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Experts' Opinions Differ On Impeachment, Indictment

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Impeachment, Thomas Jefferson once complained, "is not even a scarecrow." Woodrow Wilson called it "little more than an empty menace."

Designed as a guarantee against the misconduct of public men, it is also the only method prescribed by the Constitution for ousting a President, a Vice President or any "civil officers of the United States" otherwise entrenched in their jobs.

Now it is being raised as a roadblock to the separate federal grand jury investigations swirling about the nation's two highest officers. According to President Nixon's lawyers, only Congress can hold him accountable while he remains in the White House.

"... There is only one court to which the President is answerable for any supposed dereliction of duty," Mr. Nixon's chief constitutional lawyer, Charles Alan Wright, asserted at a hearing here last week, "and that is a court of impeachment."

Vice President Spiro T. Agnew's lawyers are reportedly of the same persuasion. And Attorney General Elliot L. Richardson, who has the burden of what to do with the allegations of bribery against Agnew, is clearly considering the same argument.

If the evidence against Agnew seems solid enough for presentation to a grand jury, Richardson has said, he would still have to confront the overriding legal issue of whether a Vice President can be indicted without first being impeached.

The Justice Department—in fact, Mr. Nixon's Justice Department—has already taken a stand on that point, at least in the eyes of some legal scholars.

Just a few months before the Watergate scandal broke, on Dec. 15, 1971, Judge Otto Kerner of the U.S. Circuit Court of Appeals in Chicago was indicted for bribery, tax evasion, fraud and conspiracy dating back to his seven-year term as Democratic governor of Illinois.

Still a "civil officer" under a lifetime judicial appointment that he has not relinquished, Kerner was convicted in February and subsequently sentenced to

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three years in prison. The White House was so pleased that then-presidential adviser John D. Ehrlichman, riding aboard Air Force One, paused to phone mid-air congratulations to the government prosecutor in the case the day after the jury returned its verdict.

If judges can be indicted and convicted in a court of law, why not a Vice President, or even a President?

"The Constitution says they're all on a par," emphasizes Raoul Berger, an outspoken Harvard Law School scholar and one of the nation's leading authorities on both impeachment and executive privilege. "They can all be impeached. They can all be indicted without being impeachment and executive privilege. "They can all be impeached. They can all be indicted. And they can be indicted without being impeached. All the Constitution says is that you can do both without running into problems of double jeopardy."

The controversy, however, is far from settled. After assigning to the House "the sole power of impeachment" and to the Senate "the sole power to try all impeachments" — much in the manner of criminal indictment and trial — the Constitution says:

"Judgment 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, judgment and punishment, according to law."

Alexander Hamilton thought that was plain enough. The author of more than half of the Federalist Papers — the famous essays that appeared in the New York press in 1787-88 to urge the Constitution's ratification — Hamilton wrote repeatedly in terms that put impeachment first.

The President, Hamilton said in Federalist No. 69, would not only be liable to impeachment, but upon conviction, "would afterwards be liable to prosecution and punishment in the ordinary course of law." Under the Constitution, Hamilton wrote again in Federalist No. 77, the President is subject not only to "dismission from office (and) incapacity to serve in any other," but also to "subsequent prosecution in the common course of law."

Not surprisingly, the White House, in contesting Watergate Special Prosecutor Archibald Cox's grand jury subpoena for Mr. Nixon's taped conversations about the Watergate scandal, cited Hamilton first of all as authority for its claim of presidential immunity from criminal proceedings.

But if Hamilton is a White House favorite, he is also becoming Otto Kerner's. After his indictment, the judge and his lawyers considered the gambit of insisting on impeachment first, but only briefly.

"Kerner said, 'God, no'" recalls his chief defense attorney, Paul R. Connolly. "He didn't want to subject himself to a political body. He felt a jury would find him not guilty."

As a result, Connolly says, the issue wasn't even raised in the trial court. But Kerner, who voluntarily stopped drawing his $42,500-a-year salary when he was found guilty, is appealing his conviction now. And he plans to argue, among other points, that impeachment should have come first with him, too. Alexander Hamilton, after all, drew no distinction between presidents and judges.

