

A Colloquy on the Unresolved Issues

The precedents are slight, the uncertainties legion. But Vice President Spiro Agnew's situation now seems sure to force the resolution of a number of long open constitutional questions. Last week TIME asked six experts in constitutional law and history to discuss together the complex issues and implications of the case. The six: Raoul Berger, 72, Harvard Law School Senior Fellow and authority on impeachment and Executive privilege; Alexander Bickel, 48, Yale

implied privilege that was denied to the Congress by the Constitution. Congressmen "shall in all cases, except treason, felony and breach of the peace, be privileged from arrest" and only during "attendance at the session." That means that they could be arrested for treason and felony—bribery, for example—even during a session. The narrow privilege thus granted to Congress was consciously withheld from the President. Finally, an act of 1790 passed by the first Congress provided that a judge could be indicted for bribery and that he could be disqualified from office if convicted. Now that would have been gratuitous if you had to have an impeachment first.

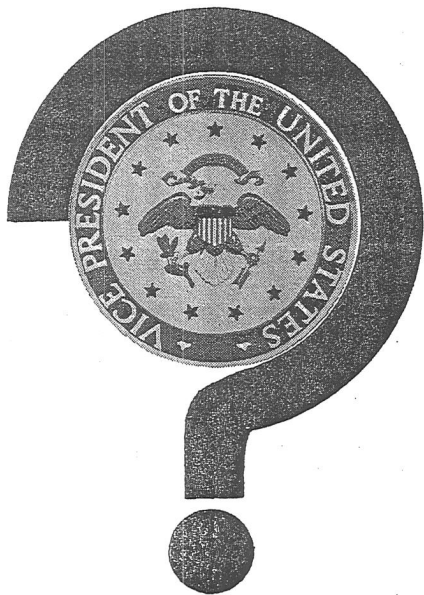
BICKEL: I take the contrary view. I think the President is not indictable before impeachment because he's indispensable. His personal continuity and function in office are indispensable to the existence of the State. I think in the Vice President's case it's not that he's indispensable, it is that he is unavoidable. I mean by that if, while he's on trial or in jail, a vacancy should occur in the presidency, he has to succeed, so long as he's alive. I think it inconceivable that we can contemplate the succession of a man who has been convicted of crime, and I conclude therefore on this simple ground that he is not indictable before impeachment.

KURLAND: My conclusion is that Mr. Berger is right in his answer, but for Mr. Bickel's reasons. I don't think there is much help in the language or the history of the constitutional provisions. I see a clear distinction between the President, who as an indispensable official cannot be taken away from his duties without first being removed from office, and the Vice President, who, I would suggest, is the most dispensable man in the hierarchy of Government. It is quite true that one runs the risk that the President will have to be replaced by a Vice President who is convicted and in jail. That is a possibility that has not been taken care of.

BERGER: I find this whole problem—that there is nobody to keep the store—chimerical. If the President is paralyzed or if he goes to China for three weeks, a Cabinet officer, for example, runs the shop. I cannot buy this mystique that only the President can run the country. If he is a criminal and the grand jury says he needs to be tried, why are the circumstances different from those in case of paralysis?

Does the Vice President's status differ from that of federal judges when it comes to impeachment or indictment?

SCHLESINGER: The historical practice has been, in the case of judges, that indictment can precede impeachment. There are hundreds of judges, so that if



Law School constitutional scholar; Alan Dershowitz, 35, Harvard Law School criminal-law expert; Gerald Gunther, 46, Stanford Law School constitutional specialist; Philip Kurland, 51, University of Chicago constitutional expert and editor of the annual *Supreme Court Review*; and Arthur Schlesinger, 55, City University of New York historian and author of the forthcoming *The Imperial Presidency* and one-time aide to President Kennedy. The moderator was TIME Correspondent James Simon, himself the author of a recent book on the Nixon court, *In His Own Image*. Excerpts from the colloquy:

Must the Vice President be impeached before he can be subjected to any criminal proceedings?

BERGER: I think we ought to start with the constitutional language in Article I, Section 3. "Judgment in cases of impeachment shall not extend further than to removal from office . . . but the party convicted shall nevertheless be liable and subject to indictment, trial" and so forth. This language is pretty plain. They didn't say that an impeachment must precede an indictment. They provided only that an impeachment would not foreclose an indictment. Second, the Vice President is seeking a privilege, an

one judge is indicted, others can take up his work. There is only one President. I would add that if you assume that the President can be indicted and convicted without being impeached, you raise the possibility that he would still have the power to pardon himself. And since the Constitution does not contemplate absurdities, I would guess that the President is in a different position.

So I suppose the problem is whether a Vice President is more like a President or is he more like a judge? Given the ambiguity of the situation, I think a pragmatic resolution would be in terms of the alleged offense. If these were essentially political allegations, that is to say an abuse of political power, I think that the argument would be that it

been part of the legitimate process of handling the matter.

Does it change things if Agnew's alleged misconduct occurred before he became Vice President?

DERSHOWITZ: I would hope that policies would incline toward not allowing a man to gain immunity from prosecution simply by being elected to office.

SCHLESINGER: Both Vice Presidents Colfax and Calhoun, the two cases often cited, involved actions done before they became Vice President. But they don't provide a clear precedent. In the Calhoun case, the House accepted the responsibility to appoint a select committee to investigate charges made

seems to have simply said that it's in the courts, therefore we won't go into it. That seems to be profoundly contrary to the proper role of the House in impeachment proceedings.

