansfield[33] and Dirksen of their belief that the measure "unwisely and indeed dangerously threatens the integrity of our judicial process." They added that the bill would result in "drastic interference" with state as well as federal courts.[34]

Objections to the merits of the proposal were soon voiced in a number of statements from various public groups, in newspaper editorials, and in Congress. Senators Burdick and Hart opened the Senate fight against the amendment by asking and securing unanimous consent on August 6 for the printing of their individual views on S. 3069 as part two of Senate Report 1328 on that bill:

> "This bill raises immediate and serious constitutional questions. Additionally, its scope and consequences are uncertain of understanding upon mere reading of its language. It could well cause the 'chaos' it professes to avoid. The bill affects the franchise of every American citizen as expressed in the election of State legislatures.
>
> "Under these circumstances, the committee owes the Senate careful hearings and full discussion based on an adequate record before action. There was no hearing; there is no record."[35]

Eight other so-called "liberal" Senators agreed to join Senators Burdick and Hart in a substantial effort to resist passage of the Dirksen amendment, which otherwise seemed likely to be enacted. This was critical since resistance in the House was not then—or even later—strong enough in numbers or in determination to oppose this or even more drastic legislation intended to restrict the Court. These ten Senators, later reinforced by a few more who were willing to speak in opposition to the Dirksen amendment and in support of

31. *Id.*, Aug. 6, 1964, p. 28, col. 2.
32. *Id.*, Aug. 7, 1964, p. 1, col. 4.
33. Senator Mike Mansfield of Montana joined as cosponsor of the amendment when it was formally introduced on August 12. 110 CONG. REC. 18559 (daily ed. Aug. 12, 1964).
34. N.Y. Times, Aug. 10, 1964, p. 36, col. 1.
35. 110 CONG. REC. 17850 (daily ed. Aug. 6, 1964).

the reapportionment decisions, decided to "speak at some length," as Senator Morse put it when he called the plan a filibuster in which he was glad to join, describing himself as "the only liberal who admits that he filibusters."[36] The Senators who agreed to speak in opposition, never more than twenty in number of active participants, took care to distinguish this "extended debate" or this "education debate" from the filibusters which many of them had unsuccessfully sought to forbid by amendment of the Senate rules. As the debate progressed, they pointed out, quite rightly, that they had kept the debate germane, allowed other Senate business to proceed while retaining S. 3069 as the pending business, and, in fact, had used up only twenty-six and one-half hours of Senate time by September 8.[37] It is of course possible that the decision to keep the debate germane and the willingness to allow the Senate to dispose of other business were not unrelated. There were times when it appeared to have been difficult to keep constant the flow of new and germane materials and Senators to present them.

The fact is, however, that the sponsors of the "baby filibuster," as it came to be called, were successful enough in rallying important support for their position. By September 2, Senator Metcalf was able to read into the record sixty-eight newspaper editorials (which he described as a random sample), more than two-thirds of which opposed the Dirksen amendment.[38] Before the debate on the original S. 3069 had run its course, Senator Mansfield was showing signs of uneasiness about his cosponsorship;[39] and representatives of the Department of Justice, expressing doubt about the constitutionality of the original S. 3069, conferred with Senator Dirksen in efforts to persuade him to tone down the language of absolute negation in the bill as introduced.[40] In an all-day conference on August 12 between legal aides of Senators Dirksen and Mansfield, Deputy Attorney General Nicholas deB. Katzenbach, and Solicitor General Archibald Cox, a compromise bill was worked out which the representatives of the Justice Department concluded could be

36. *Id.* at 19187 (daily ed. Aug. 17, 1964).

37. *Id.* at 21005 (daily ed. Sept. 8, 1964). Senator Proxmire added that, since August 13, the Senate had passed eighty-nine bills and thirty-two resolutions, adopted seventeen conference reports, and sent ten bills to conference, "probably the largest number of measures acted upon during any comparable period in the 88th Congress." *Ibid.*

38. *Id.* at 20716-33 (daily ed. Sept. 2, 1964). Senator Douglas introduced other editorials to similar effect on Sept. 1, *id.* at 20624-27 (daily ed. Sept. 1, 1964), and on Sept. 2, *id.* at 20739-46 (daily ed. Sept. 2, 1964).

39. *Id.* at 19002 (daily ed. Aug. 14, 1964).

