Whether Congress has the constitutional power to limit the functions of the courts in these ways by simple statutes is a question debated by scholars. Congress has done so only once before, in 1868, when it cut off the Supreme Court's jurisdiction to hear habeas corpus appeals because it believed the Court was about to declare Reconstruction laws unconstitutional in a habeas corpus case known as ex parte McCardle. The Court upheld Congress action then.

The Tuck measure follows the McCardle approach. Experts disagree sharply on whether it would hold up now.

For one thing the McCardle decision has been much criticized as inconsistent with the independence of the judicial process. For another, some argue that the McCardle statute, a removal of Supreme Court jurisdiction in a general class of cases, habeas corpus appeals, was less a violation of the separation of powers than would be a bar to judicial enforcement of one particular constitutional right.

A PRECEDENT

Foreclosing enforcement of the right to equal representation would be a precedent for picking out any other constitutional right that Congress did not like at the moment and excluding it from the courts.

On the other side, scholars point out that article III of the Constitution gives Congress specific powers to regulate the appellate jurisdiction of the Supreme Court and to fix the jurisdiction of all lower Federal tribunals. As to the latter, indeed, it is up to Congress which, if any, to establish.

The Dirksen rider as redrafted rests on a different constitutional basis—the section of the 14th amendment saying that Congress may enforce the amendment by legislation. The theory is that since the Court has now construed the amendment to require equity in districts, Congress may exercise its power to lay down a rule of decision requiring a reasonable delay for legislatures to act. The argument on the other side is that the measure violates the separation of powers.

POWER AND WISDOM

Some suggested that the Justice Department really considered the Dirksen rider unconstitutional but went along on the theory it would fall in a court test. That is not correct. High officials of the Department, at least, believe that the rider is a valid invocation of Congress powers under the 14th amendment.

The wisdom of the Dirksen proposal is another matter, and there the Justice Department certainly does not agree with the Senator from Illinois. The administration supports the Supreme Court's apportionment decision and would prefer to have no legislative interference with it. The compromise was made with Senator DIRKSEN for one blunt reason: Officials were afraid that they would get something worse if they did not take this. The subsequent progress of the Tuck bill suggested that they were right.

Should the Dirksen rider become law in some form, the next question would be whether a constitutional amendment would be adopted during the period delay. That might well depend on whether President Johnson is reelected this fall and, if so, whether he took a strong position against any constitutional change. Thus far in the current battle he has not spoken out.

The question posed by the present conflict between Congress and Court is in any event larger than the apportionment problem. What is now at issue is the status of the Supreme Court and the continuance unimpaired of its historic power to enforce the citizen's constitutional rights.

MEASURE SCORED

That the issue is the Court as an institution explains the willingness of 15 prominent law deans and professors last week to attack such proposed curbs on the apportionment decision as the Tuck bill. A telegram from them called the proposals drastic ones that would dangerously threaten the integrity of our judicial process.

Some of the signers of that telegram had themselves opposed the apportionment decision. Some have sharply criticized the present Court as too hasty, too confident of its own wisdom, too ready to use bootstrap history in its opinions. The professors can be just as sharp as politicians in their criticism. The difference is that they do not lose their reverence for the institution of the Court.

It is easy for sophisticated analysts to the law to condemn sweeping, ill-considered personal attacks on the Justices who so evidently are trying honestly to tackle the intolerably difficult problems put to them.

But, as Prof. Louis Jaffe of the Harvard Law School has said, the Supreme Court cannot expect only careful appraisals. It must justify itself in the crude marketplace of public opinion precisely because it deals not only with esoteric lawyers' questions but with great social issues.

What is about to be tested is whether the recent line of Supreme Court decisions protecing individual liberty has offended public opinion so much that the political forces arrayed against the apportionment decision will be able to limit or overcome it. On the answer depends not only a good measure of the States' future political makeup but the great role of the Supreme Court in the American system of government. It is hard to imagine a more fascinating or more vital struggle.

## CALL OF THE ROLL

Mr. DOUGLAS. Mr. President, I suggest the absence of a quorum, and ask that the quorum be a live quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

[No. 547 Leg.]

| | | |
|---|---|---|
| Aiken | Gore | Mundt |
| Allott | Gruening | Muskie |
| Anderson | Hart | Nelson |
| Bartlett | Hartke | Neuberger |
| Bayh | Hayden | Pastore |
| Beall | Holland | Pearson |
| Bennett | Hruska | Pell |
| Bible | Inouye | Prouty |
| Boggs | Jackson | Proxmire |
| Brewster | Javits | Randolph |
| Burdick | Johnston | Ribicoff |
| Byrd, Va. | Jordan, N.C. | Robertson |
| Byrd, W. Va. | Jordan, Idaho | Russell |
| Carlson | Keating | Salinger |
| Case | Kuchel | Saltonstall |
| Church | Lausche | Scott |
| Clark | Long, Mo. | Simpson |
| Cooper | Long, La. | Smathers |
| Cotton | Magnuson | Smith |
| Curtis | Mansfield | Sparkman |
| Dirksen | McCarthy | Stennis |
| Dodd | McClellan | Symington |
| Dominick | McGovern | Talmadge |
| Douglas | McIntyre | Thurmond |
| Eastland | McNamara | Tower |
| Edmondson | Mechem | Walters |
| Ellender | Metcalf | Williams, N.J. |
| Ervin | Miller | Williams, Del. |
| Fong | Monroney | Young, N. Dak. |
| Fulbright | Morse | Young, Ohio |
| Goldwater | Morton | |

Mr. MANSFIELD. I announce that the Senator from Minnesota [Mr. HUMPHREY], the Senator from Alabama [Mr. HILL], the Senator from Utah [Mr. Moss], and the Senator from Texas [Mr. YARBOROUGH] are absent on official business.

I also announce that the Senator from Massachusetts [Mr. KENNEDY] is absent because of illness. I further announce that the Senator from Nevada [Mr. CANNON] and the Senator from Wyoming [Mr. MCGEE] are necessarily absent.

Mr. KUCHEL. I announce that the Senator from Iowa [Mr. HICKENLOOPER] is absent on official business as a delegate to attend the meetings of the Interparliamentary Union at Copenhagen, Denmark.

The PRESIDING OFFICER. A quorum is present.

## AMENDMENT OF FOREIGN ASSISTANCE ACT OF 1961

The Senate resumed the consideration of the bill (H.R. 1380) to amend further the Foreign Assistance Act of 1961, as amended, and for other purposes.

Mr. JAVITS. Mr. President, on behalf of myself and the Senator from Minnesota [Mr. MCCARTHY], I send to the desk a proposed substitute for the amendment offered by the Senator from Illinois [Mr. DIRKSEN] and ask that it be printed under the rule.

The PRESIDING OFFICER. The amendment will be received and printed, and will lie on the table.

Mr. JAVITS. Mr. President, the amendment in the nature of a substitute (No. 1215), proposes a sense of Congress resolution, as follows:

It is proposed to strike out all on and after line 1, page 1, and insert in lieu thereof the following:

SEC. 402. 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 first, 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 second, 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.

Mr. President, I will, in consultation with the Senator from Minnesota [Mr. MCCARTHY], call up the amendment in the nature of a substitute at the appropriate time for consideration by the Senate.

The first proper question is, Why submit the amendment? Perhaps the corollary to that question has already been put in his usual picturesque way by my leader, the Senator from Illinois [Mr. DIRKSEN], who, I understand from the press, called it meaningless.

There is a very real purpose in submitting the amendment. I believe it would avoid a grave danger to the constitutional establishment of our Government posed by the so-called Dirksen amendment, in which the Senator from Montana [Mr. MANSFIELD] is joined. As I shall develop in a few moments, the

Senator from Montana [Mr. MANSFIELD] joins in it on very different grounds from those relied on by the Senator from Illinois [Mr. DIRKSEN]. I believe that the sense-of-Congress resolution which the Senator from Minnesota [Mr. MCCARTHY] and I propose as a substitute is entirely in accord with the constitutional separation of powers as between the legislative and judicial branches of the Federal Government. It would not jeopardize our governmental establishment but it would frankly meet what I recognize to be a difficult issue. Most importantly, it would have the desired effect without the deleterious effects upon our system of government which I see in the Dirksen amendment.

It is also assumed, in saying that a "sense" resolution is "meaningless," that the Dirksen amendment would be meaningful. In my judgment, the Dirksen amendment would not have the operative effect of law which is claimed for it, if that is what is meant by "meaningful," but would purport to have such operative effect without in fact having it. Hence it would work an injury both to the prestige of the Congress and, by an effort which would miscarry or misfire, to the relationships between the Congress and the judiciary. Therefore, a frank statement of what we have the power to do—namely, to request the Court to stay its hand for appropriate reasons—is the most honest procedure in this situation.