Impeachment, Hamilton wrote in Federalist No. 65, is a guarantee against "the misconduct of public men" in the government generally. All of them, he suggested, "after having been subjected to a perpetual ostracism" by impeachment "will still be liable to prosecution and punishment in the ordinary course of law."

According to Berger, however, Hamilton was far from infallible. "On impeachment, he spoke loosely," Berger feels. As Chief Justice John Marshall said, we must not follow him when to do that would lead us from the Constitution.

"The Constitution, first and last, speaks for itself," Berger, author of "Impeachment: the Constitutional Problems," said in a telephone interview. "And there's nothing in it which reflects Hamilton's meaning.

"The Constitution says that impeachment shall not be a bar to subsequent indictment. All it says is that you cannot plead double jeopardy just because you have been impeached first. You have to stand the Constitution on its head," Berger exclaimed, "to say that, therefore you must impeach before you indict."

Kerner, moreover, is not the first federal judge ever indicted. In March of 1941, senior Judge John Warren Davis of the Third U.S. Circuit Court of Appeals was accused by a federal grand jury in Philadelphia of obstructing justice by accepting payoffs for favorable rulings. He went through two trials that year, but both ended inconclusively with hung juries.

Davis had resigned as an active judge in April of 1939, but he was still a member of the federal bench

with full salary and pension rights until Attorney General Francis Biddle asked Congress on Nov. 8, 1941—after the two criminal court trials—to impeach him. Davis blocked the move with a complete resignation, waiving both retirement and pension rights.

Other cases involved senior Judge Martin T. Manton of the Second U.S. Circuit Court of Appeals in New York in 1939 and U.S. District Judge Albert W. Johnson of Lewisburg, Pa., in 1945.

Widely considered the most prestigious on the federal bench next to the justices of the Supreme Court, Manton was accused of widespread corruption on Jan. 29, 1939, in a letter that crusading Republican prosecutor Thomas E. Dewey of New York sent to the House Judiciary Committee.

Manton, a Democrat, sent his resignation to the White House the next day, protesting his innocence and apparently holding on to some of the prere quisites of his lifetime appointment. He said he simply wanted to avoid a controversy that might weaken public confidence in the courts. In turn, Rep. Hatton Sumners (D-Tex.), chairman of the House Judiciary Committee, said he was not inclined to bother with impeachment simply to make sure that Manton never held office again.

With the government still under pressure from Dewey, however, a federal grand jury was impaneled. Charged with obstructing justice, he was convicted of taking $186,000 in bribes and loans from litigants and sentenced to two years in prison, all within six months of Dewey's letter. The Supreme Court refused to hear Manton's appeal.

Six years later, Judge Johnson found himself under investigation by the House Judiciary Committee and a federal grand jury at the same time. He resigned in July of 1945, the day after a tough grilling on Capitol Hill, and renounced all his rights and privileges. Johnson was indicted later in the year for conspiracy to obstruct justice, but was finally acquitted in 1947 when two of his co-defendants refused to repeat testimony they had given the grand jury.

In the meantime, the judge had also changed his mind about renouncing all "honor, trust or profit" and demanded his lifetime $10,000-a-year pension. It took an act of Congress to deny it to him.

Washington lawyer Joseph Borkin, a student of impeachment and author of a book on the Manton, Davis and Johnson cases, "The Corrupt Judge," says it is settled by now that judges can be indicted without being impeached. And like Raoul Berger, he feels that Presidents and Vice Presidents are subject to the same rigors.

"The Constitution puts them all together in the impeachment clause," Borkin says. It says, 'The President, the 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 or Misdemeanors.' If any of them can be indicted first, they all can."

As Borkin sees it, "the guiding light is simply 'equal justice under law.' A President and a pauper ought to be on the same plane. He may be first, but he's first among equals. Otherwise, we're headed for dictatorship."