40. N.Y. Times, Aug. 13, 1964, p. 1, col. 4.

upheld as constitutional. The amended proposal[41] was much the same as the original S. 3069 except that it contained a requirement that the issuance of a stay order could be excused in "highly unusual circumstances," a phrase not elsewhere defined. In the absence of such circumstances, the proposed substitute provided that any United States court having jurisdiction over an apportionment action "shall, upon application, stay the entry or execution of any order" relating to the election process or apportionment formula "for such period as will be in the public interest." The "public interest" was in turn defined to permit a stay long enough (1) to insure the conduct of any election of state representatives at least until January 1, 1966, in accordance with state laws as they were before the judicial challenge and (2) to allow the state legislature "a reasonable opportunity in a regular session" or to allow the people of the state "a reasonable time" to effect reapportionment by constitutional amendment following a court judgment that the state's apportionment does not meet the constitutional standard as expressed by the Supreme Court in June 1964.

41. "(a) Any court of the United States having jurisdiction of an action in which the constitutionality of the apportionment of representation in a State legislature or either house thereof is drawn in question shall, upon application, stay the entry or execution of any order interfering with the conduct of the State government, the proceedings of any house of the legislature thereof, or of any convention, primary, or election, for such period as will be in the public interest.
"(b) A stay for the period necessary—

(i) to permit any State election of representatives occurring before January 1, 1966, to be conducted in accordance with the laws of such State in effect immediately preceding any adjudication of unconstitutionality and
(ii) to allow the legislature of such State a reasonable opportunity in regular session or the people by constitutional amendment a reasonable opportunity following the adjudication of unconstitutionality to apportion representation in such legislature in accordance with the Constitution

shall be deemed to be in the public interest in the absence of highly unusual circumstances.
"(c) An application for a stay pursuant to this section may be filed at any time before or after final judgment by any party or intervenor in the action, by the State, or by the Governor or attorney general or any member of the legislature thereof without other authority.
"(d) In the event that a State fails to apportion representation in the legislature in accordance with the Constitution within the time allowed by any stay granted pursuant to this section, the district court having jurisdiction of the action shall apportion representation in such legislature among appropriate districts so as to conform to the constitution and laws of such State insofar as is possible consistent with the requirements of the Constitution of the United States, and the court may make such further orders pertaining thereto and to the conduct of elections as may be appropriate.
"(e) An order of a district court of three judges granting or denying a stay shall be appealable to the Supreme Court in the manner provided under section 1253 of this title, and in all other cases shall be appealable to the court of appeals in the manner provided under section 1294 of this title. Pending the disposition of such appeal the Supreme Court or a Justice thereof, or the court of appeals or a judge thereof, shall have power to stay the order of the district court or to grant or deny a stay in accordance with subsections (a) and (b)." 110 CONG. REC. 18846 (daily ed. Aug. 13, 1964).

One section of the compromise seemed to endorse the Supreme Court decisions by authorizing federal district courts, when confronted with legislative failure to correct malapportionment beyond the period of any authorized stay, to effect judicial reapportionment on their own. Presumably the Justice Department officials were willing to endorse the compromise because of this provision (although undoubtedly Senator Dirksen contemplated a constitutional amendment before this provision could ever be used); because the way was left at least partially open for denial of a stay in "unusual circumstances" (although Dirksen thought the legislation was "about 99 and 2/3 per cent mandatory"); *and* because this might get the foreign aid bill on its way once more.[42] The liberals, however, were not at all satisfied with the new proposal. Senator Mansfield, in disassociating himself from the Dirksen motivation in sponsoring the amendment, stated his support for the Court's ruling, explaining that he had cooperated only to give the states a "reasonable" time to conform.[43] The liberals responded to the Dirksen argument that failure to adopt his amendment would produce chaos in such states as Colorado, Connecticut, Michigan, New York, Oklahoma, and Vermont,[44] by taking the offensive. Not only did they deny the validity of the contentions made concerning those states,[45] but they also countered strongly that the Dirksen proposal would create "far more serious chaos"[46] in as many as thirty-eight states.[47] In many of those states, action had already been quietly taken by state legislatures, courts, or executive study commissions. It was possible that 1964 elections in many of these states could be upset if the Dirksen amendment should be enacted. Indeed, it was not at all clear that that was not one of the precise purposes for offering the amendment in that form.

As the debate on the merits continued, both sides added further statements and editorials to the rapidly growing mass of material preserved "for the record." Walter Lippman and William S. White, for example, were quoted by the conservatives in support of postponement of judicial enforcement;[48] but the liberals were quickly able to counter with evidence of impressive support from the voting

42. See N.Y. Times, Aug. 13, 1964, p. 1, col. 4.
43. *Id.*, Aug. 15, 1964, p. 1, col. 5; see also 110 CONG. REC. 18871-72 (daily ed. Aug. 13, 1964); *id.* at 21232-33 (daily ed. Sept. 10, 1964).
44. See, *e.g.*, *id.* at 18842-46 (daily ed. Aug. 13, 1964).
45. *Id.* at 20209-13 (daily ed. Aug. 21, 1964).
46. *Id.* at 18959 (daily ed. Aug. 14, 1964).
47. *Id.* at 20210-11 (daily ed. Aug. 21, 1964).
48. See, *e.g.*, *id.* at A4292 (daily ed. Aug. 13, 1964); *id.* at A4317 (daily ed. Aug. 14, 1964).