There is a real situation of difficulty which faces the Nation in the State legislative reapportionment decision of the U.S. Supreme Court, the so-called "one-man-one-vote" decision. The problems which are thereby created are twofold. First is the problem of conformance without unduly upsetting our whole society.

I should like to say just a word on that subject, because I believe it is important. There has been altogether too much loose talk about the possibility that the enactments of State legislatures which are organized on bases different from the one-man-one-vote concept, including those which are subject to the mandate of the Supreme Court in the six cases which the Court has already decided are unconstitutional, void, illegal, invalid, or in question.

One can speak as a lawyer only with considered judgment, and I speak in that way. I cannot conceive of the Supreme Court upsetting the acts of a State legislature which is organized in a way which is not approved by one of these decisions. I can understand the Court making every effort to bring about the organization of a legislature upon a proper apportionment, but I consider it inconceivable that the Court would invalidate the enactments of a legislature functioning for decades, in the case of many of them, and organized along lines of which the Court disapproves.

That is a very important point, because if we did not grant that point, we would face a great national crisis and emergency; but no one, including the Supreme Court, has given any indication that this will be the fact.

If we do not face that danger—that the acts of our State legislatures are invalid because they are not organized according to the principles laid down in those cases which have brought on the present problem, then we are entitled to proceed with such speed—or deliberate speed, if we want to use the words of the civil rights case—as to balance the public interest and the stability of governmental organisms with the requirement of the Supreme Court that legislatures be organized based upon lawful apportionment.

The assumption on which I am proceeding would also include approval by a legislature of a proposed amendment to the U.S. Constitution. It should always be kept in mind that in every State—if the U.S. Constitution is to be amended to allow one house of the State legislature to be organized on a basis other than population—which is the effort to be made by the Senator from Illinois [Mr. DIRKSEN] and other Senators who are seeking time for such a constitutional amendment to take effect—it will be a question, in the final analysis, for the people of that State to decide. Once such a constitutional amendment is adopted, the people of each State will have to decide whether they will avail themselves of it or not.

The fact that a State legislature will or will not approve a constitutional amendment permitting the people of each State to make their choice represents only one element of the constitutional process—the people of each State must decide on their State constitutions. At this time no legislature can organize one house of its State legislature on the basis of population and the other house on some other basis without running afoul of the 14th amendment, under the Supreme Court decision. Something should be done, under the Constitution, for the people to be able to act in each State upon that matter as they deem advisable.

The other point is that the lower Federal courts have proceeded to press the matter of reapportionment in some cases in a manner which can turn out to be inimical to the very objective to be served. Let us remember that these malapportionments have been going on for decades, in many cases over a century, and somehow or other we have managed to survive. I am all for changing the system and for giving proper representation to our urban and suburban areas, which have grown so much larger in population, but I am not for tearing the country up by the roots. Hence, the Senator from Minnesota [Mr. MCCARTHY] and I have offered what we consider to be a fair compromise.

The question is being pressed by some of the lower courts too hard. For example, in my State of New York the State has been given, under Court order, the direction to reapportion by April 1, 1965. In the interim the Court has ordered three separate elections in 2 years. Our State legislators hold office for 2 years. The court in New York has held that they shall hold office for only 1 year, and that we shall have an election this fall, one next fall, and one the fall after that. It is rather difficult when a Federal court tells a State that it must curtail the constitutional term of its legislators. That is pressing the matter a little further than it should be pressed. I hope the Supreme Court will hear me and others like me who have been indefatigable in its defense, when the Court considers, as it will, whether these mandates are really what is intended.

There are other States in which the courts have held that there should be weighted voting in the State legislature—that is, one senator or one assemblyman shall have one and a half votes, or one and three-quarter votes, and another shall have half a vote. Again, this is completely inimical to the American system. We have never operated that way, and I do not see why the Court should impose such a system on us.

There are other cases. In Vermont the Court has told the legislature it must meet and reapportion and then must adjourn, that the legislators must go home and cannot transact any other business. Mr. President, that is straining the judicial authority a little bit further than it should be strained.

However, that does not mean that we in our turn must be guilty of the same thing. We must express ourselves very clearly, and the residual power, even if we have it, must be very sparingly and very judiciously exercised.

Mr. NELSON. Mr. President, will the Senator yield for a question?

Mr. JAVITS. I yield.

Mr. NELSON. As I understand this resolution it purports effectively to act as a kind of interlocutory decree running against the Supreme Court and postponing the effect of its decision. It that correct?

Mr. JAVITS. When the Senator says "this resolution," does he mean the Dirksen amendment?

Mr. NELSON. Yes.

Mr. JAVITS. Yes; it purports to do that. I had intended to develop that point a little later. Perhaps it is just as well that I tell the Senator now what I have in mind. It purports to do what the Senator has indicated. However, it contains an escape hatch. The escape hatch is "in the absence of highly unusual circumstances." If the Court finds highly unusual circumstances, it may deny the application for a stay.

In my judgment, had the Dirksen amendment omitted that provision, it would have run directly in the face of at least two U.S. Supreme Court decisions, which I shall cite in the course of my speech this afternoon, and would have been held to be unconstitutional. It would therefore have been thrown out by the Court. That is my considered judgment as a lawyer.

The Justice Department felt that the addition of the words, "in the absence of highly unusual circumstances" meant that a court could say, "We are not absolutely bound, because of the language highly unusual circumstances, and we can therefore deny the stay."

I feel that the original Dirksen proposal, which lacked such an escape clause, would have been thrown out as unconstitutional, or run the danger of a serious confrontation between the power of the Supreme Court and the

power of Congress to invade the Supreme Court's power. This would be a confrontation similar to the one which occurred in the previous century, which almost led to the impeachment of a President and to a dismemberment of the organs of our Government. I do not want to see anything like that happen.

I believe that the Court will have to say one of two things about the amended Dirksen proposal. The proposal requires the Court to issue a stay order unless it finds highly unusual circumstances, as a fact. But when we consider the nature of the cases involved, highly unusual circumstances already exist when there is malapportionment, and therefore it is difficult for me to imagine what else would be highly unusual circumstances, if the Court were honestly to administer these words. It is therefore my judgment that the Court would either strike down the stay amendment on the ground that it is a usurpation of the judicial power, especially in already pending cases in which decrees have been handed down and to some extent complied with, for these are equity cases, in which the courts may retain jurisdiction until the decrees have been fully complied with or longer; or the Court will say, "We shall treat the amendment as a request, because it is not really binding upon us in view of the exclusionary language, "highly unusual circumstances. We will treat it as a request, and because we now have the sentiment of Congress, we shall honor it as a request."

I answer the Senator as follows: It would be much more dignified and sound and in the interest of our Government, since the Court must treat it as only a request in order to uphold it, to remake the amendment in the form of a request.

Does any Senator believe that the Supreme Court would treat a considered request of Congress, enacted by both Houses of Congress and signed by the President, as a nullity? It would do no such thing. But the dignity and integrity of both the judiciary and the Congress would be upheld.

Mr. NELSON. Mr. President, will the Senator yield?

Mr. JAVITS. I yield.

Mr. NELSON. I read from page 2 of the amendment, as follows:

(1) 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—

Does not the language clearly provide that in any case where the law of any State has been declared unconstitutional, they can now go back and conduct elections under their laws preceding the decision?

Mr. JAVITS. That is exactly it. The Senator has chosen a situation which could represent highly unusual circumstances and in which the Court should therefore refuse to issue a stay.

I should like to tell the Senator, if he does not mind bearing with me a few minutes, exactly what the situation is in a number of States which have already acted in pursuance of the Court's decision that their State legislatures must be reapportioned.

Mr. NELSON. May I ask the Senator one brief question?

Mr. JAVITS. Certainly.

Mr. NELSON. Under this paragraph, the amendment provides that any appropriate elector or party may file a petition, and even though the State has been ordered to conduct an election on a different basis, it may go back to the old basis. Is this not considered in the amendment a highly unusual circumstance?

Mr. JAVITS. The answer is "Yes." I do not believe the Court would require that. I believe the Court would then invoke the words "highly unusual circumstances." Where a decree has been issued in an apportionment case and compliance with that decree is under way, it would read "highly unusual circumstances" to mean that it should not issue a stay order, and therefore would not issue one.

This bears upon the argument I made a moment ago, that the Court may strain to sustain this amendment, if we adopt it—and I understand there is some chance we shall. After all, to be realistic, when the majority leader and the minority leader join in sponsoring an amendment, it has a pretty good chance of success, although I understand from what I have read in the newspapers that they may differ as to the reason why they have submitted the amendment. One account I have read says that the minority leader believes it will afford time for the States to approve a constitutional amendment partially revising the Court's decision; and that the majority leader believes it will afford time for the States to comply with the decision.

