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Mr. Nixon's Constitutional Strategy

Out of all the stunning and bewildering developments of the last week, one thing clearly emerges: Mr. Nixon has hit upon a defense strategy that not only could save himself but also Vice President Spiro Agnew and the former top White House officials now under investigation.

The strategy, which has the merit of simplicity, would at one stroke divert the whole mess in Washington from an argument over criminality to one over constitutionality, a far more favorable defense posture from both a legal and political standpoint.

It is all to be found in the White House legal brief filed with federal judge John J. Sirica, which argues that the so-called doctrine of "executive privilege" is so absolute that the courts have no power to force the President to provide a grand jury with tape recordings of his Watergate conversations. The 10,000-word brief maintains that even if those conversations involved details of a criminal plan, Mr. Nixon still has the right to withhold them so as to protect the confidentiality of presidential communications.

But then the brief, curiously, takes up a question that was not even raised by the grand jury in its subpoena of the presidential tapes. The Nixon defense lawyers contended, for the first time ever, that the President could not be prosecuted for any crime until after

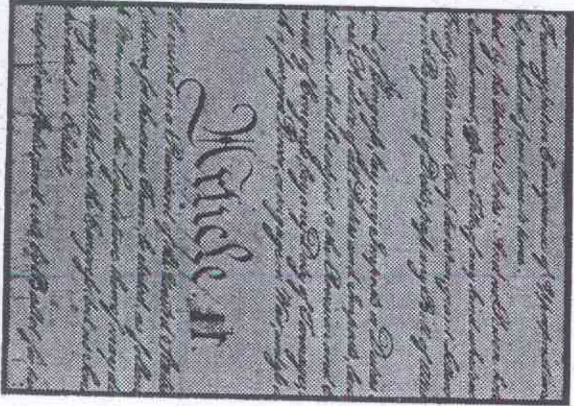
he was impeached, convicted and removed by Congress.

Many constitutional authorities would dispute that, just as they would dispute the assertion of absolute executive privilege. But if Mr. Nixon's view is valid, then, by extension, Mr. Agnew could not be prosecuted either, unless he were first impeached. The impeachment clause in the Constitution makes no distinction between the President and the Vice President. The language is the same for both.

No matter how angry Mr. Nixon may be with Mr. Agnew for involving the administration in another scandal, he has little choice to rescue the Vice President from prosecution if he is going to follow through on his own claim of similar immunity. And there's no doubt that he is in a position to do it.

All Mr. Nixon need do is have Elliot Richardson, the Attorney General, direct the U.S. district attorney in Baltimore, George Beall, a Nixon appointee who has been investigating charges of bribery, extortion and tax fraud against Agnew, to drop the case against the Vice President and, on constitutional grounds, suppress any indictment of him.

Strangely, John Mitchell, who preceded Richardson as Attorney General, several years ago ordered Mr. Beall's predecessor to kill an indictment that both the district attorney and a Baltimore federal grand jury openly



wanted to bring against certain national political figures. This case did not involve any constitutional grounds, but it shows how decisively the Attorney General can intervene.

It is difficult to see how Mr. Nixon could consent to the indictment and trial of the Vice President without seriously compromising his argument before Judge Sirica that the President is immune to prosecution until he has been impeached.

The White House brief also implies

that Mr. Nixon will not yield up the Watergate tapes even if ordered to by the courts, which could easily lead to dismissal of criminal charges against his closest associates, such as H. R. Haldeman and John Ehrlichman, and possibly many others now facing indictment in the Watergate case.

The defendants, it is anticipated, would rightly contend that the tapes and other documents withheld by the President would deprive them of evidence material to their defense, and there are many precedents indicating that the courts would give great weight to this argument. The White House is well aware of this, as shown by its brief, which says:

"It is not the President's view that refusal to produce these tapes will defeat prosecution of any who have betrayed his confidence by committing crimes. . . . But the President has concluded that even if he should be mistaken about this in some particular case, the public interest in a conviction, important though it is, must yield to the public interest in preserving the confidentiality of the President's office."

Nobody has a greater stake than Mr. Nixon in keeping Agnew in office, for who will vote to impeach the President if he were to be succeeded by a Vice President under a cloud that rivals Watergate?