public directed against interference with the reapportionment decisions; and that is, after all, an audience that is not uninfluential with Senators. On August 19 Senator Douglas cited the results of a Gallup poll published the day before, which indicated that throughout the nation as a whole the Court's ruling was endorsed by the people by a three-to-two ratio.[49] About the same time, the mayors of a number of principal cities expressed to the White House their concern about the current legislative attempts to curb the Court.[50]

Senator Joseph S. Clark of Pennsylvania explained the support for the Dirksen proposal in this way:

> "All the talk about a crisis, which we heard in support of the Dirksen amendment, to my way of thinking, comes only from the politicians in the State legislatures, their friends, their sycophants, their supporters. It has no grassroots basis at all. It is merely the normal fear that someone will lose his job. There is no crisis except that some State legislators and those who follow them or whose jobs are contingent upon the continuance in office of the State legislators, are afraid that if the people of a particular State had the right to choose their representatives in proportion to their numbers, such individuals would not return to the statehouse."[51]

Senator Abraham A. Ribicoff of Connecticut was even more blunt in opposing the idea of allowing existing malapportioned legislatures to make the decision as to whether malapportionment should continue. "To adopt the Dirksen 'freeze,'" he said, would be "to let the boy caught with his hand in the cookie jar decide whether he is to continue his illegal nourishment."[52]

Up to this point in the debate the Administration had been silent, almost strangely so, since it has not usually been reticent in conveying views on pending legislation to Congress. True, there had been, in the background, the cooperation by officers of the Department of Justice in the development of compromise language; and Senator Mansfield had lent his name. But it was not clear that the Administration was committed by these actions. Matters were in that posture when Congress adjourned on Friday, August 21, for the Democratic National Convention. President Johnson let it be known that he did not favor a specific endorsement of the Court's

49. *Id.* at 19742 (daily ed. Aug. 19, 1964).
50. N.Y. Times, Aug. 19, 1964, p. 16, col. 1.
51. 110 CONG. REC. 19383 (daily ed. Aug. 18, 1964). Anthony Lewis of the *New York Times* observed that "This would seem to be strictly a politician's rebellion." N.Y. Times, Aug. 16, 1964, p. E3, col. 1.
52. 110 CONG. REC. 19792 (daily ed. Aug. 19, 1964).

reapportionment decisions in the platform itself;[53] and of course his view prevailed. This did not, however, indicate any presidential or party lack of sympathy for the Court or the rulings. Instead, the "usually reliable sources" expressed the President's belief that the attack on the Court should be blunted in Congress rather than directed toward public pronouncements that might inflame public feeling, making it more difficult for Congress to shunt aside the jurisdiction-restrictive proposals. "Never," one White House aide said in what may have been intended as a paraphrase of the President, "try to kill a snake until you have the hoe in your hand."[54]

At about the same time, another suggestion was advanced for sidetracking the issue: perhaps it was a White House trial balloon, although it was not to be attributed to the President. The idea was to propose a resolution allowing continued spending of foreign aid money at previously authorized levels, leaving final resolution of the whole question until January 1965.[55] But nothing further was heard of this, and the legislative posture was essentially unchanged when Congress resumed on August 31, after the conclusion of the Democratic formalities in Atlantic City.

The legislative struggle in the House had meanwhile run its brief and decisive course without protracted debate or extensive moralizing. It will be remembered that Representative Celler, in his capacity as chairman of the House Judiciary Committee, had commenced orderly, albeit somewhat leisurely, hearings in July on the various proposals to limit or deny the jurisdiction of the federal courts on apportionment matters by statute or by constitutional amendment. Moreover, he made no attempt to conceal his unfriendliness to proposals to limit the Court's jurisdiction. After the successful Dirksen ploy by which the issue had been maneuvered to the floor of the Senate and made the immediate business before that body, the critics of the Court in the House were no longer willing to work within the Celler framework of careful investigation of all points of view. In the House, too, the critics of the Court successfully employed an irregular tactic. On August 13 the Rules Committee, long the final resting place for legislation not favored by its chairman, Representative Howard W. Smith of Virginia, was moved to

53. N.Y. Times, Aug. 23, 1964, p. 82, col. 1. The Attorney General, in answer to a question propounded to him when he appeared before the Platform Committee, said: "The Department of Justice is opposed to tampering by legislation or constitutional amendment with the decisions of the Supreme Court of the United States." *Id.* at 19941 (daily ed. Aug. 20, 1964).

