9-17-1974

Congressional Record S. 16861 - Economic Foresight: The First Step Achieved

Mike Mansfield 1903-2001
POWER OF CONGRESS TO IMPEACH AND TRY A PRESIDENT AFTER HE HAS RESIGNED; AND POWER TO CONTINUE A TRIAL OF AN IMPEACHMENT BEGUN IN ONE SESSION AND CARRIED OVER INTO A SUBSEQUENT SESSION OF CONGRESS

Mr. MANSFIELD. Mr. President, on September 17, 1974, I inserted in the Record a memorandum on questions dealing with the power of the Congress to impeach and try a President after he has resigned and the question of continuing a trial of an impeachment begun in one session and carried on into a subsequent session of Congress. The memorandum was prepared by the School of Law of the University of Montana.

I now have an addendum prepared by Gardner Cromwell, professor at the Montana School of Law.

MR. PRESIDENT, I ask unanimous consent that my insertion under date of September 17, 1974, beginning on page S16725 and concluding on page S16728 be reinserted in the Record in its original form and that this addendum be printed in sequence.

There being no objection, the material was ordered to be printed in the Record, as follows:

POWER OF CONGRESS TO IMPEACH AND TRY A PRESIDENT AFTER HE HAS RESIGNED; AND POWER TO CONTINUE A TRIAL OF AN IMPEACHMENT BEGUN IN ONE SESSION AND CARRIED OVER INTO A SUBSEQUENT SESSION OF CONGRESS

Mr. MANSFIELD. Mr. President, on August 4, 1974, during the impeachment proceedings in the House of Representatives, I requested the very able and distinguished law faculty at the University of Montana School of Law, through its dean, Robert E. Sullivan, to consider and provide me and the Senate with advice and counsel concerning two constitutional questions, which at that time confronted the Senate and the Nation. One question dealt with the power of Congress to impeach and try a President after he has resigned and the other related to a continuation of a trial of an impeachment begun in one session and carried over into a subsequent session of Congress.

Dean Sullivan responded to my request and has submitted a memorandum prepared under the direction of Prof. Gardner Cromwell of the University of Montana School of Law.

While the overriding issue of impeachment proceedings has been rendered moot by the acceptance by the House of Representatives of the report of its Committee on the Judiciary, it is my judgment that the work product of this legal research endeavor by the University of Montana is of significance and should be included in the public record. In pursuance of that objective, also, I have forwarded a copy of the memorandum to Senator Howard Cannon, chairman of the Committee on Rules and Administration, asking that he review the conclusions of this memorandum to determine whether any changes in Senate rules might be suggested in view of the points considered.

Moreover, to enable the full Senate, and others interested in these issues, to have the benefit of these views, I ask unanimous consent that the memorandum be printed at this point in the Record, as well as a letter which I have received from Dean Robert E. Sullivan of the School of Law, University of Montana under date of August 22, 1974.

There being no objection, the letter and memorandum were ordered to be printed in the Record, as follows:

University of Montana

Hon. Mike Mansfield, Senate Majority Leader, Senate Office Building, Washington, D.C.

Dear Senator Mansfield: In response to your request of August 4, 1974, I am enclosing a memorandum by Professor Gardner Cromwell of our law faculty. As you may know, Professor Cromwell teaches Constitutional Law and has been a member of our law faculty since 1967. He practiced for a time after graduation from law school and has the reputation of an accomplished legal scholar and a hard-nosed realist.

As the memorandum indicates, there are no definitive answers to the questions pre-
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-mented. Source material is not extensive, but
-thestion of vested beliefs in this case by
-basis of probabilities—conclusions that re
d what a court would do if the
question were decided in the same way.

I appreciate the opportunity to submit this
memorandum to record that the
mbership” and the scope
of the
branches of government:
Initial
characteristics”) for
goal: “legal authority
of the
legislative.

It was
sufficient for the purposes of this
memorandum to record that the
Supreme Court decided that it had the power to
separately construe that provision and to
conclude that the
proportion “is at most a
‘textually demonstrable commitment’ to
Congress to judge a question of qualifications;
expressly forth in the
Constitution. Therefore the
... doctrine does not bar Federal courts
from adjudi-cating
claims.” (Emphasis added.) (395 U.S. at 548)

Most recently, the Supreme Court assumed
jurisdiction in a record suit by
(7/24/74). On appeal was the
District Judge’s order to the President to pro-
duce “certain tapes, memoz-anda, papers,
transcripts, or other writings” allegedly rele-
vant to criminal proceedings brought by the
Special Prosecution. The Supreme Court up-
held that order and the District Judge’s
ruling that the judiciary, not the
President, was the final arbiter of a claim of
executive privilege. The Court rejected the
President’s claim that the doctrine of separation
of powers prevented judicial review of a Presi-
dent’s determination that the privilege apply.
Especially relevant to this heading is the
following language:

