9-23-1974

Congressional Record S. 17196 - Power of Congress to Impeach and Try a President after he has Resigned

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,
Missoula, Mont., August 23, 1974.

Hon. MIKE MANSFIELD,
Senate Majority Leader, Senate Office Building, Washington, D.C.

DEAR SENATOR MANSFIELD: In response to your request of August 7, 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 1957. 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-

sented. Source material is not extensive, but there is sufficient basis to state conclusions on the basis of probabilities—conclusions that reflect what a court would do if the questions were presented for decision.

I appreciate the opportunity to submit this memorandum to you. It enables us to reciprocate in a small way for your extensive and continuing efforts to assist the University of Montana.

Best personal regards.

Sincerely yours,

ROBERT E. SULLIVAN,
Dean, School of Law.

CONSTITUTIONAL RESPONSIBILITY OF CONGRESS TO PURSUE IMPEACHMENT AND TRIAL REMEDIES IN A PROCEEDING ONCE COMMENCED OR AFTER A PRESIDENT RESIGNS

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 continue the trial of an impeachment begun in one Session of Congress into the next Session.

CONCLUSIONS

I. Probably.

II. Probably not.

Preliminary Question: Whether determinations of these questions are subject to judicial review.

Conclusion: Probably.

The preliminary question raises the issue of the justiciability of so-called "political questions." Or, as the Supreme Court put it, in *Baker* v. *Carr*, 369 U.S. 186, 210 (1961): "The nonjusticiability of a political 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 culled criteria from other cases (the Court called them "common characteristics") for identifying cases involving political questions. At p. 217 of 369 U.S., it listed these:

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

(2) A lack of judicially discoverable and manageable standards for resolving it;

(3) The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;

(4) The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;

(5) An unusual need for unquestioning adherence to a political decision already made;

(6) The potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Thereafter, in *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Court applied the *Baker* criteria to Adam Clayton Powell's declaratory judgment suit claiming that the House of the 90th Congress had unconstitutionally refused to seat him. Because the United States District Court had dismissed Powell's petition "for want of jurisdiction of the subject matter," the Supreme Court considered the question of justificiability. Particularly, the Court determined the "textually demonstrable commitment" and the scope of that commitment. The constitutional text involved was that portion of Article I, § 5, which makes the House of Representatives "the Judge 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 separately construe that provision and to conclude that the provision "is at most 'a textually demonstrable commitment' to Congress to judge the qualifications expressly set forth in the Constitution. Therefore, the . . . doctrine does not bar Federal courts from adjudicating petitioner's claims." (Emphasis added.) (395 U.S. at 548.)

Most recently, the Supreme Court assumed jurisdiction in *U.S.* v. *Nixon*, (No 73–1766), 42 L.W. 5237 (7/24/74). On appeal was the District Judge's order to the President to produce "certain tapes, memoranda, papers, transcripts, or other writings" allegedly relevant to criminal proceedings brought by the Special Prosecutor. The Supreme Court upheld 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 President's determination that the privilege applied. Especially relevant to this heading is the following language:

"In the performance of assigned constitutional duties, each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all presidential communications. Many decisions of this Court, however, have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that *'it is emphatically the province and duty of the judicial department to say what the law is.' Id.*, at 177." (Emphasis added.) 42 L.W. at 5243.)

One more decision must be discussed under this heading, *U.S. v. Smith*, 286 U.S. 6 (1931), concerned the application of certain Senate rules to action by the President. The facts were these: The President had transmitted to the Senate the nomination of Smith to the F.P.C. The Senate confirmed the nomination, ordered that the resolution of confirmation be forwarded to the President, and adjourned (from December 20 to January 5) all on the same day. On December 22, the Secretary of the Senate notified the President of the confirmation, the President commissioned Smith and named him chairman, and Smith took the oath and began work.

On January 5, when the Senate returned, a motion to reconsider the confirmation of Smith was properly made under Senate rules. It passed, as did a motion to ask the President 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 appointed. 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 primarily upon the applicable Senate rules." (286 U.S. at 30.) The Court made plain that the question concerned *construction* of the rules, not their constitutionality, clearly recognizing that it had no concern with "wisdom or folly," only power. The significance of the *Smith* decision to this heading is emphased in this quotation:

"As the construction to be given to the rules affects *persons other than members of the Senate*, the question *presented is of necessity a judicial one.*" * (Emphasis added.) (286 U.S. at 33.)

This position is significant, too, to a matter considered under the second question presented—present Senate rules and their relation to impeachment. In the *Smith* opinion, 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 that it was *not* precluded from making its own interpretation of them.