54. *Ibid.*

55. *Ibid.*

precipitate action. By a vote of ten to four the Committee cleared H.R. 11926, which had been earlier introduced by Representative William M. Tuck of Virginia. That bill, designed to deny the Supreme Court the right to review any action on reapportionment by any federal or state court and to deny jurisdiction over such matters to federal district courts, read as follows:

> "The Supreme Court shall not have the right to review the action of a Federal court or a State court of last resort concerning any action taken upon a petition or complaint seeking to apportion or reapportion any legislature of any State of the Union or any branch thereof. . . .
>
> "(c) The district courts shall not have jurisdiction to entertain any petition or complaint seeking to apportion or reapportion the legislature of any State of the Union or any branch thereof."

Speaker John W. McCormack of Massachusetts declared himself against the bill; but the Democratic leader, Representative Carl Albert, who expressed concern about the apportionment situation in his home state of Oklahoma, supported the bill, as did the Republican leadership.[56]

For the next several days the bill was not specifically the pending business, and for a time there were only sporadic comments on the reapportionment issue. However, the desultory debate came into sharp focus when Representative Smith, using another rare but not unprecedented parliamentary device, announced on August 19: "Mr. Speaker, I call up House Resolution 845 [embodying H.R. 11926] and ask for its immediate consideration."[57] The point of order raised by Representative James G. O'Hara of Michigan, challenging the jurisdiction of the Rules Committee to take this action, was overruled with a recitation of four precedents dating from 1895, suggesting that the move had not caught the Speaker entirely unaware;[58] nor was the ruling changed as a result of Representative Celler's reminder that, when Representative Smith was a minority member of the Rules Committee, he "took a stand in opposition to the very type of action he is taking now."[59] The debate on the point of order and on the merits was quickly over (nine pages of the *Congressional Record*); doubts as to the constitutionality and wisdom of the proposal, which were later to prove persuasive to a substantial majority of the Senate when confronted with the same

56. *Id.*, Aug. 14, 1964, p. 1, col. 8.
57. 110 CONG. REC. 19580 (daily ed. Aug. 19, 1964).
58. *Id.* at 19580-81.
59. *Id.* at 19581.

bill, were easily shrugged off in the House with a favorable vote of 242 to 148.[60]

It may be that the House did not then, either as an institution or as a collection of individual participants, seriously intend the enactment of this drastic legislation. It had been understood from the beginning of the debate that the Senate was not so much in search of a bludgeon to maim as it was for a scalpel to excise the offending judicial rule with as little bloodletting as possible. There was at least corridor talk at the time that, if the House revealed itself in an angry mood—and unquestionably much of the reaction was just that—this reaction would offer helpful leverage to secure the necessary majority in the Senate for some milder action. But, of course, this is mostly speculation; certainly, a number of the Representatives saw the issue in highly personal and pragmatic terms. Although none of the proposals sought directly to overrule the Supreme Court's congressional districting decision, which required that congressional districts be "as nearly equal as is practicable" in population,[61] there is no doubt that those who saw their own seats threatened by that decision were glad to strike out, however wildly, at the cognate state legislative reapportionment decisions.

When Congress reconvened on August 31, Senator Dirksen, perhaps sensing that his support was ebbing away, or at least not increasing, announced his intention to close debate if possible. On September 8 he moved for cloture, with seventeen Senators joining, and it was announced that under the Senate rules the vote would be taken two days later.[62] During the narrowly limited and equally divided time allowed for debate prior to the vote on the motion for cloture, the previously advanced arguments were rehearsed once more. The arguments against were summarized most succinctly by Senator Frank Church of Idaho:

> "I have concluded that, regardless of how one approaches it, the Dirksen rider is wrong. It is wrong to force a vote upon it without benefit of committee hearings; it is wrong to attach it to the foreign aid bill, where it has no place, and thus to coerce the consent of the President. But, above all, it is wrong on its merits, because it seeks to suspend the Constitution of the United States as that document relates to the right of each citizen to have representation in his State legislature which is as equal as possible to that of all other citizens of his State.
>
> "I do not believe that it is within the power of the Con-

60. *Id.* at 19589.
61. Wesberry v. Sanders, 376 U.S. 1 (1964).
62. 110 CONG. REC. 21004 (daily ed. Sept. 8, 1964).