“One in the performance of assigned constitu-
tional duties and powers Govern-
ment must initially interpret the Constitu-
tion, and the interpretation of its powers by
branch is derived from branch to
the others. The President’s counsel, as we have
noted, reads the Constitution as providing an
absolute ‘textually demonstrable’ clarity for
all presidential communications. Many deci-
dions of this Court, however, have unequiv-
co-ly stated that the
Barbary
Maddison, 1
(1803), that it is
emphatically the province and duty of the judici-
ary to say what the law is. (Emphasis added.)

One more decision must be discussed under
this heading, F.S. (6) 1971, concerned the
application of certain Senate
rules to action by the
President. The facts were these: the
Senate submitted to the
Senate the nomination of
Smith to the
P.C.C. The Senate confirmed the
nomination, ordered the confirmation con-
firmation be forwarded to the President, and
adjourned (from December 30 to January 5)
all on the same day. On December 22, the
Secretary of the Senate notified the President of
the confirmation. The
President commis-
sioned Smith and named him chairman, and
Smith took the oath and began work.

On January 5, Smith returned, a motion to reconsider the confirmation of
Smith was properly made under Senate rules.

It was" passed, as was the motion to
Presi-
dent to return the original resolution of
confirmation. The President was notified.
He refused to accede to the request on the
ground that Smith had been properly ap-
pointed. Thereafter, the
Senate asked the
district attorney of the
District of Columbia to bring a quo warranto proceeding.
The Supreme Court stated that the sole
question was one of law. Did the
Senate have the power it asserted? The answer to
the question, the
Court said, “depends pri-
marily upon the applicable Senate
rules.” (286 U.S. at 30.)
The Court made plain that
the question concerned the
construction of the
rules, not the
question of whether clearly rec-
ognizing that it had no concern with “wis-
dom or folly,” only power. The significance of the
Smith decision in this heading is em-
phasized in this quotation:

“As the construction to be given to the
rules affects members of a
House or Senate, the
question presented is of ne-
ces-sity a judicial one.” (Emphasis added.)

(286 U.S. at 33.)

This position is significant, too, in a
matter considered under the second
question—whether the power and duty to
take
action and their relation to
impeachment. In the
Smith opin-
ion, following the language quoted above, the
Court stated that it “must give great
weight to the Senate’s present construction
of its own rules,” but it did not con-
clude from making its own interpretation of
the

“A related view was expressed by the
court of Appeals for the District of
Columbia in
den. 346 U.S. 827 (1953): “Though a court can no more enjoin a
congressional
resolution for
constitutional search and seizure than it can enjoin Congress from passing an
unconstitutional bill, it
must, of course, re-
Sincerely yours,
Robert F. Sullivan,
Dean, School of Law

CONSTITUTIONAL RESPONSIBILITY OF CONGRESS TO
PUT ON IMPEACHMENT AND TRIAL REMEDIES
IN A PROCEEDING ONCE COMMENCED OR
AFTER A PERIOD OF APPEAL

QUESTIONS PRESENTED
I. Whether the Congress has power to
impeach and try a President after he has
resigned.
II. Whether the Senate has power to con-
tinue the trial of an impeachment begun in
one Session of Congress to the next
Session.

CONCLUSIONS
I. Probably, if not
II. Probably not.

Preliminary Question: Whether determina-
tions of these questions are subject to judi-
cial review?

Conclusion: Probably.

The preliminary question raises the
issue of the so-called “political questions.” Or, as the
Supreme Court put it, in
question is primarily a function of the separation
of powers.” This memorandum approaches the
questions presented from the viewpoint of the
lawyer, not that of politician or
historian, so most of the materials cited will be
“legal.” Because the questions presented are
unusual (if not unique), there is not much
legal authority available.

The Baker decision cited criteria from
other cases (the Court called them “common
characteristics”) for identifying cases involv-
ing political questions. At p. 217 of 369 U.S., it listed these:

(1) A textually demonstrable constitutional
commitment of the issue to a coordinate
department of government;

(2) An absence of discernible and
manageable standards for resolving it;

(3) The impossibly of deciding without an
impartial determination of a kind clearly
for nonjudicial discretion;

(4) The impossibility of a court’s
under-taking independent resolution without ex-
pressing lack of the respect due coordinate branches of government;

(5) A unique need for unquestioning
adherence to a political decision already
made.