*A related view was expressed by the court of Appeals for the District of Columbia Circuit in *Nelson v. U.S.*, 208 F.2d 505, 513 (1953), *cert. den.* 346 U.S. 827 (1953): "Though a court can no more enjoin a congressional committee from making an unconstitutional search and seizure than it can enjoin Congress from passing an unconstitutional bill [citing *Hearst v. Black*, 87 F.2d 68 (1936)], a court does have the power and duty to deny legal effect to either in an action before it." A similar statement and application appears in *Fischler v. McCarthy*, 117 F. Supp. 643 (D.C.S.D.N.Y. 1954), *aff'd.* 218 F.2d 164 (1954).

Addendum: Somewhat related to the preliminary question is another posed by Raoul Berger in IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS (Harvard, 1973). Chapter III, entitled "Judicial Review," refers to some of the matters discussed under this heading, including *Powell v. McCormack*. Berger recognized that "from Story onward," (including Prof. Herbert Wechsler), the view has been that the Senate "has the last word." But, taking account of constitutional guarantees of individual freedoms, *inter alia*, he wrote:

"Constitutional limits, as *Powell v. McCormack* again reminds us, are subject to judicial enforcement; and I would urge that *judicial review of impeachment is required* to protect the other branches from Congress' arbitrary will." (Emphasis added.) (Berger, IMPEACHMENT, p. 119.)

Irving Brant, IMPEACHMENT: TRIALS AND ERRORS (Knopf, 1973) presents a different argument [pp. 182–197] that, if impeachment in fact amounts to a bill of attainder, the judiciary has power to act.

Bates, Book Review [Berger and Brant books on IMPEACHMENT, 25 Stan. L. Rev. 908, 925 (1973) states: "Berger and Brant have, by their analyses, considerably undermind the traditional view that judicial review of impeachments is unavailable." . . . These authors, almost alone among constitutional scholars, have developed arguments for judicial review that the Court might adopt."

On the other hand, W. W. Willoughby (3 THE CONSTITUTIONAL LAW OF THE UNITED STATES, p. 1551, 1929) asserted flatly: "It is scarcely necessary to say that the proceedings and determinations of the Senate when sitting as a court of impeachment are notsubject to review in any other court." Broderick, *Citizens' Guide to Impeachment of a President: Problem Areas*, 23 Cath. U. L. Rev. 205, 237 (1973) makes the same "assumption," but takes account of Berger's contrary view.

DISCUSSION

I. Whether the Congress has power to impeach and try a President after he has resigned.

There is very little precedent or discussion available. The Associated Press wire carried an item (Spokane, Washington, Spokesman-Review, Sunday, August 11, 1974, p. 3, col. 7) quoting an ACLU demand for impeachment despite resignation, based on the 1876 impeachment of ex-Secretary of War Belknap.

In the most recent of his two timely books [Executive Privilege: A Constitutional Myth (Harvard 1974)], Raoul Berger referred to the Belknap situation. In discussing President Andrew Jackson's refusal to furnish certain material at the request of Congress, Berger wrote:

". . . Jackson was clearly wrong, unless we are to assume that the power to *investigate* executive conduct is cut off by termination of official service." (Emphasis added.) (Berger, Executive Privilege, p. 182.)

In a footnote (No. 114) to that sentence appears this:

". . . The issue was 'squarely raised' in the impeachment of Grant's Secretary of War, W. W. Belknap, and the Senate ruled that 'it had not lost jurisdiction by virtue of Belknap's resignation'; 3 W.W. Willoughby, *The Constitutional Law of the United States*, 1449 (New York, 1929."

As far as it goes, the reference to Willoughby is accurate. But, for the purposes of this memorandum, it is important to record that a footnote (No. 5) to the Willoughby text states that, upon five separate occasions, impeachment proceedings against federal judges were dropped by the House when it was notified that each had resigned.

Belknap was acquitted. A Treatise on Federal Impeachments, Simpson (Scholarly Resources, Inc., 1973; first printed 1916) contains (pp. 203–205) an abridgement of the Belknap impeachment trial, taken from "Proceedings of the Senate sitting for the trial of William W. Belknap, 9 (1876)." It concludes with this sentence: "He was acquitted upon the ground that he had resigned his office as Secretary of War, and his resignation had been accepted by the President a couple of hours before the actual adoption of the articles of impeachment by the House." (Simpson, Treatise, p. 205.)

Brant, Impeachment, *supra*, treats of the Belknap trial in Chapter VIII. He reports that 37 senators voted for conviction (4 short of the two-thirds necessary) and 25 for acquittal. Twenty-two[1] of the latter number gave as their reason that the Senate had no jurisdiction over a civil officer who resigned before he was impeached.