> gress to suspend the Constitution, either in this, or any other particular. If the Dirksen rider were to pass, I believe that it would be promptly struck down by the courts. The folly of our action would then be matched by its futility."[63]

The constitutional argument that Senator Church summarized had, of course, been made more fully in earlier debate, both in the Senate and the House. The constitutional doubts were determinative for some, at least in the Senate, which was manifestly unwilling to take seriously the House-approved Tuck bill, and for some in opposition to the Dirksen amendment as originally proposed. Because even the modified Dirksen proposal was thought by many not to be free of constitutional difficulties, it is appropriate to examine those contentions somewhat more fully.

The premise of all these jurisdiction-denying or jurisdiction-limiting proposals was the same. Article III of the Constitution vests the judicial power of the United States in the Supreme Court "and in such inferior Courts as the Congress may from time to time ordain and establish." The same article provides for appellate jurisdiction of the Supreme Court, "with such Exceptions, and under such Regulations as the Congress shall make." Thus, it was contended (1) that Congress may discontinue the lower federal courts or withdraw from them any portion of jurisdiction previously conferred upon them and (2) that Congress may withdraw all or any selected portion of the appellate jurisdiction of the Supreme Court. Scarcely any constitutional lawyer contends that the argument in that extreme form is supportable, although that is exactly the assumption of the House-approved Tuck bill. As previously noted, passage of that bill by the House was an act of legislative irresponsibility which did not at all commend itself to the Senate as a whole or even to Senator Dirksen. There was general agreement in the Senate that a categorical withdrawal of federal court jurisdiction in a class of cases otherwise within the article III power would not be sustainable.

Much the same argument was also made, again quite properly, against the original Dirksen amendment, which purported to deprive the federal courts of all jurisdiction over apportionment matters for as many as four years in some instances. Moreover, it suffered an additional disability that was not shared even by the Tuck bill: by purporting to withdraw all judicial power from the federal courts, the original Dirksen amendment would have left the state courts

63. *Id.* at 21226 (daily ed. Sept. 10, 1964).

as courts of last resort on all matters of apportionment; under the supremacy clause of the Constitution in article VI, state courts would then be bound to apply the same constitutional doctrine as would the federal courts if they had been permitted to act. Proponents of the Dirksen proposal apparently assumed either that the state courts would disregard the equal-population principle laid down in *Reynolds* (an unworthy suggestion) or, if state courts showed a willingness to act as required by the Constitution, that a suit could always be commenced in a federal court to challenge some feature of the state apportionment scheme, whereupon the federal court would be required to stay further action by state or federal courts. If this was an intended consequence of the Dirksen amendment, as its language suggests, the proposal was almost unparalleled in its disregard for the integrity of the state as well as the federal judicial process.

The only support cited for the permissibility of closing the federal courts in specified classes of litigation is the case of *Ex parte McCardle*,[64] a case exceptional on its facts, although never specifically overruled. There are at least two difficulties with that case as authority. One is that *McCardle* involved only congressional withdrawal of jurisdiction from the Supreme Court as to appeals from lower federal courts. Congress had not attempted to withdraw the exercise of original habeas corpus jurisdiction, either from the lower federal courts or from the Supreme Court. Even more important, Congress had not attempted the much more critical interference with the judicial branch and with the functioning of the federal system that was now suggested, namely, a denial of appellate jurisdiction in review of *state* court decisions. To take away this power would be to negate what has always been considered the most important aspect of judicial review and to alter fundamentally the character of the federal system. As Mr. Justice Holmes long ago observed, "I do not think the United States would come to an end if we lost our power to declare an act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."[65] The proposal, therefore, would be of dubious constitutionality even assuming that *McCardle* was correctly decided on its facts. But that assumption is doubtful, for, as Mr. Justice Douglas recently stated, "There is a serious question whether the *McCardle* case could command a majority view today."[66] In the

64. 74 U.S. (7 Wall.) 506 (1869).
65. Holmes, *Law and the Court*, in COLLECTED LEGAL PAPERS 295-96 (1920).
66. Glidden Co. v. Zdanok, 370 U.S. 530, 605 (1962) (dissenting opinion).

same case, Mr. Justice Harlan, while not so specifically disavowing *McCardle* on its narrow facts, observed, "The authority [of Congress] is not, of course, unlimited."[67]

The proposal is uncomfortably close to an 1870 act of Congress that the Court invalidated in *United States v. Klein*,[68] distinguishing that case from the *McCardle* case which had been decided three years earlier. In *Klein* the Court passed upon an act by which Congress purported to withdraw jurisdiction from the Court of Claims, and from the Supreme Court on appeal, of cases involving claims for indemnification for property captured during the Civil War, which both courts had previously held might be predicated upon an amnesty awarded by the President. The Court refused to apply the statute to a case in which the Court of Claims had already held the claimant entitled to recover, calling it an unconstitutional attempt to invade the judicial province by prescribing a rule of decision in a pending case. In a mildly sardonic vein the Court said: "We must think that Congress had inadvertently passed the limit which separates the legislative from the judicial power."[69] The original Dirksen rider to the foreign aid bill was similarly defective, in view of the fact that the Constitution gives to the courts the responsibility for deciding when an order staying proceedings shall issue. Such an order is a necessary adjunct of the judicial power; without it the judicial power is something less than entire.