In any event, if the Court will hold that "highly unusual circumstances" is an escape hatch, I am sure that the Court could sustain the amendment in such a case as the Senator has described, but the amendment then would be, in effect, nothing more than a request. That is the only basis upon which the Court could sustain it.

On the other hand, if it is held that this language is binding, and that the "highly unusual circumstances" must have occurred in connection with the original lawsuit which challenged the State's apportionment system and that the issuance of a decree and compliance with that decree is not in the category of "highly unusual circumstances," then I go back to my original proposition that this amendment would be thrown out on the ground that it represented an effort to make a rule of decision for the Court in pending cases.

In my judgment, the precedents are clear that the Court will not let that stand; and I do not see anything in social philosophy or anything else which would induce me to believe that the Court would abandon these precedents. On the contrary, I think the Court will hold with them. If not, we shall have what I am deeply concerned about: A confrontation between the power of the Court and the power of Congress, which, in my judgment, does not bode very well for either.

Mr. NELSON. What is the Senator's interpretation of the effect of the amendment, if adopted, on a case that is raised subsequently and considered by the Court? Suppose a legislature meets next January and an order is made that the State be reapportioned. Can the Court issue such an order in October 1964 directing the legislature to act when it meets in January 1965? Does the Senator interpret the amendment to mean that the Court is deprived of jurisdiction? What is the unusual circumstance?

Mr. JAVITS. Yes; in my judgment, if we adopt this amendment and the Court upholds this as a valid exercise of constitutional power, it will be required to stay the effect of its order until January 1, 1966, at least.

Mr. NELSON. If some validity or credence is given to the authority of Congress to pass upon the effective date, one way or another, of the Supreme Court decision—and I understand the minority leader to say that this is more than 99 percent mandatory. What kind of violence, then, would we be doing to the concept of separation of powers? Would this not set a precedent, so that every single time the Supreme Court made an interpretation of the Constitution that Congress did not like, Congress could then adopt an amendment like this, which has strong and persuasive influence, without even the adoption of a constitutional amendment, to postpone the effective date of the order? If we can do that, are we not, in effect, constituting ourselves as a kind of super Supreme Court to review the actions of the Supreme Court?

Mr. JAVITS. That is so. I have already stated that it is my considered judgment that the Dirksen amendment as originally offered, until redrafted in consultation, as I understand—and I have no inside knowledge except that which is generally available—with the Department of Justice, would, in my judgment, have been unconstitutional as violating the separation of powers. It may or may not be saved by the phrase with respect to "highly unusual circumstances." If it is saved by that clause, it would only be because the Court construes the whole amendment as being a request.

If that is the case—and I deeply believe it is—I ask, why not adopt a dignified course, a course more honoring the separation of powers, and put it in the form of a request, because that is the only chance of its being sustained?

I point to the cases which, in my judgment, decide this issue. The first case which decided it is the case of *United States* v. *Klein*, 13 Wall. 128, decided in 1871. That case related to a Reconstruction controversy with respect to the indemnification of Southerners who had been granted amnesty, for property seized during the Civil War pursuant to law. Congress endeavored to deprive the court of jursidiction to indemnify claimants in connection with pending cases. The Court in the Klein case refused to accept that legislation and declared it unconstitutional. That case was decided after the McCardle case, which is being very heavily relied upon by the proponents of the Dirksen

amendment. The distinction between the McCardle case and the Klein case and the distinction between the McCardle case and the Dirksen amendment is that in McCardle the appellate jurisdiction was taken way from the Court. No effort was made to impose upon the Court a rule of decision in a pending case; whereas, that was exactly the purport of the legislation in the Klein case and is also the purport of the Dirksen amendment, if it is to have operative effect and is not to be treated merely as a request.

In my judgment, the Klein case is decisive. The Klein case was succeeded by the case of *Glidden* v. *Zdanok,* 370 U.S. 530, a case decided as recently as 1962, in which the majority opinion in the Klein case was cited with approval. The Glidden case concerned the power to assign a judge of the Court of Claims to a statutory 3-judge court, a constitutional court, as it is called. The Court invoked the doctrine of the Klein case in order to sustain its judgment that the assignment was properly made.

Almost 100 years elapsed between the Klein and Glidden cases, and the Court stood by the Klein decision. It did not invoke the McCardle case, and that is very insignificant, in my judgment.

I have given the Senator from Wisconsin my considered judgment—which is the best each of us can go by—as to what the Supreme Court would do in respect to the particular approach which we are discussing. That is why I came to the conclusion that the only honest thing to do—and I do not use that term invidiously; the Senator from Illinois [Mr. DIRKSEN] is an excellent lawyer, and his judgment is as good as mine; I am speaking of integrity to act based upon my concept of what will or will not be upheld as constitutional—would be to make a request of what, in order to be sustained, would have to be considered a request in any event, instead of seeking power which in my judgment we do not have and should not have under our constitutional form of government. It is only another way to pack the Supreme Court, if we are going to try to tell it what to do in interlocutory proceedings in a pending case. That is exactly what the Klein case held.

Mr. NELSON. This is precisely the point I was getting at. If the plain language of the resolution means what it says it requires the Court to make a finding of fact that it is in the public interest to postpone the effective date of the Court decision unless it finds highly unusual circumstances. Since the specific finding must be based on some kind of substance, it would appear that we are then superimposing our judgment upon the Supreme Court's judgment in cases that are pending and cases that have been adjudicated, and, in effect, are making a judicial decision eroding away the powers of the Supreme Court.

(At this point Mr. SALINGER took the chair as Presiding Officer.)

Mr. JAVITS. That turns on what the Court will hold with respect to the words "highly unusual circumstances."

If I may develop that point with the Senator for a moment, we have already covered the point that if there has been a decree and partial or total compliance with the decree, the Court could then say that even though those circumstances occurred after the entry of the decree, those are highly unusual circumstances which entitled the Court to refrain from issuing the stay which would be authorized by this amendment.

I can conceive also of highly unusual circumstances preceding the litigation itself, if a State legislature gave every indication of not cooperating in an effort to reapportion. The Court might deal with that situation as it has certain civil rights cases in which the Court has held that there is no use going to the local authorities to obtain relief when the entire history of the local authorities, such as a voting registrar, for example, has been characterized by discrimination on racial grounds. Therefore, the Court has held it would be fruitless to require that the plaintiff exhaust the remedy provided by State or local law by appealing to those authorities.

Such a situation might constitute "highly unusual circumstances"; and I believe that they are important. I mention them because they bear upon the answer to the Senator's question. But laying aside the meaning of the words, "in the absence of highly unusual circumstances," unless the Court uses that as an escape hatch, the amendment would run afoul of the separation of powers, in my judgment, and would endeavor, in defiance of the decisions which I have mentioned, to impose a rule of decision upon the Supreme Court.

I do not believe that a discussion of the McCardle case avails to save this type of legislation. It is for that reason that I state that it is my considered judgment that the only thing which places it in some doubt is the meaning of the words, "in the absence of highly unusual circumstances." If the Court were to give those words the weight it needs to give them in order to hold the legislation constitutional, it would have to treat the whole thing as a request. So long as that is what the Court must consider it, why not frankly face the question now and ourselves maintain the principle of separation of powers and make the request which is the purport of the amendment which the Senator from Minnesota [Mr. MCCARTHY] and I have offered.

I believe that if Senators will search their own minds on the subject, they must perforce agree that that kind of request will be honored by the Supreme Court in accordance with the spirit in which it is made.

I point out, too, that the amendment as I have proposed it, in the form of a request, covers the problem of interfering in pending cases. The proceedings which have taken place in a pending case give the Court an opportunity, pursuant to our expressed wish, to defer decrees of the lower courts which in my judgment have been oppressive. The amendment does not challenge the good faith, the sincerity, or fidelity to duty of any lower court. However, I believe that in effect we have a right to say to the Supreme Court that we believe this issue is being ridden too hard, especially if we do not believe that the acts of these legislatures are per se invalid because the legislatures are apportioned on a basis of which the Supreme Court disapproves.

Therefore, sufficient time should be given so that adequate Government processes may operate in an orderly and judicious way.

I have given some examples of the types of order so far issued by some lower courts which are ill-advised in terms of bringing about the reapportionment reform ordered by the Supreme Court.

I shall now refer to the situation in a number of States in which the effort to apply the naked power contained in the Dirksen amendment will upset steps already taken to comply with the Supreme Court decree.

In the State of Colorado, for example, the Supreme Court held on June 22 that the legislature was malapportioned. On July 8 the legislature reapportioned both Houses on a population basis and on July 9 a three-judge Federal district court issued an order upholding that reapportionment. The supreme court of the State has now held that action invalid under the State constitution. The matter is thereby very much in the status of the courts having it under consideration for future decision, with the necessity of reconciling Federal and State court decisions. To introduce into the situation the kind of naked stay which is incorporated in the Dirksen amendment would be disruptive and unwise.