The potential of embarrassment from
multifarious pronouncements by var-
ious departments on one question.

Thereafter, in
Powell v. McCormack, 395 U.S. 486 (1969), the
Court applied the
Baker criteria to Attorney
General’s decision denying the House of the
90th Congress had unconstitutionally
refused to seat him. Because the United States
District Court had dismissed Powell’s plea-
tion “for want of jurisdiction of the subject
matter,” the
Supreme Court considered the
question of justiciability. Particularly, the
Court determined the “sexually demonstra-
table commitment” and the scope of that
commitment. The constitutional texts involved
was that portion of Article I, § 6, which makes
House “judges of the Qualifications of its Own Members.”

It is sufficient for the purposes of this
memorandum to record that the
Supreme Court decided that it had the power to

Mike Mansfield Papers, Series 21, Box 50, Folder 22, Mansfield Library, University of Montana
In a footnote (No. 114) to that sentence appears this:

...in a footnote (No. 114) to that sentence appears this: a judicial body." His reason for making the assertion, however, appears revealed by the context of the sentence. The Senate has "at least a moral obligation" to apply judicial procedures.

In an article entitled Federal Impeachments, 64 U. Penn. L. Rev. 651 (1916) reprinted in Treatise cited supra, Simpson Turner, in writing, "In whole question of the President's power to declare a bill dead by virtue of the Senate's action in adjournment up to the date of the close of Congress, the Senate has 'at least a moral obligation' to apply judicial procedures.

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record of constitutional conventional debate shows that impeachment was intended as a legislative, not judicial, check on the executive; politically speaking, it is a function of the doctrine of separation of powers. Whether the Senate, in conducting trial of an impeachment, follows or adopts “judicial” or “legal” rules procedure, the proceeding itself is, constitutionally speaking, legislative.

Any argument that a Senate sitting in trial of an impeachment, has a life separate and distinct from that of the Congress of which it was a part so that it may continue trial past adjournment of the Congress must fail; it is a function of the Constitution. This is clear from two cases cited supra, the Supreme Court posed the question whether “the Congress by their adjournment” prevented the President from returning the bill which was the subject of the dispute. The Court responded:

“The Congress” did not adjourn. The Senate alone was in recess. The Constitution creates and defines “the Congress.” It consists of “a Senate and House of Representatives.” (Emphasis added.) 302 U.S. at 567.

Adendum to My August 23 Memorandum Concerning “Impeachment.”

As that memorandum noted, IMPEACHMENT: A HANDBOOK, by Prof. Charles L. Black, Jr., of Yale, had not been received by its date. I have since received and read it, and offer the following comments.

There is nothing directly in the HANDBOOK on the questions raised directly in the memorandum. The only utterance even remotely related to the question of Congress’s power to impeach after resignation appears in this sentence in Chapter 2, “Procedures”: “It seems to be optional with the Senate whether to impose the additional penalty of disqualification from office.” (p. 13)

In Chapter 4, entitled “Impeachment and the Courts,” Prof. Black takes a position markedly opposite suggested by Prof. Berger. Black’s discussion, as did that of Berger, concerns the question whether the Supreme Court has power to review a judgment of conviction in a Senate trial of an impeachment. The preliminary question which I posed in the memorandum was different. Whether the Supreme Court has power to review Congressional determinations of its power to impeach, try, and convict after a President has resigned, Black does not treat that question, but there is matter in his answer to his question which I want to call to your attention.

On page 59, Prof. Black writes: “So far as I can find, not one syllable pronounced or written in or around the time of the adoption of the Constitution gives the faintest color to the supposition that the Supreme Court was expected to have anything to do with impeachments, or the trial thereof, or appeals thereon.” (emphasis added) The emphasized word “anything” is an overstatement, because his question is broader than that, and it may be that it is similar to judicial dictum which is broader than the particular case demands. Nevertheless, when (see p. 62) Prof. Black seems to be restating his conclusion, he writes: “... the wide diffusion of this concept—that the courts have no role to fill—makes very plain to all the final responsibility of the Senate, on facts and on law.” Prof. Black emphasized the word “final.” I added the other emphasis.

This language and other in the same chapter relates tangentially to another point made in the memorandum, Prof. Black makes plain his opinion, based on a reading of the Constitution and proceedings in the Convention, that the Senate’s trial of an impeachment is a legislative (not judicial) function. That issue is critical, you will recall, to the question of the power of the Senate to continue a trial once begun past the date of adjournment of the Congress of which it was a part. I conclude by observing that Prof. Black several times repeats a principle which he puts this way on page 55: “The most powerful maxim of constitutional law is that its rules ought to make sense.”