The substituted version of the Dirksen amendment, for all its leaving of the jurisdictional door slightly ajar, was regarded by the opponents of the original rider as scarcely less objectionable. It has been suggested that this proposal, unlike the jurisdiction-denying bills, was not based upon the congressional power to regulate and make exceptions to the exercise of federal judicial power, but instead was based upon the affirmative power conferred upon Congress by section 5 of the fourteenth amendment to enforce the substantive provisions of that amendment. Apparently the argument was that, since the Court has said that state legislative apportionment is regulable under the equal protection clause of the fourteenth amendment, Congress too can operate to define and regulate the judicial exercise of that authority.

It is difficult to believe that the modified Dirksen proposal could be regarded as an exercise of the "power to enforce" the Supreme Court interpretation of the equal protection clause in the reappor-

67. *Id.* at 568.
68. 80 U.S. (13 Wall.) 128 (1872).
69. *Id.* at 147.

tionment cases. In *Reynolds* the Court emphasized the present right of voter-plaintiffs to a validly apportioned state legislature and noted, as follows, the necessity for prompt correction of malapportionment:

> "It is enough to say that, once a State's legislative apportionment scheme has been found to be unconstitutional, *it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan.*"[70]

The Dirksen proposal would not only permit, but would require, an approach opposite to the language of *Reynolds*. It would require delay of apportionment action "in the absence of highly unusual circumstances." Thus, to describe the proposal as an exercise of congressional power to enforce or implement the protections of the fourteenth amendment is surely a perversion of plain meaning that should not be tolerated. The whole proposal was thus infected with serious doubt as to its constitutionality.

Senator Dirksen made the principal argument, technically in support of cloture but realistically addressed to the merits of the Supreme Court decisions and the necessity, as he saw it, for resort to drastic and unusual parliamentary devices in order to avoid foreclosure of the opportunity for adoption of a constitutional amendment. He said in part:

> "It has been alleged on the floor, and in editorials, that this is an attack on the Court. I could use an inelegant term to describe those allegations. But I shall content myself with saying that nothing could be further from the truth. . . .
>
> "The amendment before the Senate is a breather. It is nothing more. We had no choice on the question. Our resolution [for amendment of the Constitution] was submitted, but how could we do something about it before the present session of the Congress adjourned?"[71]

Believing that there was substantial interest in Congress for securing some kind of delay in the judicial enforcement of the apportionment rulings, Dirksen argued, in effect, that his proposal was the middle way. On the one hand, the Tuck bill, if approved by both houses of Congress, "would be vetoed" at the White House, he contended.[72] On the other hand, he rejected as insufficient a "sense of Congress" resolution, which Senators Jacob K. Javits, Hubert H. Humphrey,

70. Reynolds v. Sims, 377 U.S. 533, 585 (1964). (Emphasis added.)
71. 110 CONG. REC. 21228-29 (daily ed. Sept. 10, 1964).
72. *Id.* at 21229.

and Eugene J. McCarthy had sponsored as a less drastic alternative. That resolution, which Senator Javits had said would be offered as a substitute for the Dirksen amendment, read as follows in its original form:

> "It is the sense of the Congress that in any action or proceeding in any court of the United States or before any justice or judge of the United States in which there is placed in question the validity of the composition of any house of the legislature of any State or the apportionment of the membership thereof, adequate time should be accorded (1) to such State to conform to the requirements of the Constitution of the United States relating to such composition or apportionment consistently with its electoral procedures and proceedings and with its procedure and proceedings for the amendment of the constitution of such State, and (2) for consideration by the States of any proposed amendment to the Constitution of the United States relating to the composition of the legislatures of the several States, or to the apportionment of the membership thereof, which shall have been duly submitted by the Congress to the States for ratification."[73]

That proposal was derided by Senator Dirksen:

> "Is it not wonderful for this legislative, coordinate branch of the government to get on its knees and say to the Court, 'Please, Mr. Court, be gracious, be graceful. Let us give them adequate time'? We are asked to beg a little. I do not propose to beg, because that demeans the dignity and authority of this branch of government."[74]

Needless to say, a motion for cloture always raises issues extraneous to the substance of the issue at hand. As Senator John L. McClellan of Arkansas noted, in explaining the likelihood of his vote against the cloture motion, he was "against cloture as a legislative weapon," but might be impelled at some later time to vote for cloture in view of the fact that it had been invoked "against me and my State" in connection with the civil rights legislative battle earlier in the summer, largely at the instance of the so-called northern liberals.[75]

Although presumably the proponents of cloture had not expected to be successful on a first vote, they were apparently surprised to find their motion decisively defeated by a vote of thirty to sixty-three.[76] Senator Javits then indicated his intention to seek substitution of his "sense of Congress" resolution; but Senator

73. *Id.* at 21227.
74. *Id.* at 21229.
75. *Ibid.*
76. *Id.* at 21236.