Finally, under this heading, it is emphasized that the last clause of Art. I, § 3, provides not only for removal from office as a judgment in a case of impeachment, but permits "disqualification to hold and enjoy any office of honor, Trust or Profit under the United States." Berger's footnote No. 114 (p. 182), referred to above, cites instances of *requests* by Secretary of the Treasury Wolcott (1800) and Vice President Calhoun (1826) to the House to investigate their respective performances in offices since vacated. Then appears this sentence: "And, if the derelictious warrant, impeachment can follow and result in disqualification to hold office."

II. Whether the Senate has power to continue the trial of an impeachment begun in one Session of Congress into the next Session.

The only flat answer appears in "Jefferson's Manual," reproduced in Rules and Manual United States Senate 1973 (93rd Congress, 1st session—Senate Doc. No. 93–1); "Continuance. An impeachment is not discontinued by the dissolution of Parliament, but may be resumed by the new Parliament T. Ray., 383, 4 Com. Journ., 23 Dec., 1970; Lord's Journ., May 15, 1791; 2 Woods, 618." (Rules and Manual, p. 565). Rule XIII of the Senate's Rules for Impeachment Trials does not speak to the issue, providing that adjournment of the impeachment *trial* does not adjourn the Senate. (Rules and Manual, p. 140.) Likewise, Willoughby's statement is not on the point. He argues that dissolution of the *House*, by analogy to criminal proceedings and the English practice, ought not to terminate the *charges*. (Willoughby, *supra*, § 933, p. 1451.)

To some extent, the answer to the question presented depends upon whether the character of the Senate when trying an impeachment is so altered from that of "legislative body" as to prevent the application of decisions concerning the effect of adjournment. Existing *precedent* relates to the latter. But Willoughby, *supra*, asserts (§ 932, p. 1450) that the "Senate, when trying impeachments, sits not as a legislative but as a judicial body." His reason for making the assertion, however, appears revealed by the next sentence which suggests that the Senate has "at least a moral obligation" to apply judicial procedures.

In an extensive article entitled *Federal Impeachments*, 64 U. Penn. L. Rev. 651 (1916) reprinted in Treatise cited *supra*, Simpson poses the question (pp. 667–676): "In what capacity does the Senate sit upon the trial of an impeachment?" He answers the question, after consideration of historical precedent, thus: "The Senate, then being a court, *or proceeding as if it were*, ..." (Emphasis added.) (p. 674.) Much of the ten pages devoted to discussion of the question relates to the manner in which the Senators, in impeachment trials, have denominated the Senate—as "court" or as "high court of impeachment." But the more telling precedent is this (from p. 668): "The matter came up during the impeachement of President Johnson. It is said in Hinds' *Precedents of the House of Representatives* [Vol. 3, par. 2057 (1907)]:

" 'In 1868, after mature consideration, the Senate decided that it sat for impeachment trials as the Senate and *not as a court*. . . . An anxiety lest the Chief Justice might have a vote seems to have led the Senate to drop the words "High Court of Impeachment" from its rules.' "

It is worth observing that the use of such phrases as "High Court of Impeachment" may ignore the historical fact that the House of Lords has performed *both* legislative and judicial functions. To the very recent past: Press reports of proposals to change the Senate Rules to deprive the Chief Justice of a vote do not affect the analysis which follows.)

On several occasions, the Supreme Court has treated the question of the effect of adjournment of the Congress or the House. There have been two subjects involved—(1) the extent of the power to punish for contempt, and (2) the veto power of the President.

(1) The earliest case was *Anderson v. Dunn*, 6 Wheat, 204 (1821). There, the question was the extent of the power of Congress to imprison for contempt. The Supreme Court ruled that the duration of imprisonment was set by the life of the Congress. For purposes of this heading, the following language is significant:

". . . although the legislative power continues perpetual, the *legislative body ceases to exist on the moment of its adjournment* or periodical dissolution." (Emphasis added.) (6 Wheat, at 231.)

That conclusion was reaffirmed in *Marshall v. Gordon*, 243 U.S. 521, 542 (1916).

Both of those decisions are cited in support of a footnote statement appearing in *Gojack v. U.S.*, 384 U.S. 702, 707 (1965). That case involved an indictment and conviction for contempt of Congress under statute, and the footnote related to an assertion by the United States that there was a "continuing investigation" by a House committee of Communist activities in labor unions. The Court pointed out, in footnote, that there was no record of House authorization of such a "continuing investigation." The Court continued:

"In any event, the authorization of a 'major investigation' by a full Committee must occur during the term of the Congress in which the investigation takes place. *Neither the House of Representatives* nor its committees *are continuing bodies. Cf. Anderson . . .; Marshall. . . .*" (Emphasis added.) (384 U.S. at 707, fn. 4)

(The Court also noted that the House adopted its Rules at the beginning of each Congress. The same reason could be applied to the Senate. The SENATE RULES cited *supra*.)

