

# JUSTICE DEPT. SAYS AGNEW CAN, LEGALLY, BE INDICTED, WITH HOUSE ACTING LATER

## REPLY TO HIS SUIT

### Government Contends Time Limit Nears on Prosecution

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BALTIMORE, Oct. 5 — The Justice Department argued today that a sitting Vice President can be indicted and tried on criminal charges but said it was willing to give the House of Representatives a chance to impeach Vice President Agnew before trial, should he be indicted by the Federal grand jury investigating him.

This, the Justice Department said, would give Mr. Agnew a

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chance to have "this matter considered in the forum provided by the Congress" and at the same time prevent the statute of limitations from excluding criminal prosecution.

Disputing Mr. Agnew's contention that an incumbent Vice President is immune from criminal prosecution, the Justice Department presented its arguments in a 5,000-word memorandum. It was filed in court here in the name of Solicitor General Robert H. Bork in answer to a suit by Mr. Agnew to block the Federal grand jury investigation here into allegations that he took bribes. The issue could end up in the Supreme Court.

#### Statute of Limitations

The statute of limitations will begin to expire on Oct. 26 on some of the matters the grand jury is investigating, the department said. Unless indictments are returned by then, the Government could be precluded from ever bringing charges, it said.

The department's discussion of the constitutionality of indicting the Vice President apparently reflected a decision by Attorney General Elliot L. Richardson to allow the grand jury to bring charges against Mr. Agnew if it believes the evidence is sufficient.

Previously, Mr. Richardson had allowed United States Attorney George Beall to present evidence about the Vice President to the 22 grand jurors but said he would reserve a decision on whether to allow an indictment.

In its memorandum today,

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the department made clear that the grand jury would decide whether to indict the Vice President, indicating that Mr. Richardson had dissolved his reservation on that point.

On Sept. 28, Mr. Agnew asked the Federal District Court here to halt the grand jury investigation, contending that a sitting Vice President has the same immunity from prosecution as the President.

Mr. Agnew has called the investigation "malicious" and has said that officials in the Justice Department have been leaking information to reporters in an attempt to discredit him.

While the court battle over whether Mr. Agnew can be indicted was being joined, Government prosecutors continued to try to build a case against him.

One of their major proposed witnesses, Jerome B. Wolf, an executive of the J. E. Greiner Engineering Company, conferred with the prosecutors again today.

Mr. Wolf, a former Agnew aide who headed the Maryland State Road Department while Mr. Agnew was Governor of the state, has been granted limited immunity by the Government in a move to force him to testify.

The grand jury did not meet today, but is expected to resume taking testimony about the Vice President next week.

#### 'Special Circumstances'

The Justice Department memorandum said that, because of the "historic independence and vital function" of grand juries, it ordinarily would have sought to have a suit such as Mr. Agnew's dismissed.

"But in the special circumstances of this case, which involves a constitutional issue of utmost importance, we believe it appropriate, in the interest of both the Vice President and the nation, that the court resolve the issue," the department said.

If the courts agree that a Vice President can be indicted and tried, the Government will complete the presentation of evidence to the grand jury, it said.

"Should the grand jury return an indictment, the department will hold the proceedings in abeyance for a reasonable time, if the Vice President consents to a delay, in order to offer the House of Representatives an opportunity to consider the desirability of impeachment proceedings," the Government's memorandum to the court said.

"The department believes that this deference to the House of Representatives at the postindictment stage, though not constitutionally re-

quired, is an appropriate accommodation of the respective interests involved," the memorandum continued. "It reflects a proper comity between the different branches of government, especially in view of the significance of this matter for the nation."

#### President Held Immune

"We also appreciate the fact that the Vice President has expressed a desire to have this matter considered in the forum provided by the Congress."

Last month Mr. Agnew asked the House to investigate the allegations against him, citing as precedent the appointment of a committee to investigate Vice President John C. Calhoun almost 150 years ago.

But Speaker Carl Albert declined to entertain such an idea at this time, pointing out that the matter was before the courts.

In its answer to the Vice President suit, the Justice Department said it agreed that the President himself cannot be indicted and brought to trial while he is in office.

To allow the President to be made to answer criminal charges while trying to run his office could "incapacitate" the Government, the department said.

But, the memorandum went on, "although the office of the Vice-Presidency is of course a high one, it is not indispensable to the orderly operation of government."

#### Never Decided by Court

"There is in fact no comparison between the importance of the Presidency and the Vice-Presidency," it said.

In his suit, Mr. Agnew argued that the Vice-Presidency was the second most important office in the Government and that the Vice President must be ready at all times to assume the office of President, if it became vacant.

Whether a President or a Vice President can be indicted and tried while in office has never been decided by the courts.

But the Justice Department said, "almost all legal commentators agree . . . that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process."

#### Decline to Argue Point

And the department's lawyers said they would not argue this point.

"The framers [of the Constitution] could not have contemplated prosecution of an

incumbent President because they vested in him complete power over the execution of the laws, which includes, of course, the power to control prosecutions," their memorandum said.

In his suit, Mr. Agnew said that his argument that neither the President nor the Vice President can be tried while in office was based on the following sections of the Constitution:

¶Article I, Section 3, Clause 7, which reads: "Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgement and Punishment, according to Law."

¶Article II, Section 4, which reads: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

¶The 12th Amendment, which provides that the Electoral College ballot separately for the President and the Vice President.

#### Agnew's Contention

Mr. Agnew's lawyers said that, if the framers of the Constitution had intended that the Vice President or the President could be indicted and tried before being removed from office through impeachment proceedings, they would have said so.

"The framers' feeling for the nuances of our language was, of course, extraordinary," Mr. Agnew's memorandum said. "They did not use words casually."

In its answer, the Justice Department said that the Vice President's contention "rests heavily on the assumption that even initiation of the process of indictment, trial, and punishment upon conviction, would effect his practical removal from office."

"This assumption is without foundation in history or logic," it said. "We agree that the conviction upon impeachment is the exclusive means for removing a Vice President from office."

"But it is clear from history that a criminal indictment, or even trial and conviction, does not, standing alone, effect the removal of an impeachable Federal officer."

#### Burr Case Recalled

The memorandum noted, for example, that Aaron Burr, who was indicted for murder and for issuing a challenge to a duel while he was Vice President, had continued in office. He was never tried.

The Justice Department said it could even be that a Vice President might be convicted of a crime that Congress would not consider to be grounds for removal from office.

Under the Justice Department's contention, the Vice President could go to jail while retaining his office. And conversely, if he were convicted by the Senate on impeachment charges brought by the House, but were never convicted in a criminal trial, the penalty would be loss of office and the right to hold office again, but not imprisonment.