A similar situation exists in Kansas, where a plan for the reapportionment of both houses was upheld by the State supreme court on March 30, 1964. It is now awaiting implementation.

The same situation exists in the State of New York, where a three-judge court ordered reapportionment. Although I disapprove of the idea of three elections in 2 years as ordered by the court—which I mentioned a minute ago—this question will be before the Supreme court; and I believe that to attempt to stay those proceedings by congressional fiat would be distinctly ex post facto.

In North Dakota, the legislature is acting on four proposals for reapportionment, pursuant to a court order.

In Tennessee, the State of the original decision in the case of Baker against Carr, a court proceeding and legislative proceedings are pending to reapportion, pursuant to court decree.

In Vermont, I have already stated that there is a lower court order ordering the legislature to reapportion and to disband without transacting further business.

The Wisconsin Supreme Court has ordered reapportionment with various provisions respecting the 1964 elections and thereafter, until the legislature and the Governor bring about the enactment of a valid reapportionment plan.

There are many other States—in which various proceedings involving this issue are in the process of litigation. In approximately 16 States there have already been court orders entered. In approximately 23 others litigation has already begun. In many of these 39 States, as well as in some of the other 11, some

legislative or executive action has already been taken toward reapportionment. All those judicial proceedings would be placed in jeopardy unless the Supreme Court were to hold the Dirksen amendment to be ineffective to change a rule of decision in a pending case.

At the same time, on the merits, the situation which we face is not at all an open-and-shut issue of one man, one vote. There is the Federal compact, which is constantly in the minds of the people of all our States, which gives the Senate two representatives from each State, regardless of population. How often have many of us from the great populous States, like New York and California, the State of the distinguished Presiding Officer, the junior Senator from California [Mr. SALINGER], felt ourselves frustrated by the fact that actions, which we consider inimical to our States, are brought about by a vote of Senators from very much smaller States. But this Federal compact has worked well for almost two centuries. And we wish to see it continue.

There is no reason, in my judgment, why the people of the respective States should not have the same opportunity. I emphasize the word "opportunity." Many States may not wish to follow the Federal pattern. The State of Nebraska has a unicameral legislature. There are other States in which a one-house legislature is now contemplated for simplicity or for other reasons pleasing to the people of those States. Our great sister free nation, the United Kingdom, has functioned for centuries, for all practical purposes, with one house. It has worked very well. It has been a model of parliamentary government, indeed, for the whole world.

On the other hand, consider the situation which obtains in the State of Oregon, which reapportioned both of its houses on the basis of population a few years ago. Now it has encountered a new form of discrimination in terms of representation. That situation involves discrimination against areas in favor of the one-man, one-vote concept. For example, 8 of the 30 Senators in the State Senate of Oregon live within the city limits of Portland, Oreg. One State senator represents 28,000 square miles—a district as big as Vermont, New Hampshire, Rhode Island, and New Jersey combined. The question raised is, Should the people of the State of Oregon have a right to say, "We enjoy these tremendous areas, too. We want them to be worked, cultivated, and developed. We want to have people brought into those areas. We want them to be given agricultural and industrial opportunity." I emphasize that word "want." Should the people have a right to say, "We want more than one voice in one of the houses in our State legislature with respect to the resources concentrated in such an enormous area."

I see no reason why the people of a State should not so decide. They ought to have that opportunity. I can see a very orderly pattern worked out to effectuate the mandate of the Supreme Court and conform to the desire of all of us to see that it is worked out in such a way as to be not unduly disruptive of our social order and State governments, to give the people the opportunity, if they wish, within a very proximate time to enact a State constitution which will apportion one house on a basis other than population. They might express themselves by turning down the proposal and proclaiming that they want an apportionment of both of the houses on the basis of population, which is their privilege.

I do not see why we cannot effect all those purposes by requesting the Supreme Court—as a coordinate branch of the Government along with ourselves—to stay its hand. The Supreme Court is acquainted with our plans. We should ask the Court to stay its hand until we act with prompt and deliberate speed. I use the phrase which the Court itself used in the civil rights case of Brown versus Board of Education. We would thus avoid the need for placing the Supreme Court in the position of turning down an act of Congress which purports to have a statutorily operative effect, but which, in my judgment, if it had such an effect, would have to be struck down by the Court as unconstitutional because it interferes with the prerogatives of the judiciary.

Why should we have that confrontation when it is not necessary? How often do we see in a decision of the U.S. Supreme Court the phrases: "We are sympathetic with what the losing party is claiming. But this is a problem for Congress. We invite the attention of Congress to this problem." How often have we seen Congress thereafter legislate in that field? Why not, in a historic moment in American history, do the same thing with the Supreme Court? Why should we not say to the Supreme Court, "This procedure is being crowded too hard and too fast by the lower courts. We do not expect you to declare the acts of our State legislatures to be invalid, nullities, or void, even if the State legislatures are elected on a malapportioned basis. Therefore, we ask for time within which our plan or legislative scheme for dealing with this problem can be worked out."

That is the dignified, respectful way in which to do it. It is the way in which the Supreme Court has dealt with us. It is the way in which, in my judgment, we ought to deal with the Court. I believe that a confrontation between the power of the Supreme Court and the power of Congress is so dangerous that it could be disruptive of the American system.

We are operating in the atmosphere of a presidential campaign. It is a presidential campaign in which there will be sufficient overtones of attacks upon the Supreme Court and dissatisfaction with Supreme Court decisions in the civil rights field, the school prayer field, and other fields. This will impose more than an adequate strain upon the body politic in the United States.

Why add another? That is the question I ask. Why add another when we can accomplish a legitimate result by being respectful ourselves, as we expect the Supreme Court to be respectful of the orders, views, and plans of Congress?

At best, we shall be home for 3 months. Since Baker against Carr, when this whole process was initiated, a period of years has elapsed. Therefore, what harm would there be in waiting to see if the approach which the junior Senator from Minnesota [Mr. MCCARTHY] and I have suggested works. We shall soon find out if it does not work. There is plenty of time in which to apply power, if power is necessary. There is plenty of time to apply power, if the request does not work.

It is upon that ground that the junior Senator from Minnesota [Mr. MCCARTHY] and I believe that the amendment in the nature of a substitute, which we have proposed, represents a fair way for Congress to work its will, and at the same time to respect faithfully the institutions established by the Constitution, of coordinate power to rule our people.

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. MCNAMARA. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. MCNAMARA. Mr. President, in my opinion, the proposed amendment to circumvent the Constitution of the United States is ill-conceived, misbegotten, misguided, and mischievous.

It is also destructive of the rights of the American people to full and equal representation in their State legislatures.

Until this belated effort was mounted to bludgeon the Congress, under pressure of adjournment deadlines, into a nullification of the Supreme Court decision on legislative reapportionment, I had hoped that the year 1964 would be remembered for two great milestones along the road to equality.

One, of course, is the recently enacted Civil Rights Act of 1964, the other, the Supreme Court's decision on legislative apportionment.

Both of these great achievements bolster the same basic principle that equality of citizenship, dignity, and opportunity for all Americans is fundamental to our Nation's heritage, and that it is guaranteed by our fundamental laws; and that basic to everything else is the right to vote—fully, fairly, without dilution, and at every level—from township supervisor to President of the United States.

It is tragic irony, therefore, that within a few weeks of the triumphant passage of the Civil Rights Act of 1964 the Congress should be considering its effective repeal.

And I mean just that, because if this amendment should be enacted into law, we would establish as the American rule that some men are created half equal, and that they are entitled to only half-protection of the laws.

It would be a discrimination, based not upon the color of your skin; the church where you worship, or the country from which your ancestors came, but upon where you now live.

Mr. President, I intend to examine in some detail the absurd premise that gross discrimination in one house of a bicameral legislature, based on factors other than people, be it pine stumps, cows, inland lakes or what, does not really matter as long as some kind of quality is preserved in the other house of the legislature.

We have had considerable experience with this situation in Michigan, where a malapportioned State senate, isolated and insulated from the needs, aspiration and desires of the majority of the people, effectively throttled all attempts at social reform and economic progress, proposed by Governors elected at large and representing the majority of the people.

I am indebted for this documentation to one of the nationally recognized leaders in the fight for equal representation—Mr. August Scholle, president of the Michigan AFL–CIO Council.

Mr. Scholle has been waging the "one-man, one-vote" battle for years, and his efforts have now succeeded in Michigan, where we now have a legislature that is fairly representative of the people in both the State senate and house of representatives.

Mr. Scholle had prepared testimony in opposition to this destructive effort now before us which he had hoped to present to the House Judiciary Committee. He was unable to do so.

