

Can Nixon and Agnew be Tried?

The President is ... not above the law. He is liable to prosecution and punishment in the ordinary course of law for crimes he has committed, but only after he has been impeached, convicted and removed from office.

So reasoned President Nixon's attorneys in arguing last week that the Chief Executive need not give tape recordings of White House conversations to Special Prosecutor Archibald Cox, not even if they contain evidence of a crime. That argument, along with the disclosure that Vice President Agnew was being investigated by a federal grand jury looking into bribery, extortion and conspiracy, prompted legal experts to debate two questions: 1) Is the President's argument that he is immune from prosecution sound? 2) If so, could it be used by Agnew?

No President has ever taken such an extreme position on immunity, but as Chicago Law Professor Philip Kurland points out, none before Nixon has faced the possibility of criminal prosecution. Nor does the Constitution specifically deal with the question.

Nonetheless, several experts interviewed by TIME believe the President's lawyers are on sound legal ground. Explains Yale Professor Alexander M. Bickel: "The President embodies the continuity of the state. The Constitution assumes that there is no moment when

a President is not capable of acting." Since to prosecute or jail a President would break that continuity, Bickel argues that impeachment must come first.

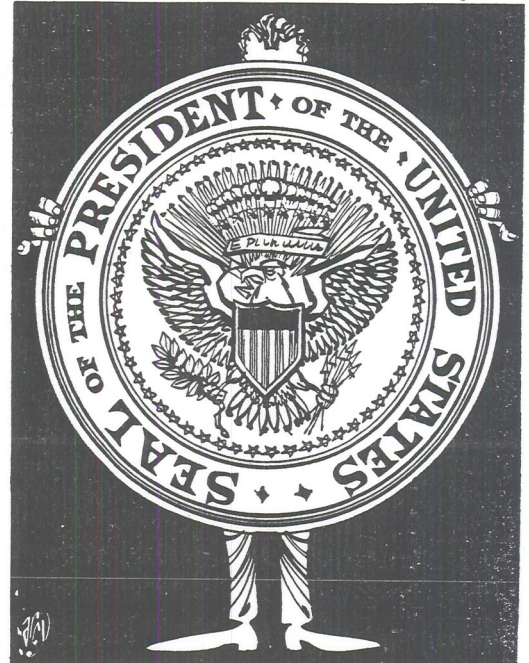
Not all experts share Bickel's opinion. Columbia Law Professor Albert J. Rosenthal argues that a President kept by a trial from performing his duties could be temporarily removed from office as provided by the 25th Amendment. Further, Harvard Law Professor Raoul Berger suggests in his book, *Impeachment: The Constitutional Problems*, that the Constitution's double-jeopardy clause might preclude prosecution for the same acts that caused a President to be removed from office.

There was even less agreement on whether a presidential immunity from prosecution applies to a Vice President. Although three previous Vice Presidents (Aaron Burr, John C. Calhoun and Schuyler Colfax) were threatened with criminal charges, none was either brought to trial or impeached, so there are no clear precedents. Kurland believes that since only the President is indispensable, only he enjoys the privilege of immunity. According to the Constitution, the Vice President's sole duty is to preside over the Senate—and to be ready to succeed the President if necessary. But Bickel argues that immunity also applies to the Vice President. He explains: "If he is indictable and can be sent to jail, he is incapable

of providing the necessary continuity."

On one point, however, Agnew's situation may be clearly different from the President's. Explains Harvard Professor Alan Dershowitz: "He is not being investigated as a Vice President but as a Governor and a private citizen, and there is no special immunity there."

DARCY—NEWSDAY



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