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# Senator Proxmire's Questions

On October 30, Senator Proxmire of Wisconsin asked consent to publish in the *Congressional Record* I. F. Stone's article "Agnew's Successor: What Nixon Fears" from the November 1 issue of *The New York Review*. His statement follows:

Mr. President, does the President have the power to terminate by executive fiat a criminal investigation or a prosecution involving himself? If the President commits a crime—and I want to stress the if part of this question—while in office, is he in effect immune from prosecution, because as Chief Executive he has the inherent power to control everything done within the executive branch?

If a court proceeded with a criminal trial of an incumbent President and he was found guilty, would the President have the power to pardon himself?

If a President resigned his office while under investigation, would his successor have the power to terminate the investigation? Would he do so?

Events are moving so swiftly, with scandals and hints of new scandals involving the White House tumbling over one another, that it is difficult and not pleasant to look ahead and try to anticipate new problems. But it is important that we do just that. Congress is now considering the nomination of a new Vice President and it is likely to be considering nominations of a new Attorney General and possibly a new special prosecutor for the Watergate affair in the near future.

On October 5, Robert H. Bork, as Solicitor General, filed a memorandum of law in response to the Vice President's court motion asserting immunity from criminal prosecution unless he was first impeached and removed from office. The Solicitor General properly opposed this motion, but in arguing that the Vice President does not have such immunity he advanced the dubious proposition that the President does.

Mr. Bork stated in his memorandum of law:

The Framers could not have contemplated prosecution of an incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions. And they gave him "Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment," a power that is consistent only with the conclusion that the President must be removed by impeachment and so deprived of the power to pardon, before criminal process can be instituted against him.

The implication of Mr. Bork's position,

if I interpret it correctly, is that the President is immune from prosecution unless impeached and removed from office, because he has "the power to control prosecutions" and he also has the power to grant reprieves and pardons. Therefore, the President could simply shut down a prosecution directed against himself, or if he failed to do so and he was prosecuted and convicted of a crime, pardon himself.

In my judgment, this argument is nonsense. It places the President above the law, so long as he is President, and reads into the Constitution something that is not there.

Mr. Bork, of course, is now the Acting Attorney General and he is in the process of selecting a new special prosecutor to replace the one he fired on orders of the President.

I strongly urge the Senate Judiciary Committee to raise the questions I have posed at the appropriate times, when confirmation is sought for a new Attorney General or a new special prosecutor. I would also hope that similar questions would be put to the Vice President-designate when he testifies in his confirmation hearings. It is important to know at the outset, before Congress votes on his nomination, whether the man who might some day succeed to the Presidency adheres to Mr. Bork's view about Presidential immunity from criminal prosecution.

This line of reasoning would give to the President, in effect, a license to engage in criminal activities. He would have the assurance that he could stop any investigation or prosecution of himself so long as he was in office. The Justice Department would be barred from taking action even if the evidence that crimes were committed was overwhelming.

Members of Congress do not have such immunity, judges do not have such immunity, Cabinet members do not have such immunity, the Vice President does not have such immunity, and I do not believe it was ever intended that the President have such immunity.

I. F. Stone, with his usual perception and insight, explored some of these questions in an article printed in the November 1, 1973 issue of *The New York Review of Books*. I ask unanimous consent to print Mr. Stone's article in the *Record* at the conclusion of my remarks.

There being no objection, the article was ordered to be printed in the *Record* . . .

(The next day, October 31, Senator Proxmire sent letters to the Chairmen of the House and Senate Judiciary Committees and the Senate Rules Committee containing seven questions raised by Mr. Bork's memorandum. He requested that they be put to Gerald Ford during the hearings on his nomination for Vice President.)