

Agnew Charges Raise Many

For Instance, Must a Vice President Be Impeached

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The obscurity that has plagued the vice presidency throughout history now clouds the legal and constitutional issues surrounding the investigation of Spiro T. Agnew in connection with possible federal crimes.

A nest of unprecedented questions has been uncovered with the disclosure that federal prosecutors are probing possible kickbacks and tax law violations both during the preceding Agnew's time as Vice President.

The principal question dividing the experts is whether a Vice President, while holding office, is subject to criminal prosecution or whether he must first be removed from office by impeachment.

Vice presidents have been so neglected—or so upright—over the years that the experts can point to no historical precedent, let alone a legal precedent, let alone a legal one, for criminal charges against an incumbent.

Even Aaron Burr, whose 1807 treason case has been dusted off for its bearing on attempts to subpoena White House Watergate evidence, got into his trouble after leaving office. Burr was Vice president in 1804 when he killed Alexander Hamilton in a duel, but he was not prosecuted for that.

Like the Watergate subpoena dispute and the question of whether President Nixon can be commanded to appear before grand juries and congressional commit-

tees, the Agnew investigation raises fundamental problems involving the separation of powers and the basic structure of American government.

In theory, it should be easier to indict, try, convict and even imprison an incumbent Vice President than a sitting President, but some scholars feel that the man whose main job is to stand ready when the chief executive falls should enjoy the same immunity—whatever it is—as the President.

There is no question that the Vice President, like the President, the federal judiciary and other federal office holders, is subject to impeachment and removal for "treason, bribery or other high crimes and misdemeanors."

And it is undisputed that this removal from office does not exempt anyone from subsequent criminal prosecution, for the Constitution states that "the party convicted" in the Senate after impeachment by the House "shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

Leading the argument for the right to prosecute first and impeach later is Raoul Berger, the Charles Warren senior fellow at Harvard University law school, who considers both presidential and vice presidential immunity part of a false "mystique of the presidency."

"You have to get used to

the notion that nobody is immune to the law," Berger said yesterday.

Berger argues, as he has in recent articles on presidential immunity, that the Vice President's immunity is no stronger than the immunity of a sitting federal judge, and that the Justice Department took the position that Judge Otto Kerner of the Seventh U.S. Circuit Court of Appeals could be prosecuted without first being impeached.

Kerner's lawyers raised no objection at his trial for bribery (while governor of Illinois) and perjury (after going on the bench), but they are known to be considering making the argument on appeal. Ordinarily, late objections are not considered by higher courts, but challenges to the trial court's basic jurisdiction may be entertained any time, and courts sometimes consider them on their own initiative.

Albert Sacks, Harvard's law dean who is here for the American Bar Association convention, finds the reasons for vice-presidential immunity less compelling than those for the President's but wonders, "What if they put the Vice President in jail" and he can't perform the few constitutional functions that are given to him?

Another Harvard law educator, Paul A. Freund, sees nothing to prevent a prosecution "technically," but wonders whether "practical considerations" should not weigh heavily against it.

The Vice President, who presides over the Senate, "is the only nationally elected officer other than the President himself," Freund pointed out. "It's hard to separate the two, and it's easier to draw the line after the Vice President," he added.

Others said that while the President has numerous constitutional duties that only he can perform, the Vice President's job of presiding over the Senate can be handled by the Senate's President Pro Tempore. Agnew has been on hand to break possible tie votes, but even this has been done only twice since 1969.

If Agnew is viewed as a Senate officer, his immunity diminishes, since sitting senators and representatives have been indicted and their prosecutions approved by the Supreme Court.

If the reason for immunity from prosecution while in office is to enable the executive branch to function properly, what can be done about crimes that were committed before a person assumed one of the top two national offices? Presumably a President or Vice President can't be impeached for prior conduct, but a criminal trial is just as disruptive whenever the crime is said to have occurred.

If there can be no such criminal prosecution, could an officeholder escape punishment altogether if the statute of limitations runs out before he returns to private life? Perhaps the accused could be indicted

Questions

Before Being Indicted?

while in office but tried later, though that might involve the denial of a speedy trial.

One former Justice Department criminal law expert, who asked not to be identified, said perhaps the clock could be stopped on the statute of limitations while the accused is in office, just as it sometimes is stopped while a defendant is out of the country and beyond the court's jurisdiction.

An impeachment, which is similar to an indictment, is the constitutional method of starting the removal process by a majority vote of the House of Representatives. When that happens, the Senate sits to try the case. A two-thirds vote is required to convict, which removes the officeholder and bars

him from future federal positions.

Should the vice presidency become vacant for any reason, the vacancy is filled in accordance with the 25th amendment, titled "Presidential Inability and Succession," which was ratified in 1967. The amendment provides, among other things:

"Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority of both houses of Congress."

Federal law goes on to spell out what happens when both the presidency and the vice presidency are vacant: the Speaker of the House resigns that post and becomes President.