However, his carefully documented testimony presents such a powerful argument against the pending amendment that I intend to quote extensivey from it.

Before doing so, however, I wish to refute some of the rationalizations advanced on behalf of legislative malapportionment, which are nothing more than smoke screens for maintaining a status quo situation of minority control in our State capitols.

The first might be described as "The people's right to be wrong." The gist of this proposition is that the most wildly unfair and unjust malapportionment of one house of a State legislature is perfectly all right as long as it has been approved in a referendum election, regardless of the constitutional rights that are trampled upon in the process.

This is, of course, absurd. No State or city could pass a law denying a citizen elector the right to vote because of race, color, or creed. And should such a law be approved in a referendum vote, it would be thrown out by the courts.

Why then should a law be upheld that dilutes or denies a citizen an equal voice in his State legislature on the basis of where he lives?

I would just comment, in passing, on the discredited "Federal analogy" rationalization that there is a valid parallel between State legislatures and the Federal Congress.

The Supreme Court of the United States has eloquently held to the contrary, explaining that the sovereign States joined initially in the Great Compromise to form the Federal Union, representing people in one House and "sovereign" States in the other.

But, Mr. President, there is not now, and never has been, such a thing as a "sovereign" county.

Equally disreputable is the argument that at least one house of a State legislature must be unequal in order to represent diverse interests of the State in both or to achieve a system of checks and balances.

Any districting plan in a bicameral legislature of different-sized houses will automatically meet this problem—even if both houses are based on population. This is true because of the overlapping districts' different personalities; different terms of office; and the mere necessity that measures must successively pass two houses to become law.

This brings me to the key fallacy of the pending proposal that fair representation in one house of a legislature will suffice:

Fair representation—which means majority control—in one house only will not pass a bill.

An entrenched minority in the other house can kill it—and often does—as I will soon demonstrate.

Equally important, that second, minority-controlled house is likely to have exclusive life-and-death power over gubernatorial appointments. And when it also is granted the power of legislative review over State agency actions, the stranglehold is complete.

I know too well, from the experience of my own State, of what I speak.

Michigan, in its 1908 constitution had relatively fair provisions for legislative apportionment and for reapportionment every 10 years. The basic problem was that these provisions were judicially unenforceable.

As the metropolitan areas of Michigan grew tremendously after World War I, the State changed from agrarian to industrial in nature.

But the legislators charged with the duty of decennial reapportionment simply refused to act for fear of voting themselves out of office.

Our senate was last reapportioned under the 1908 constitution in 1925, supposedly under the 1920 census, but only roughly at that. The reapportionment constitutionally required in 1930, 1940, and 1950 were flagrantly denied by a Republican-minority-controlled legislature fearful of Democratic urban strength.

A petition drive in 1952 for correction failed—through a campaign of abuse, vilification, and misrepresentation that demonstrates how useless is protection of referendum assumed to exist in the amendment we are discussing.

A counterproposal freezing the 1920 districts carried, and even its proponents a dozen years later conceded the tragic errors involved. For, in the ensuing decade one house, the Michigan Senate, controlled by a destructive minority block, elected by a minority of the people, frustrated legislation proposed by a popular governor, elected at large for six consecutive terms, more times than ever before in the country's history.

But because of Senate malapportionment, he could not translate the popular will into law.

And a minority-controlled State senate served for years as a graveyard for progressive legislation, frustrating the popular will, unresponsive to the needs of the State, and unaccountable for their actions to the majority of citizens in the State.

In his statement, Mr. Scholle noted that he has helped sponsor two petition drives for legislative reapportionment in Michigan. He also was plaintiff in a court suit that went to the U.S. Supreme Court and resulted in a modern, fair, and equitable legislative reapportionment this year in Michigan.

He said:

> Reapportionment and equality of citizenship are inseparable. What we are actually discussing when we pose this problem is the age-old struggle of men to achieve equality and thereby freedom and dignity. This struggle is without beginning and seemingly without end.
>
> Throughout our country, and throughout the world today men are struggling for freedom; freedom of opportunity and freedom of choice, both of which are unattainable unless there is equality of citizenship. Citizens are unequal where equality is most essential—at the ballot box.

What happens when an unresponsive, uncaring, and unreachable minority controls one house of a State legislature?

I think the Michigan experience might be illuminating here, not only in terms of denying needed legislation, but also in the redistribution of tax moneys collected for all State governmental functions.

A study in Michigan of tax collections and redistributions in a carefully selected representative group of 26 Michigan counties for the fiscal year of 1960–61 showed that in the small senatorial districts that had the least number of people, we had a per capita collection in one district of $90.33 while the State redistributed in that area $98.63.

In another much overrepresented district the per capita collection of tax dollars was $89.59 and the redistribution was $107.06 per capita.

Contrast this with the districts which were very much underrepresented with a much larger population.

For example, in one district, the State collected $99.17 per capita and the legislature redistributed only $72.56.

In Wayne County, the most populous area in the State, and one of the most underrepresented in the State senate, per capita collections were $108.61 and the redistribution was only $66.45.

For further information on collection and redistribution based on Michigan Senate and House districts, I am attaching exhibit "A," prepared by Mr. Scholle, and ask unanimous consent that it be inserted at this point in my remarks.

There being no objection, the table was ordered to be printed in the RECORD, as follows:

*Senatorial districts within 25 counties*

[Figures based on 76 percent of revenue from counties and all direct payments to local units of government from State]

State collections, $799,147,880.98; State distributions, $565,753,745.45

| | 1960 population | Collections from county | Per capita collections | Distributions to counties | Per capita distributions |
|---|---|---|---|---|---|
| 32d senatorial district: | | | | | |
| Ontonagon | 10,584 | $945,273.80 | $89.31 | $1,052,505.73 | $99.44 |
| Baraga | 7,151 | 638,031.32 | 89.22 | 863,604.72 | 120.76 |
| Houghton | 35,654 | 3,307,030.47 | 92.75 | 3,350,958.73 | 93.98 |
| Keweenaw | 2,417 | 241,131.70 | 99.76 | 335,774.72 | 138.92 |
| Total | 55,806 | 5,131,467.29 | 90.33 | 5,602,843.90 | 98.63 |
| 26th senatorial district: | | | | | |
| Mason | 21,929 | 2,088,368.36 | 95.23 | 2,786,549.39 | 127.07 |
| Newaygo | 24,160 | 2,009,466.24 | 83.17 | 2,434,909.06 | 100.78 |
| Oceana | 16,547 | 1,362,976.56 | 82.37 | 1,599,285.06 | 96.65 |
| Lake | 5,338 | 453,198.42 | 84.90 | 807,324.06 | 151.24 |
| Manistee | 19,042 | 1,792,519.32 | 94.13 | 1,687,899.39 | 88.64 |
| Total | 87,016 | 7,796,508.90 | 89.59 | 9,315,966.96 | 107.06 |
| 23d senatorial district: | | | | | |
| Muskegon | 149,943 | 14,148,703.19 | 94.36 | 11,712,156.95 | 78.11 |
| Ottawa | 98,719 | 8,849,436.72 | 89.64 | 4,071,883.39 | 41.42 |
| Total | 248,662 | 22,998,139.91 | 92.48 | 15,784,040.34 | 63.47 |
| 12th senatorial district: | | | | | |
| Oakland | 690,583 | $68,486,736.31 | $99.17 | $50,109,430.00 | $72.56 |
| 13th senatorial district: | | | | | |
| Genesee | 374,313 | 36,268,457.39 | 96.89 | 26,068,756.00 | 69.64 |
| 33rd senatorial district: | | | | | |
| Washtenaw | 172,440 | 16,177,392.79 | 93.81 | 9,867,099.00 | 57.22 |
| 16th and 17th senatorial districts: | | | | | |
| Kent | 363,187 | 39,153,019.54 | 107.80 | 23,440,538.92 | 64.54 |
| Per Senator | | 19,576,509.77 | | 11,720,269.46 | |
| Wayne County senatorial districts (1, 2, 3, 4, 5, 18, and 21): | | | | | |
| Wayne | 2,666,739 | 289,648,288.00 | 108.61 | 177,226,542.00 | 66.45 |
| Per senator | | 41,378,326.85 | | 25,318,077.42 | |
| 11th senatorial district: | | | | | |
| Macomb | 405,804 | 31,390,352.23 | 77.35 | 25,387,365.00 | 62.56 |
| 15th senatorial district: | | | | | |
| Clinton | 37,969 | 2,556,816.75 | 67.33 | 2,823,035.00 | 74.35 |
| Eaton | 49,684 | 3,613,503.61 | 72.72 | 4,252,668.39 | 85.59 |
| Shiawassee | 53,446 | 4,503,576.36 | 84.26 | 4,362,903.39 | 81.63 |
| Total | 141,099 | 10,673,896.72 | 75.64 | 11,438,606.78 | 81.06 |

