

Only a President
Immune, U.S. Says

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Justice Responds To Agnew

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The Justice Department rejected yesterday Vice President Spiro T. Agnew's contention that he is constitutionally immune from criminal prosecution, arguing in a brief filed in Baltimore Federal Court that only a sitting President stands above the criminal-justice system.

In a 23-page response to a motion filed last week by Agnew's lawyers, the Justice Department also said it would defer to Agnew's own preference and the traditional role of Congress by pausing after a possible indictment of the Vice President to allow the House of Representatives to first impeach him.

In the meantime, Solicitor General Robert H. Bork said in the brief, the Justice Department would continue its special investigation of Agnew since "the statute of limitations with respect to some of the possible illegal activities . . . will run out as early as Oct. 26, 1973." Any suspension of the investigation, Justice said, could result in Agnew and others becoming permanently immune from prosecution because of lapsed statutes.

Agnew was notified Aug. 2 that he is under criminal investigation on allegations that he violated bribery, extortion, conspiracy and tax laws. The case, which is being heard by a special federal grand jury in Baltimore, involves allegations that Agnew received kickbacks from Maryland engineering and architectural firms while governor of the state.

Agnew's lawyers filed a request Sept. 28 in U.S. District Court in Baltimore that the grand jury investigation of the Vice President be halted because Agnew is constitutionally shielded from criminal prosecution unless he is first impeached and removed from office by Congress.

At the same time, Agnew's

See **REPLY, A4, Col. 1**

REPLY, From A1

lawyers contended that the Justice Department has tainted its own case against Agnew by purposely leaking details of the investigation to the press, prejudicing his right to a fair hearing either by the grand jury or at any subsequent trial.

As a result, the Vice President and the Justice Department have become locked in a constitutional struggle that is likely to be settled only by the Supreme Court. Amred with the same weapons—the Constitution's brief references to the impeachment process—the two sides have taken diametrically opposing positions.

In the background looms the legal position President Nixon has staked out in his refusal to turn over the so-called Watergate tapes: that he is immune to any judicial demands that he surrender the tapes.

In its brief, the Justice Department said that if the court rules that Agnew can be investigated, it will "complete the presentation of evidence to the grand jury and await that body's determination of whether to return an indictment."

If an indictment is returned, Justice said, it would wait a "reasonable time" to allow the House to impeach and the Senate to try Agnew, conceding that Congress shares jurisdiction with the Justice Department "over allegations made concerning the Vice President."

In their suit, Agnew's lawyers—Martin London and Jay Topkis of New York, and Judah Best of Washington—echoed Mr. Nixon's argument, calling the Vice President "second only to the President in personifying the national will and dignity."

Moreover, Agnew's lawyers argued that the "nation must not be deprived of his services while he defends himself against an indictment . . ."

The Justice Department, however, rebutted these arguments one by one, citing the Constitution, the 18th century debates of the framers of the Constitution and subsequent court cases to buttress its contention that the President—and only the President—must first be removed from office before he can be indicted.

"Without denigrating the constitutional functions of a vice president—or those of any individual Supreme Court justice or senator, for that matter—they are clearly less crucial to the operations of the executive branch of gov-

ernment than are the functions of the President," Bork wrote.

"Although the office of the vice presidency is of course a high one, it is not indispensable to the orderly operation of government," he added. The Justice brief pointed out that the nation has managed without vice presidents and that one of them, Aaron Burr, served while under indictment in two states.

Moreover, Justice argued that Agnew did not stand alone in the Baltimore investigation and that a successful attempt to block the grand jury probe would also prevent the Justice Department from investigating—and possibly indicting—other targets of the probe.

The investigation of Agnew grew out of a probe of alleged political corruption in Maryland. The special grand jury in Baltimore has already indicted Agnew's successor as

Baltimore County executive, Democrat Dale Anderson, on 43 counts including charges of bribery, extortion, conspiracy and tax fraud. Agnew served as Baltimore County executive from 1962 to 1966 and as governor from 1967 to 1969.

In addition to Agnew and Anderson, other Maryland political figures and a host of businessmen are known to be under investigation. Some of them have been granted a limited form of immunity to testify against Agnew, but continue to face criminal charges.

The Justice Department began first by attacking the constitutional argument presented by Agnew's lawyers that impeachment and removal from office must precede indictment. The Constitution, Justice wrote, meant that to apply only to a president, adding that the framers of the Constitution devoted little discussion to impeachment of a vice president since the creation of that office was historical afterthought.

As for officials other than the president, Justice wrote, there is ample precedent to prove that federal judges—and vice presidents—can be indicted before they are removed from office. The department cited the recent indictment and conviction of U.S. District Judge Otto Kerner in Illinois and the indictment of Aaron Burr for the shooting of Alexander Hamilton in a duel.

"Thus we conclude that considerations derived from the structure of the Constitution itself indicate that only a president possesses immunity from the criminal process prior to impeachment," the Justice Department said.

The department's brief reached back into the 18th

century for some arguments, but pointed also to the imminent deadline of the statute of limitations.

The date cited by Justice as the expiration of some of the statutes—Oct. 26—is about five years after Agnew presided over his last meeting of the Maryland Board of Public Works, the state agency that formally awards most state contracts. Agnew, then a Republican vice presidential candidate, left the campaign trail on Oct. 22, 1968, to return to Annapolis for a meeting of the board.

At that meeting, Agnew, State Comptroller Louis L. Goldstein and State Treasurer John A. Luetkemeyer, awarded nonbid engineering contracts for the then-planned second Chesapeake Bay Bridge and the Baltimore harbor crossing.

The bribery and extortion allegations against Agnew carry a five-year statute of limitations. However, a charge of tax violation carries a six-year statute. The five-year statute on conspiracy can be extended, legal sources say, by an overt act that renews the conspiracy.

Thus, sources say, not all of the applicable statutes in the Agnew case will expire soon.

Agnew lawyers must now respond to the Justice Department's brief next Thursday, with oral arguments scheduled for the next day.