The consistent pattern shown by constitutional provisions and Court decisions continues in Acts of Congress. For example: 2 U.S.C. § 7 provides: "The Tuesday next after the 1st Monday in November, in every even numbered year, is established as the day for the election, in each of the States and Territories of the United States, of Representatives and Delegates to *the Congress* commencing on the 3d day of January next thereafter. . . ." (Emphasis added.) The provision for adjournment, 2 U.S.C. § 198, recognizes that each Congress ends at the end of an even-numbered year.

(2) The "pocket veto" decisions make clear that the adjournment of a Congress ends its legislative life. The question was extensively considered in *The Pocket Veto Case* (*Okanogan Indians v. U.S.*), 279 U.S. 655 (1928). At issue there was that part of the Constitution which reads as follows:

Art. I, § 7, cl. 2: ". . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law."

The Court decided that the word "adjournment," as used in that provision, was not limited to *final* adjournment. But the opinion specifies the effect of such final adjournment. The Court stated that it was conceded "that the President is necessarily prevented from returning a bill by a final adjournment of the Congress, since *such adjournment terminates the legislative existence* of the Congress. . . ." (Emphasis added.) (279 U.S. at 681.) And the Court concluded:

". . . it follows, in our opinion, . . . that no return can be made to the House when it is not in session as a collective body and its members dispersed." (279 U.S. at 683.)

The opinion also considered at pp. 685–690 an abortive attempt by the Senate in 1868 to provide for return of bills by the President when Congress was not in session. The extensive footnote reproduction of Senate debate shows the opinion of some Senators that the Senate has no life after adjournment.)

The Pocket Veto Case was relied on in *Wright v. U.S.*, 302 U.S. 583 (1937), to determine that a "temporary recess" taken by one House during a session of Congress was not "adjournment." But the Court emphasized the bases of the earlier decision.

The factual difference between the *Pocket Veto Case* and the *Wright* case has received contemporary emphasis. The Great Falls Tribune (Thursday, August 15, 1974, p. 2, col. 7) reported that the United States Court of Appeals (Dist. Col.) had affirmed a District Court holding that President Nixon's "pocket-veto" of the Family Practice of Medicine Act in 1970 could not stand. The press reported that Circuit Judge Tamm wrote that "an *intrasession* adjournment of Congress does not prevent a president from returning a bill he disapproves. . . ." (Emphasis added.) In *Kennedy v. Sampson*, 364 F. Supp. 1075 (D.C.D.C.) 1973), the trial court came to the same conclusion. And the District Judge wrote: "It must be kept in mind that the Supreme Court's language in the *Pocket Veto Case* applied to an *adjournment at the end of a session and not to a short recess during a session*, . . . (p. 1084.)

CONCLUSION

It appears beyond argument that the capacity of a Congress to act as a *legislative* body ends when Congress adjourns. The Constitution, Art. I, § 1, provides: "All *legislative* powers herein granted shall be vested in *a Congress* of the United States which shall consist of *a Senate and House of Representatives*." (Emphasis added.) The provisions empowering House and Senate to function in impeachment appear in Article I, which establishes *legislative* powers.

Without embarking on extensive extra-legal research, one can fairly assert that the

[1] Willoughby, *supra*, gives the figure of "twenty."

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 dinstinct from that of *the Congress* of which it was a part so that it may continue trial past adjournment of *the Congress* must clear that formidable obstacle. In the *Wright* case 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.' Art. I, § 1. *The Senate is not 'the Congress.'* " (Emphasis added.) 302 U.S. at 587.)

OTHER REFERENCES

Fenton, *The Scope of the Impeachment Power*, 65 Nw. U. L. Rev. 719 (1970), does not contain matter helpful to solution of these problems.

Executive Impeachment: Stealing Fire From the Gods, 9 New Eng. L. Rev. 257 (1974), is contained in a bound volume missing from the library.

Prof. Charles Black's book IMPEACHMENT: A HANDBOOK (Yale, 1974), ordered some time ago for Constitutional Law, has not been received from the publisher.

ADDENDUM TO MY AUGUST 23 MEMORANDUM CONCERNING "IMPEACHMENT"

As that memorandum noted, IMPEACHMENT: A HANDBOOK, by Prof. Chadles 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 Surpeme 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 narrower than that, and it may be that it is similar to judicial dictum which is broader than the particular case demands. Nevertheless, when (on 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 53: "The most powerful maxim of constitutional law is that its rules ought to make sense."