

# Nixon's Immunity Backed

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The Justice Department expressed the view yesterday that President Nixon is immune from criminal prosecution as long as he remains in the White House.

It took the stand that the President, unlike other civil officers up to and including the Vice President, is indispensable to the operations of government.

As a result, the department said in a 23-page memo on the highly sensitive issue, "an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process."

White House lawyers have been relying heavily on that contention in claiming immunity from a grand jury subpoena for Mr. Nixon's secret Watergate tape recordings.

The Justice Department, however, disavowed any suggestion that it was taking a stand on the controversy over disclosure of the tapes.

In asserting presidential immunity from "the criminal process," Justice Department spokesman Horace Webb said in response to an inquiry, "We are speaking only of indictment and trial... not a subpoena."

"This has nothing to do with the tapes peripherally, sideways, upside down or backwards," Webb said of the legal brief which was addressed primarily to the federal grand jury investigation in Baltimore of Vice President Agnew.

The Constitution says simply that the President, the Vice President and "all civil officers of the United States" alike "and subject to impeachment for high crimes and misdemeanors, "but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment, according to law."

Some legal scholars have contended that this means only that impeachment shall not be a bar to subsequent criminal trial—and not that

impeachment must come first. Since federal judges and even a Vice President (Aaron Burr) have been indicted while in office, these scholars argue, a sitting President can also be subjected to criminal prosecution.

The Justice Department disagreed, siding with historians and lawyers who maintain that the President occupies a unique position that must not be hampered by indictment and trial in the courts.

The framers of the Constitution, Solicitor General Robert H. Bork argued in yesterday's brief, assumed that the President alone "would not be subject to criminal process" because of "the crucial nature of his executive powers... They assumed that the nation's chief executive, responsible as no other single officer is for the affairs of the United States, would not be taken from his duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate."

Besides citing the President's constitutional powers—from serving as commander-in-chief to executing the laws—the Justice Department lawyers also relied strongly on the recently adopted 25th Amendment which provides for the replacement of the President in the event of his temporary disability.

"This is recognition," the brief stated, "that the President is the only officer whose temporary disability while in office incapacitates an entire branch of government. The Constitution makes no provision, because none is needed, for such disability of a Vice President, a judge, a legislator or any subordinate executive branch officer."

Mr. Nixon himself stands in no immediate danger of impeachment or indictment, but in the publicly expressed view of the Senate Watergate committee, inspection of the President's secret Watergate tapes could change that outlook.

Stressing the allegations of former White House counsel John W. Dean III against the President, the committee's lawyers have said in one of their court pleadings for the tapes:

"If Dean is believed, the President may be guilty of several crimes, including obstruction of a criminal investigation, misprision of a felony, conspiracy to commit an offense or to defraud the United States, and unlawfully influencing a witness."

In effect, the Justice Department brief said that the President would have to be

impeached first, even if such charges were firmly grounded.

Watergate Special Prosecutor Archibald Cox, who is seeking Mr. Nixon's tapes for the Watergate grand jury here, said in June that he was also studying the question of whether a sitting President could be indicted, but he has so far refused to commit himself on the issue.

Aspokesman for Cox said yesterday that the special prosecutor would have "no comment" on the Justice Department contention that impeachment must come first.