*Representative districts within 25 counties*

[Figures based on 76 percent of revenue from counties and all direct payments to local units of government from State]

State collections, $799,147,880.98; State distributions, $565,753,745.45

| | 1960 population | Collections from county | Per capita collections | Distributions to counties | Per capita distributions |
|---|---|---|---|---|---|
| Iron district: | | | | | |
| Alger | 9,250 | $790,757.46 | $85.48 | $1,008,120.39 | $108.98 |
| Baraga | 7,151 | 638,031.32 | 89.22 | 863,604.72 | 120.76 |
| Iron | 17,184 | 1,724,273.55 | 100.34 | 1,661,850.39 | 96.70 |
| Schoolcraft | 8,953 | 1,036,956.14 | 105.24 | 936,497.39 | 104.60 |
| Total | 42,538 | 4,190,018.47 | 98.50 | 4,470,072.89 | 105.08 |
| Houghton district: | | | | | |
| Houghton | 35,654 | 3,307,030.47 | 92.75 | 3,350,958.73 | 93.98 |
| Keweenaw | 2,417 | 241,131.70 | 99.76 | 335,774.72 | 138.92 |
| Total | 38,071 | 3,548,162.17 | 93.19 | 3,686,733.45 | 96.83 |
| Newaygo district: | | | | | |
| Newaygo | 24,160 | 2,009,446.24 | 83.17 | 2,434,909.06 | 100.78 |
| Oceana | 16,547 | 1,362,976.56 | 82.37 | 1,599,285.06 | 96.65 |
| Total | 40,707 | 3,372,422.80 | 82.84 | 4,034,194.12 | 99.10 |
| Genesee County, 1st and 2d districts (4 Representatives): | | | | | |
| Genesee | 374,313 | 36,268,457.39 | 96.89 | 26,068,756.00 | 69.94 |
| Per Representative | 93,578 | 9,067,114.34 | | 6,517,189.00 | |
| Kent County, 1st, 2d, and 3d districts (5 Representatives): | | | | | |
| Kent | 363,187 | 39,153,019.54 | 107.80 | 23,440,538.92 | 64.54 |
| Per Representative | 72,637 | 7,830,603.90 | | 4,688,107.78 | |
| Shiawassee District: | | | | | |
| Livingston | 38,233 | 3,163,212.08 | 82.73 | 2,823,602.00 | 73.85 |
| Shiawassee | 53,446 | 4,503,576.36 | 84.26 | 4,362,903.39 | 81.63 |
| Total | 91,679 | 7,666,788.44 | 83.62 | 7,186,505.39 | 78.38 |
| Macomb County, 1st, 2d, and 3d districts (3 Representatives): | | | | | |
| Macomb | 405,804 | $31,390,352.33 | $77.35 | $25,387,365.00 | $62.56 |
| Per Representative | 135,268 | 10,463,450.77 | | 8,462,455.00 | |
| Monroe County: | | | | | |
| Monroe | 101,120 | 7,819,448.91 | 77.32 | 6,930,758.00 | 68.53 |
| Muskegon County, 1st, and 2d districts (2 Representatives): | | | | | |
| Muskegon | 149,943 | 14,148,703.19 | 94.36 | 11,712,156.95 | 78.11 |
| Per Representative | 74,971 | 7,074,351.59 | | 5,856,078.47 | |
| Oakland County, 1st, 2d, 3d, 4th, 5th, 6th districts (6 Representatives): | | | | | |
| Oakland | 690,583 | 68,486,736.31 | 99.17 | 50,109,430.00 | 72.56 |
| Per Representative | 115,097 | 11,414,456.05 | | 8,351,571.66 | |
| Ottawa County: | | | | | |
| Ottawa | 98,719 | 8,849,436.72 | 89.64 | 4,071,883.39 | 41.24 |
| Washtenaw County, 1st and 2d districts (2 Representatives): | | | | | |
| Washtenaw | 172,440 | 16,177,392.79 | 93.81 | 9,867,099.00 | 57.22 |
| Per Representative | 86,220 | 8,088,696.39 | | 4,933,549.50 | |
| Wayne County, districts 1 to 21, inclusive (38 Representatives): | | | | | |
| Wayne | 2,666,739 | 289,648,288.00 | 108.61 | 177,226,542.00 | 66.45 |
| Per Representative | 70,177 | 7,622,323.36 | | 4,663,856.36 | |

Mr. McNAMARA. Mr. President, often, the representatives from these districts who give preferential treatment in appropriating moneys to spend in their own counties are the ones, with few exceptions, who are outraged at any proposal to adopt social legislation for the well-being of the residents of the populous counties which are the greatest sources of income for the State.

Let me give some specific examples:

In 1958, the Michigan State Senate voted on an amendment which would have provided for free polio shots for needy children. The 19 Republican members, representing 2,848,423 people, voted against the measure, and the 12 Democrats, representing 3,193,417 people, voted for it. The proposal lost, even though it was favored by representatives of the majority of the people, who felt that this legislation was beneficial to the State and its people.

In 1953, the Michigan Senate voted on a $3 increase in unemployment insurance. The vote was 14 votes for and 14 votes against and the bill was killed. However, 14 senators voting for the $3 increase represented 3,542,407 people, while the votes cast against the bill represented only 2,421,631. In other words, 1,120,776 more people were represented by the 14 senators voting for the amendment.

This increase was denied even though Michigan had one of the lowest average rates of unemployment compensation in the country. We still have this dubious distinction as a result of the continued minority control of our State legislature.

An amendment to the Workmen's Compensation Act to improve and clarify the language of the act and to aid the unfortunate victims of industrial accidents was voted down by 18 senators rep-

resenting 2,859,918 people while the 14 senators who voted for it represented 3,510,849 people.

In 1955, a budget of $50,000 for preparation of the St. Lawrence Seaway was proposed by the Governor. This was cut to $500. Nevertheless, when an amendment was introduced to reinstate the original $50,000, it was killed by a vote of 19 senators representing 2,674,214 people, while the 12 senators who voted for it represented 3,266,215. In other words, 592,000 more people were represented by the 12 senators voting for it than the 19 senators voting against it. Yet it lost.

In 1957, when mental health facilities in the State of Michigan were sorely needed, particularly in the populous areas which provide the bulk of tax moneys collected by the State, leigslation was introduced to add 220 beds at Plymouth State Home and Training School in the Detroit Metropolitan area. Despite the obvious need for these beds, the proposal was killed by a vote of 20 senators representing 2,770,198 people while the 11 senators who voted for it, represented 3,132,404 people.

During the 1959–60 session of the legislature, a bill was introduced which would have enabled development credit corporations to secure the benefits provided by the Federal Small Business Investment Act of 1956, helping small business in Michigan.

This bill was defeated in the senate by 17–15. There were 3,558,821 people represented by the 15 senators voting for this bill which would have helped small business in Michigan, while the 17 senators voting against this measure represented only 2,554,206.

Again in the 1959–60 session of the Michigan Legislature a bill was introduced to exempt food and medicine from the 4-percent sales tax with the objective of relieving retirees and persons with fixed incomes from this grossly unfair burden of taxes. This proposal was killed in the State senate by a vote of 20 to 14. The senators voting against represented 3,279,700 people, while the 14 senators who voted for this relief for retirees and fixed-income groups represented 4,957,298.

In other words, 1,677,598 more people were represented by the 14 senators voting for this measure than the 20 senators voting against. But it was defeated.

Perhaps the most outrageous example of "tyranny by the minority" occurred in the apportionment of Michigan's legislative districts in the early 1950's.

The Michigan constitution—at that time—provided that representative districts be drawn with an equal number of inhabitants and consisting of "convenient and contiguous territory."

The dictionary definition of "contiguous" is: 1. bordering upon; to touch upon, and in physical contact touching; 2. Near, adjoining."

But the minority-controlled Michigan legislature, in a burst of gerrymandering zeal unmatched before or since, ignored this constitutional directive to create the four-county Iron Legislative District in the Upper Peninsula which is contiguous only by water, off the coast of Lake Superior.

That is right: Two of the counties—Baraga and Iron—are 72½ miles distant from Alger and Schoolcraft, the other two counties of the Iron District. Interposed between them are Marquette and Delta Counties which comprise another district.

The only way to get from one part of this "contiguous" district to another, without crossing another district, is to go by boat.

The legislators who created this malapportioned monstrosity thought it was very funny. They turned it into a cloakroom joke, asserting that the four counties of the Iron District "are contiguous by the waters of Lake Superior."