George D. Aiken of Vermont would have none of this, fearing that the previous vote might be taken as a two-to-one vote of confidence in the Court. Accordingly, as a test of strength, he moved to table the Dirksen amendment, indicating his intention to vote against tabling so that it would finally be possible "to find out how the Senate stands on the Mansfield-Dirksen amendment."[77] The motion to table was rejected thirty-eight to forty-nine, and Senator Javits' proposal was promptly laid before the Senate on the motion of Senator McCarthy by unanimous consent. Then, with apparent relief the Senate turned for the moment to other business, including such fascinating matters as the Bobby Baker case.[78]

Debate now left the floor, again in favor of the corridors and offices. Some of the liberals, emboldened by their success in defeating cloture by a substantial margin, expressed dissatisfaction with the Javits compromise on the following grounds: (1) it might carry an implication that Congress was committed to a constitutional amendment on the subject of apportionment (which Senator Javits had indeed indicated he would support); (2) the language of the resolution, although precatory, might be regarded by the courts as an interference with their right to dispose of cases; and (3) the compromise might serve Senator Dirksen's purpose of letting malapportioned state legislatures pass upon a constitutional amendment designed to keep them malapportioned.[79]

President Johnson's support of the "sense of Congress" resolution was indicated, and ways were sought to modify the language to win further liberal support for the vote expected on September 15.[80] By the night before the projected vote, some modification in the language of the resolution was tentatively agreed upon: to give states a "reasonable time," rather than an "adequate time," to conform to constitutional requirements; and to provide, with respect to a possible constitutional amendment, only that the courts could take such fact into account "in the event" of submission of such an amendment to the states by Congress.[81]

Thus, all seemed set for resolution by compromise, in customary legislative fashion, of the whole troublesome business. When the compromise of the compromise was introduced on September 15, however, several of those relied upon for passage were absent, and

77. *Id.* at 21240.
78. *Id.* at 21241.
79. N.Y. Times, Sept. 12, 1964, p. 1, col. 2.
80. *Id.*, Sept. 14, 1964, p. 1, col. 2.
81. *Id.*, Sept. 15, 1964, p. 1, col. 6.

Senator Wayne Morse of Oregon, unpredictable as always, voted against the resolution, which was defeated by a vote of forty to forty-two.[82] But, when Senator Strom Thurmond of South Carolina (on his last day as a Democrat)[83] forced a vote on the House-approved Tuck bill, that too was rejected by a vote of twenty-one to fifty-five.[84] The Javits proposal was studied for the possibility of a "meaningful" change, as required by Senate rules before resubmission. And, again, there was confidence that a successful vote could be achieved, presumably still permitting adjournment in time for the political rituals prior to November 3.[85]

The rest was downhill and surprisingly undramatic. Senators Dirksen and Mansfield made one further attempt to work out new language that would be acceptable to a majority of the Senate. On September 22 they tentatively agreed to modify the already once modified Dirksen proposal by defining the "reasonable period" during which courts should stay their hand on apportionment matters as the length of one regular session of a state legislature plus thirty days. Moreover, in a significant change of position, they expressed willingness not to interfere with any court order previously entered.[86] While these were important concessions, apparently they now came too late and may have been too little in the eyes of the liberal bloc, who by this time sensed the possibility of almost complete victory. The very next day Senator Mansfield, now acting primarily in his capacity as majority leader, gave up the fight for a mandatory restriction upon the jurisdiction of the federal courts. Obviously disturbed by the absence of a quorum on three consecutive days, he reviewed the situation candidly on the Senate floor:

> "It is clear that there is not the substantial majority which is necessary to invoke cloture on the Dirksen-Mansfield amendment. It is also clear that there is not a majority to table the amendment . . . .
>
> ". . . The leadership lives in the hope that one day reason will be permanently enshrined in this body and that the rules will be used and not abused, whether the issue is civil rights or reapportionment or whatever. There is only one reasonable way to redeem the reputation of the Senate in this kind of situation. That is by the adjustment of positions . . . ."[87]

82. *Id.*, Sept. 16, 1964, p. 1, col. 5.
83. *Id.*, Sept. 17, 1964, p. 25, col. 1.
84. *Id.*, Sept. 16, 1964, p. 1, col. 5.
85. *Id.*, Sept. 17, 1964, p. 1, col. 7.
86. N.Y. Times, Sept. 23, 1964, p. 1, col. 8.
87. 110 CONG. REC. 21865 (daily ed. Sept. 23, 1964).