The debate is thickest on that score. Mr. Nixon's lawyers have made pointedly plain that their claim of immunity from criminal process extends to the President alone. They have reportedly given a chilly reception to suggestions from Agnew's attorneys that they join in common defense.

"We are very confident in our view about the President," says Wright, a constitutional lawyer from Texas and Mr. Nixon's chief strategist in the Watergate case. "We do not know whether the same view holds for the Vice President and other civil officers."

Other lawyers and legal scholors think that the President has an excellent argument and the Vice President, a very good one.

"The question turns on whether the nature of the President's office and of the Vice President's office requires that they always be filled," says Yale law professor Alexander M. Bickel, a consultant to the Senate Watergate committee. "I think it's clear that for the President, you have to have impeachment before indictment because the system requires absolute continuity."

Bickel concedes that impeachment proceedings would paralyze the White House almost as much as a criminal trial. But, he says, "the Constitution provides for impeachment, and there the defendant doesn't have to be present."

The Vice President, Bickel acknowledges, "has no functions that make him indispensable. But if he's indictable, he's punishable. He could end up in jail." In Bickel's view, both the presidency and the vice presidency "are unique. You can't do without a President or a Vice President."

A former assistant attorney general under Mr. Nixon, Roger C. Cramton, now dean of the Cornell Law School, thinks the President ought to end the whole debate by turning in his resignation.

Dismayed at Mr. Nixon's "self-serving and unpersuasive" resort to executive privilege in withholding the Watergate tapes, Cramton feels the controversy over the President's alleged involvement in the Watergate cover-up almost irrelevant by now.

"The evidence is contradictory," Cramton says, "but it's almost as damaging as if he didn't know. In any event, he ought to resign."

That said, Cramton thinks that "impeachment has to precede indictment" if sufficient evidence should surface concerning the President or Vice President—even though it would be "logically consistent" to treat them in the same fashion as judges.

"Judges don't fill the same functions that they do," Cramton said. "I think history and tradition are more important than logical consistency here. I agree with (Assistant Attorney General) Henry Petersen when he testified before the Senate Watergate committee this month. He said he told the President, 'I come up with enough evidence on you, I'm going to waltz it over to the House of Representatives."

Still another law school professor saw no reason for such solicitude for the Vice President, however. "I can think of fewer reasons why he should have to be impeached first and not a judge," he said. "He's just a figurehead anyway." But with the President, he suggested, impeachment might be the "responsible" course to take even if an indictment were "legally permissible."

The suggestion reflects an etiquette that at least one other President, Andrew Johnson, would not have appreciated. Impeachment was no "empty menace" for him in his bitter fight with Congress over Reconstruction. Johnson was more than anxious to have it settled in the courts. So was Judge Kerner, at least until he was convicted. For those involved, from presidents to judges, the question seems to turn not on the Constitution so much as practical politics, real or imagined.

Still to be heard from is Watergate Special Prosecutor Archibald Cox who seemed to be deliberately holding his tongue in U.S. District Court here the other day when Mr. Nixon's lawyers kept insisting they were in the wrong forum. Cox, who offered not a word in rebuttal on the impeachment issue, had said in June that the question of whether President could be indicted first would be studied, but his office flatly refuses to comment on the research, except to say that it needs "more study."

Cox is evidently hopefcl that his demand for the tapes of the President's conversations about the Watergate scandal can be decided on narrower grounds, such as their unchallenged relevance to the sworn testimony of others under investigation, from former presidential advisers H. R. Haldeman and John D. Ehrlichman to ousted White House counsel John W. Dean III. The President himself stands in no immediate danger of either impeachment or indictment.

By all accounts, however, the question is much more acute for Vice President Agnew. He has denounced the kickback allegations involveing him as ' damned lies But if Attorney General Richardson concludes otherwise, lawyers on both sides of the impeachment vs. indictment issue agree, he will have to send the evidence either to the federal grand jury waiting for it in Baltimore o rto the House of Representatives, which hasn't impeached anyone in 37 years. After impeachment, a U.S. District Court judge, Halsted L. Ritter, was removed from office following Senate action in April, 1936.