As might be expected, this same minority-controlled legislature followed a similar gerrymandering pattern in drawing congressional district lines. The result was that this legislature created—in Michigan—the smallest congressional district in the Nation, containing only 178,251 people under the 1950 census.

The largest congressional district in the State—in the Detroit metropolitan area—contained more than 500,000 people, almost three times as many people as the smallest in the Nation.

Another evil effect of a minority-controlled legislative house is that it is likely to have exclusive life and death power over appointments by the Governor.

The Michigan constitution provides clearly for the appointive power of the Governor, with the advice and consent of the Senate.

But during the 12 years that G. Mennen Williams served as Governor of Michigan, being elected and reelected with substantial majorities, the minority-controlled State senate arrogantly usurped his appointive power, by rejecting or refusing to confirm many of his key appointees.

This is clearly demonstrated by the fact that senatorial refusal to confirm appointees of the Governor was very rare from 1901 to 1948. A total of only nine appointees were rejected. But in the 12-year period of 1949–60, the senate rejected 24 appointees of Governor Williams.

For example, one member of the appeals board of the Michigan Employment Security Commission, who was appointed in 1946 for a 6-year term, remained in office until 1960, or 8 years after Governor Williams had attempted to replace him. The senate achieved this by simply refusing to confirm the appointment of those named by the Governor to replace him.

This was clearly a senatorial usurpation of the Executive power of appointment. It is but one example of many such instances. Since the Senators themselves did not accuse the appointees of lacking qualifications, the conclusion is inescapable that they were motivated by political considerations—at the expense of good government.

As a matter of fact, on many occasions, it was blatantly admitted that in a majority of the cases the appointments were denied for partisan political advantage.

In 1963, Michigan adopted a new Constitution. It included apportionment provisions unique in the Nation's history. One house, said to be based on population, approached, but did not achieve, that description. The other, the Senate, did not, but admittedly was not intended to, for it literally represented area under a so-called 80–20 formula which, in application, meant that 19 acres literally had the voting strength of a human being, and the votes of some citizens were potentially worth up to 3 times those of others.

These 1963 provisions, like the adopted 1952 Michigan proposals, were fortunately thrown out by the U.S. Supreme Court, as a violation of our citizens' rights.

But their application under a formula, which could have been applied with only slight modification to deny democracy to every State in the Union, illustrates the fallacy of thinking that good government can be achieved when only one house is responsive to majority will.

Our Michigan experience repudiates also the outrageous argument that any abuse of constitutional rights can be permitted if enough people vote for it. Majority rule means constitutional majority rule, and our right to free speech, free press, free religion, and the free ballot box does not depend on majority approval or sufferance of our fellow citizens, as the Supreme Court has just reaffirmed.

Our 1963 apportionment provisions were adopted not alone, but as one section among hundreds in a totally new State constitution. The campaign to adopt that constitution, led by our present Governor, was pitched out-State on the theme that the apportionment provisions would restrict Detroit area influence, and, in Detroit, on the approach that citizens should vote for a generally good constitution despite the apportionment provisions, whose validity "would after all be a question for the courts." Wholesale misrepresentation abounded. When the constitution finally carried by a margin after recount, of one-half of 1 percent, the apportionment provisions were urged by their proponents to the courts as a great expression of the popular will and no longer a legal, but a voter-preempted question.

If these represent the standards of fairness the present proposals are designed to achieve, and if such proposals should carry, our Republic is in danger.

It will further be in danger because of another aspect of the proposed amendment—the notion that we strip the courts of power when we disagree with them. This proposal, probably unconstitutional, is shockingly dangerous, for it runs contrary to our heritage of obeying laws until they are changed, and of recognizing and respecting judicial authority. Moreover, these proposals constitute the gravest threat to judicial independence and the separation of powers within recent memory.

It was because of the courts and the great decisions in Baker against Carr and Reynolds against Sims that we stand in Michigan and elsewhere on the threshold of real democracy, living State gov-

ernment, and the ability to meet the needs of our citizens.

If we do not have faith and confidence in abiding by the will of the majority of the people; if we do not believe that the majority will of the people should be reflected by our legislative bodies; if we do not believe that 50-percent-plus of the people should govern, then what percentage of the minority of the people do we determine should govern the majority?

Should 49 percent govern the 51 percent, or as has prevailed in Michigan, should 29.4 percent of the population be able to govern through control of one house, the other 70.6 percent of the people?

Or should we Sovietize the State legislative bodies and have 7 percent of the people dominate the other 93 percent, as prevails in the Soviet Union?

Regardless of all of the fine academic, hypothetical, theoretical arguments that can be made, when a clear perspective is taken of this question it boils down again to this simple question: "What percentage of the minority of the people should control the majority?"

Is the tyrannny of majority rule over the minority ever likely to be more obnoxious than the tyranny of a minority over the majority? If minority control over people is to be approved, then a grave and serious question can be raised as to the morality of our spending billions of dollars a year of the people's money to defend ourselves from foreign ideologies.

There is absolutely no separation of the question of combating dictatorships, whether nazism, fascism, or communism, and of combating any other ideology wherein a minority of the people can govern the majority.

Some of our most difficult international problems could be solved if the people who lived under the iron heel of dictatorship were to be given equality at the ballot box and the majority of the people were permitted to cast a ballot to determine the form of government they wanted to live under.

Certainly we all know that the Berlin wall would be torn down by the East Germans within a week if the East German people were permitted to vote and the wishes of the majority of the East German people were abided by.

I have always firmly believed that if the various States ever achieved truly representative government that the many frictions which prevail today in areas such as civil rights, the arguments about States rights against the propaganda of concentration of power in Washington would, to a major extent, be resolved.

If the legislature actually reflects the sentiment of the majority of the people, the legislatures of each State would be concerning themselves with cooperating and working in harmony with the Federal Government to meet the problems of the pockets of poverty, illhousing, old-age security, mental health, and the many other social problems which we face as a nation today.

If we approve the pending proposal and the proposed constitutional amendment for which it is supposed to buy time, we shall have to go back to the people and tell them that we do not believe in equality of citizenship at the ballot box.

We will be in the position of advocating to our constituents that they sacrifice their most cherished basic symbol of freedom—equality.

If we are going to be honest, we will have to say to the people, "We don't believe that a majority of the people should govern, but that a minority should govern." We will be advocating an oligarchy, or some type of despotism, or some other tyrannical form of government to substitute for majority rule. We will resume the dreary argument over just what percentage of the minority of the people should govern the majority.

We will make a mockery of the words in Lincoln's famous Gettysburg Address, "that government of the people, by the people, and for the people shall not perish from the earth."

Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk proceeded to call the roll.

Mr. McCARTHY. Mr. President, I ask unanimous consent that the order for the quorum call may be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. McCARTHY. Mr. President, I commend the Senator from Michigan [Mr. McNAMARA] for his excellent presentation of the case for apportionment in his State. The examples which he cites could be found in many other States in the Union. If we need any practical demonstration of the justification for the court's action, that justification was contained in the statement which the Senator from Michigan has just completed.

Along with his statement, of course, was the theoretical case made for the Supreme Court's action by the Senator from Oregon [Mr. MORSE] in the presentation which he made to this body's few days ago, in which he inquired into the constitutional aspects of the case, and the constitutional aspect of the application of the Court's decision.

Today the Senator from New York [Mr. JAVITS] and I submitted an amendment in the nature of a substitute for the Mansfield-Dirksen amendment, which is under consideration by the Senate.

It is my opinion that the Court has ruled quite properly in this case that the principle of one vote for each person is fundamental to American democracy.

The principle that the majority shall rule is fundamental to American democracy.

This was clearly expressed by the men who drafted the Constitution of the United States. One of them, James Madison, said that once the will of the people has been determined, even though the majority was by a single vote, that decision should be held as sacred as if it were unanimous.

The RECORD clearly shows that under existing practices in many States, it is impossible to determine what the will of the majority is.

The original Dirksen proposal to the Senate was, I believe, without question, clearly unconstitutional, because it would have had the Congress overriding Supreme Court decisions—decisions which were not related to the statutes which had been enacted by the Congress, but decisions based upon their interpretation of the Constitution. Certainly, the Senate and the other body do not have any right or any power to override or overrule constitutionally based decisions of the Supreme Court.

The Mansfield-Dirksen substitute is somewhat less brazen and somewhat less open in its challenge to the Court, but in my opinion, if in the Mansfield-Dirksen substitute we move to the point where the legislative branch establishes real power or control over the Court's decisions, at that very point we shall move into the area of the unconstitutional.

If we stay short of that, we remain in the area of making a recommendation and a suggestion to the Supreme Court and the inferior courts as to how they should proceed in this case.

In my judgment there is no "between" ground in this case, unless we were to proceed to amend the Constitution; but short of that, there is no intermediate area between that which is unconstitutional and that which is a mere recommendation on the part of the Congress to the courts in their dealings with the execution of the decision which has been made with regard to reapportionment.