Senator Mansfield's "adjustment" was substantial, for the substitute amendment that he offered simply turned the Dirksen amendment inside out. The Mansfield proposal of September 23 said merely that courts "could properly" (1) "allow" the legislatures additional time for reapportionment, but such time was not to exceed six months, and (2) "permit" the next election of state legislatures to be conducted in accordance with the laws in effect on September 20, 1964. Moreover, the resolution specifically approved reapportionment by the federal courts in the event of legislative failure to act within any grace time permitted by court order.[88]

The Mansfield sense-of-Congress resolution was approved the following day, September 24, by a vote of forty-four to thirty-eight.[89] The vote was largely, but by no means entirely, along party lines; because fifteen Democrats voted against the resolution, it could not have carried without the seven Republican votes it received.[90]

With this matter out of the way, the Senate was able to give prompt approval to the foreign aid assistance bill. The final scene, then, was played out in the Conference Committee that was convened to resolve differences between the Senate and House versions of the foreign aid legislation. There the apportionment rider was eliminated altogether,[91] and both houses approved the conference version.[92]

Thus, the whole fight to deny, restrict, or even temper the jurisdiction of the federal courts on apportionment matters at last came

88. The full text was as follows:

"It is the sense of Congress that, (a) In any action in any district court of the United States in which the constitutionality of the apportionment of representation in a State legislature or either house thereof is drawn in question, any order affecting the conduct of the State government, the proceedings of any house of the legislature thereof, or of any convention, primary or election could properly, in the absence of unusual circumstances, including those which could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's order,

"(1) allow the legislature of such State the length of time provided for a regular session of the legislature plus 30 days but not to exceed 6 months in all, to apportion representation in such legislature in accordance with the Constitution, and

"(2) permit the next election of members of the State legislature following the effective date of this act to be conducted in accordance with the laws of such State in effect on September 20, 1964.

"(b) In the event that a State fails to apportion representation in the legislature in accordance with the Constitution within the time granted by any order pursuant to this section, the district court having jurisdiction of the action shall apportion representation in such legislature among appropriate districts so as to conform to the constitution and laws of such State insofar as is possible consistent with the requirements of the Constitution of the United States, and the court may make such further orders pertaining thereto and to the conduct of elections as may be appropriate." *Id.* at 21866.

89. *Id.* at 22051 (daily ed. Sept. 24, 1964).

90. N.Y. Times, Sept. 25, 1964, p. 1, col. 7.

91. *Id.*, Oct. 2, 1964, p. 1, col. 6.

92. 110 CONG. REC. 22722, 22851 (daily ed. Oct. 2, 1964).

to naught. Once more, as so often in the past, when the implications of the proposed limitation were made clear, the Congress would not quite cross the threshold of no return. However substantial may have been the sentiment in Congress that the Supreme Court's reapportionment decisions somehow extended judicial power too far—and clearly that was the view of many—the ultimately prevailing view was that such disagreement with the Court should be expressed in a constitutional amendment rather than legislation. The regulatory power of Congress in relation to the federal judiciary has been again recognized as an authority over jurisdiction in its procedural sense, and not as a power of limitation on matters of substance.

Interestingly enough, even at the height of the controversy, when it appeared likely that some kind of jurisdictional limitation would be approved, the lower federal courts seemed unaffected. The three-judge district court in Oklahoma, one of the states most talked about in the Senate debate, continued with its arrangements for a second primary election to be conducted in that state on the basis of newly approved election district lines.[93] Equally striking was the action of the three-judge court in Connecticut, which enjoined the holding of any election for the state legislature in the fall of 1964 because of the failure of the legislature, in special session, to enact a new apportionment formula as required by earlier court order.[94]

Support for a constitutional amendment will be tested in 1965. This, of course, is appropriate. In anticipation of that debate, one may speculate that Senator Dirksen was right, at least to this extent: state legislatures and courts, both state and federal, have shown an almost surprising willingness to comply with the reapportionment decisions of the Supreme Court. Accordingly, it seems unlikely that the public can now be stirred to approve constitutional limitation of the one man-one vote principle.

93. In the court-ordered primary of Sept. 29, 1964, final choices were made for the elections of November 1964. N.Y. Times, Oct. 1, 1964, p. 36, col. 3.

94. *Id.*, Sept. 25, 1964, p. 1, col. 7.