DERSHOWITZ: I agree. Just because it's in the courts doesn't mean that it isn't also appropriately in the House of Representatives. My own view is that it should be in both places if both institutions think it's properly before them.

BICKEL: I also think it was an unwise action. The critical point is that the highest national interest lies in the speediest resolution of all this. The House may or may not turn out to have a function that coexists with that of the judiciary. There was nothing to be lost and everything to be gained in appoint-



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Is the dispensable but unavoidable Vice President more like a President or more like a judge?

should go to the House. If the allegations, as they appear to be, are essentially of criminal behavior, that is a strong argument that the case should be handled through the criminal process.

DERSHOWITZ: I think you're missing a very important practical consideration when you talk about the President pardoning himself or the Vice President succeeding to the presidency while in jail. The practicalities are such that if a President or Vice President was to be indicted, and certainly if they were to be convicted, they would be impeached. And one could count on that in analyzing whether or not the Constitution contemplates absurdities. On the other hand, there are enormous practical problems involved in invoking the impeachment process. It takes too long in a case like this. I would like to see the Constitution construed in a way so as to permit the most effective removal from office of somebody charged with a serious crime. And it seems to me the most effective mechanism is indictment.

GUNTHER: The indictment route may be the "cleaner" one, but emphasizing it runs the risk of just construing a major provision into insignificance. The impeachment process is there and is a very central part of the constitutional scheme. Even if the House debated for two years and it dies there, I wouldn't find that intolerable. That would have

against Calhoun some years before. In the Colfax case, it declined to do so. In the Agnew case, not only do the two precedents glance in different directions, but we aren't even clear that the complaints against him do not spill over into his vice presidency.

KURLAND: You have two functions here. One is the function of determining whether the man should continue to hold office; the other is whether he should be subject to conviction for a crime. I think that the House could very possibly decide that a man is disqualified from office because of crimes that he had committed prior to acceding to that office and that remained undiscovered at the time of his election.

BERGER: The conventional learning is that impeachment lies for offenses committed in office. And I will say, gentlemen, that history wouldn't bear you out if you were to say that you could impeach the Vice President for acts performed as Governor of Maryland.

Did the House leadership act properly in turning down Agnew's request for a special hearing of the charges against him?

GUNTHER: The House isn't required to take up charges that are floating around or at the request of the accused. But what troubles me is that the House

ing a select committee and getting a process started that is bound to be lengthy.

BERGER: I disagree. This isn't like the attempt of the White House "plumbers" or the White House staff to corrupt the electoral process. Even if the Vice President committed these acts, whether it was petty graft or major graft, why should Congress take six weeks off to do a job like this that could be done just as well by the courts? Congress has got better fish to fry. So, it seems to me, what the House said was that this affair is being taken care of, we don't feel it calls for us to take hold of it now, we can take hold of it later.

DERSHOWITZ: Plainly, the lawyers for Agnew had in mind a very clever ploy, shifting it into the House and trying to strengthen their argument to get it out of the courts. And the House was right in not falling prey to that tactic. But there was a way of avoiding that: setting up a special committee with some statement indicating that this was in no way intended to pre-empt, to adopt exclusive jurisdiction over the matter.

Have the leaks about the charges against him prejudiced the Vice President's chances for a fair trial?

BICKEL: It is quite ordinary that before trial it is publicly known that you have been accused. What is added to

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that by prior leaks is a drop in the bucket. Leaks are regrettable, but let's not fool ourselves. I think the Vice President's complaints and the Civil Liberties Union's complaints on his behalf are overdone. Most of these objections most of the time are overdone because they assume a somewhat too idealized system of justice.

DERSHOWITZ: It's strange to hear that complaint come from members of this Administration who have been artful masters of the selective leak designed to discredit people like Ellsberg and others, but that shouldn't deny them standing to make the argument. Still, I think the possibility of a fair trial is very substantial. If his lawyers at a trial are able to establish that in fact he can't get as fair a trial as, say, Jack Ruby, then there would be time enough to void the conviction or the indictment.

KURLAND: The accusation made by the Vice President here is, I think, a very serious one: that those in charge of the prosecution have taken it upon themselves to leak this evidence to the press for purposes of prejudicing the trial. I think that if those are the facts he has a very strong case for not permitting the grand jury to go forward at this time.

BICKEL: Well, if I had evidence that there was a conspiracy to leak I would quite agree.

GUNTHER: I also think the Vice President has a very substantial, legitimate gripe. But it ought to be noted that the alternative forum he is seeking in the House is hardly immune from leaks, pressures and adverse publicity.

Does the Supreme Court have a proper role to play in these matters?

BICKEL: It's the kind of thing I think the Supreme Court ought to decide. In that connection, there is a tough problem facing the Attorney General. Suppose he concludes, as I have, that the Vice President is not indictable, or, as Mr. Berger has, that he is indictable? Can he, especially if he reaches the conclusion that he is not indictable, take it upon himself to enforce it, as he has the power to do? I would think that the issue is sufficiently in doubt that he ought to seek a judicial resolution.

DERSHOWITZ: When this is all over, and when we resolve the Agnew situation, I think this is an entirely appropriate situation for constitutional amendment. There is a constitutional blunder here. We ought to put the Constitution in shape to help us resolve these kinds of decisions.

KURLAND: This is not the only blank space in the Constitution. The court has not been hesitant heretofore to fill in blanks, and I expect that it will do so now.

BERGER: Personally, though I've had my differences with my admirable colleagues, that very fact shows that it is an issue for the courts and must be decided by the courts and once and for all be put to rest.