It is my opinion, therefore, that the best approach—an honest and open approach—is that which is proposed in the amendment which the Senator from New York and I have offered. It would express the sense of Congress with regard to proceeding under the Supreme Court decision on reapportionment.

I sincerely hope that Senators will give thought to the distinctions which the Senator from New York made in his remarks earlier today and to the points which I am now making.

I should like to emphasize the point that Senators who were most concerned about the effectiveness of State government and the integrity of States, and who spoke so often of keeping government as close to the people as possible—those who are prone to quote Abraham Lincoln that government should do for the people only what the people cannot do as well for themselves or what they cannot do at all—have in this case an opportunity to eliminate an obstacle to effective State government. This obstacle has prevented the people from doing for themselves what they saw they could do just as well as the Federal Government, but which they have been kept from doing because they do not have equal representation in the lower and upper bodies of State legislatures.

So, let us eliminate that obstacle—an obstacle in the way of the people in the States, an obstacle which keeps them from doing for themselves what they could do, and what they would do if they had reapportionment and proper representation in their State legislature.

To protect the integrity and effectiveness of State governments, to protect the integrity of the Constitution of the United States, to protect the integrity of the Supreme Court, and, along with

that, the integrity of the U.S. Senate, the proposal that the Senator from New York [Mr. JAVITS] and I have offered should be adopted in this body.

Mr. JAVITS. Mr. President, will the Senator yield?

Mr. McCARTHY. I yield.

Mr. JAVITS. I am pleased to have been able to join with the Senator from Minnesota in this effort. There are two approaches to this situation. The first approach is one which, in my judgment, was struck down in 1871 in the case of United States against Klein. It is the approach of the Mansfield-Dirksen amendment—as the Senator calls it—undiluted—that is, without the addition of the clause "highly unusual circumstances"—which perhaps gives the Court an escape mechanism. The other approach is the more condign approach, of depriving the appellate court of jurisdiction entirely, which was the course pursued in the McCardle case, a very old case which predated the Klein case. There is grave doubt in my mind that the Supreme Court would follow the McCardle precedent with respect to pending cases in the Federal courts, even though those pending cases were in the lower courts.

There may be some States—but very few of the 50 States—the apportionment of which has not now been called into question in the Federal courts. Therefore, if the McCardle doctrine, which has been questioned in later cases, were not to stand up, we would again be running the risk of a direct confrontation between the judiciary and Congress in an area in which it is not necessary to have a confrontation. It is my conviction that in the cases which are already pending before the Federal courts, if the Supreme Court would have to regard the Mansfield-Dirksen amendment as more than merely precatory, they would therefore strike it down. The amendment which the Senator from Minnesota and I recommend would best square with existing law, the likelihood of a new decision on this legislation by the Supreme Court, and the substantive result which we have a right to expect from the Court, of crowding the whole situation quite so hard in terms of implementation of the law which the Court has laid down.

Mr. McCARTHY. I believe that this is the best course of action for Congress to take insofar as it would have any bearing on decisions and rulings which have been made with respect to cases in the process of being appealed, and certainly with reference to any recent decisions that might be made with reference to other States. It is my opinion that this is as far as Congress should go in attempting to give direction or to influence the judicial process in this proceeding.

Mr. JAVITS. I thank the Senator for his intercession. The idea of a "sense" resolution was very much the idea of the Senator from Minnesota. I was honored when the Senator felt that I should take the laboring oar in it. I know that it will be regarded as our joint endeavor. I hope it might have some helpful result in resolving the question before Congress. I know the Senator joins me in the realization that it is a real problem that has to be coped with. No matter what should happen to the legislation here, it would be most unfortunate if the Supreme Court allowed the situation to be dealt with quite as hard as some lower courts seem to think it must be.

Mr. McCARTHY. I agree with the views of the Senator from New York, and I am pleased to work with him on this particular bill. I know that the Senator shares with me the conviction that the processes of democracy are not self-operating and that we need to pay continuous attention to the procedures and relationships which exist in our Government among the three branches.

The Senator from New York has joined me in the past—perhaps not in the same kind of joint effort—in trying to protect the integrity of the legislative branch as against the executive branch, and also the integrity of the executive branch as against a challenge from the judicial or legislative branch of the Government. This becomes increasingly more important as we move into many areas in which it is more difficult to draw a line between executive and legislative authority, as in the case of earlier proceedings under the civil rights issue when Congress failed to take action which it should have. In this instance we placed a great burden on the executive branch of the Government. We placed a great burden upon the judicial branch of the Government and asked them to carry out legislative functions, or almost legislative functions, because Congress had failed to act.

The Senator from New York was one of those who pressed hard for the enactment of the civil rights bill to assist the executive branch of the Government in meeting its responsibility in this area, and also to make it easier for the court to carry out its responsibility regarding this problem.

I am glad to join the Senator in drawing the line, under the limited right that Congress has, to give direction on this basis.

Mr. JAVITS. If one wants to be respected, he must give respect. That is why I appreciate the approach which we have both adopted.

I thank the Senator.

Mr. McCARTHY. Mr. President, I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The legislative clerk called the roll, and the following Senators answered to their names:

[No. 548 Leg.]

| | | |
|---|---|---|
| Aiken | Curtis | Inouye |
| Allott | Dirksen | Jackson |
| Anderson | Dodd | Javits |
| Bartlett | Dominick | Johnston |
| Bayh | Douglas | Jordan, N.C. |
| Beall | Eastland | Jordan, Idaho |
| Bennett | Edmondson | Keating |
| Bible | Ellender | Kuchel |
| Boggs | Ervin | Lausche |
| Brewster | Fong | Long, Mo. |
| Burdick | Fulbright | Long, La. |
| Byrd, Va. | Goldwater | Magnuson |
| Byrd, W. Va. | Gore | Mansfield |
| Carlson | Gruening | McCarthy |
| Case | Hart | McClellan |
| Church | Hartke | McGovern |
| Clark | Hayden | McIntyre |
| Cooper | Holland | McNamara |
| Cotton | Hruska | Mechem |
| Metcalf | Prouty | Sparkman |
| Miller | Proxmire | Stennis |
| Monroney | Randolph | Symington |
| Morton | Ribicoff | Talmadge |
| Morse | Robertson | Thurmond |
| Mundt | Russell | Tower |
| Muskie | Salinger | Walters |
| Nelson | Saltonstall | Williams, N.J. |
| Neuberger | Scott | Williams, Del. |
| Pastore | Simpson | Young, N. Dak. |
| Pearson | Smathers | Young, Ohio |
| Pell | Smith | |

The PRESIDING OFFICER. A quorum is present.

## APPOINTMENTS BY THE PRESIDENT PRO TEMPORE

The PRESIDING OFFICER (Mr. SALINGER in the chair). The Chair, on behalf of the President pro tempore, announces the following appointments:

To attend the third United Nations Conference on Peaceful Uses of Atomic Energy at Geneva, August 31 through September 9, 1964: Senators PASTORE, ANDERSON, HICKENLOOPER, and AIKEN, with Senators CHURCH, MCINTYRE, JORDAN of Idaho, and CASE as alternatives.

To attend the British Commonwealth Parliamentary Conference at Jamaica, November 15 through 22, 1964: Senators FULBRIGHT, NELSON, BOGGS, and MILLER.

The Chair, also on behalf of the President pro tempore, announces the following appointments to the Committee on Arrangements for the Abraham Lincoln Second Inaugural Address: Senators DOUGLAS, HARTKE, DIRKSEN, and COOPER.

## MESSAGE FROM THE HOUSE

A message from the House of Representatives, by Mr. Hackney, one of its reading clerks, announced that the House had agreed to the report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 11134) making appropriations for the Departments of State, Justice, and Commerce, the judiciary, and related agencies for the fiscal year ending June 30, 1965, and for other purposes; and that the House receded from its disagreement to the amendment of the Senate numbered 7 to the bill, and concurred therein.

## DEPARTMENTS OF STATE, JUSTICE, AND COMMERCE, THE JUDICIARY, AND RELATED AGENCIES APPROPRIATION BILL, 1965—CONFERENCE REPORT

Mr. McCLELLAN. Mr. President, I submit a report of the committee of conference on the disagreeing votes of the two Houses on the amendments of the Senate to the bill (H.R. 11134) making appropriations for the Departments of State, Justice, and Commerce, the judiciary, and related agencies for the fiscal year ending June 30, 1965, and for other purposes. I ask unanimous consent for the present consideration of the report.

The PRESIDING OFFICER. The report will be read for the information of the Senate.

The legislative clerk read the report.

(For conference report, see House proceedings of Aug. 15, 1964, p. 19167, CONGRESSIONAL RECORD.)