

Excerpts From Justice Department Memorandum

Special to The New York Times

BALTIMORE, Oct. 5—Following are excerpts from a Justice Department memorandum filed by Solicitor General Robert H. Bork in response to Vice President Agnew's move to block a grand jury investigation of the Vice President:

The motion by the Vice President poses a grave and unresolved constitutional issue: Whether the Vice President of the United States is subject to Federal grand jury investigation and possible indictment and trial while still in office.

Due to the historic independence and vital function of the grand jury, motions to interfere with or restrict its investigations have traditionally met with disfavor. Thus in ordinary circumstances we would oppose the litigious interference with grand jury proceedings without regard to the underlying merits of any asserted claim of immunity. 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 at this stage of the proceedings.

Counsel for the Vice President have ably advanced arguments that the Constitution prohibits the investigation and indictment of an incumbent Vice President. We acknowledge the weight of their contentions. In order that judicial resolution of the issues may be fully informed, however, we wish to submit considerations that suggest a different conclusion, that the Congress and the judiciary possess concurrent jurisdiction over allegations made concerning the Vice President.

This makes it appropriate that the Department of Justice state now its intended procedure should the court conclude that an incumbent Vice President is amenable to Federal jurisdiction prior to removal from office.

The United States Attorney will, in that event, complete the presentation of evidence to the grand jury and await that body's determination of whether to return an indictment. 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.

Would Defer to House

We note that the Speaker of the House, Representative Carl Albert, though declining to take action at this stage, has not foreclosed the possibility that he might recommend House action at a subsequent stage.

The department believes that this deference to the House of Representatives at the postindictment stage, though not constitutionally required, in an appropriate accommodation of the respective interests involved. It reflects a proper comity between the different branches of government, especially in view of the significance of this matter for the nation. 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. The issuance of an indictment, if any, would, in the meantime, toll [annul] the statute of limitations and preserve the matter of subsequent judicial resolution.

We will first state the posture of this matter and then offer to the court considerations based upon the Constitution's text, history, and rationale which indicate that all civil officers of the United States other than the President are amenable to the Federal criminal process either before or after the conclusion of impeachment proceedings.

A grand jury in this district, empaneled Dec. 5, 1972, is currently conducting an investigation of possible violations by Spiro T. Agnew, Vice President of the United States, and others of certain provisions of the United States Criminal Code, including 18 U.S.C. 1951, 1952 and 371, and certain criminal provisions of the Internal Revenue Code of 1954. This investigation is now well advanced and the grand jury is in the process of receiving evidence.

The Vice President has made to enjoin "the grand jury from conducting any investigation looking to his possible indictment . . . and from issuing any indictment, presentment or any other charge of statement pertaining to [him]." The Vice President has further moved "to enjoin the Attorney General of the United States, the United States Attorney for the District of Maryland and all officials of the United States Department of Justice from presenting to the grand jury any testimony, documents, or other materials looking to possible indictment of [him] and from discussing to any person such testimony, document or materials."

The Vice President's motion is based on two contentions:

1. That "the Constitution forbids that the Vice President be indicted or tried in any criminal court," and
2. That "officials of the prosecutorial are and have engaged in a steady campaign of statements to the press which could have no purpose and effect other than to prejudice any grand or petit jury hearing evidence relating to the Vice President."

The text of the Constitution and historic practice under it do not support a broad immunity for civil officers prior to removal.

Analysis of the Constitution's text indicates that no general immunity from the criminal process exists for civil officers who are subject to impeachment.

A

The only explicit immunity in the Constitution is the limited immunity granted Congressmen.

The Constitution provides no explicit immunity from criminal sanctions for any civil officer. The only express immunity in the entire document is found in Article I, Section 6, which provides:

"The Senators and Representatives . . . shall in all cases, except treason, felony and breach of the peace, be

privileged from arrest during their attendance at the session of their respective Houses, and in going to and returning from the same."

Since the framers knew how to, and did, spell out immunity, the natural inference is that no immunity exists where none is mentioned.

The framers of the Constitution did not debate the question whether impeachment generally must precede indictment. Their assumption that the President would not be subject to criminal process was based on the crucial nature of his executive powers. Moreover, the debates concerning the impeachment clause itself related almost exclusively to the Presidency.

The impeachment clause was expanded to cover the Vice President and other civil officers only toward the very end of the convention. Indeed creation of the office of the Vice-Presidency itself came in the closing days of the Constitutional Convention. Thus none of the general impeachment debates addressed or considered the particular nature of the powers of the Vice President or other civil officers. Certainly nothing in the debates suggests that the immunity contemplated for the President would extend to any lesser officer.

B

As it applies to civil officers other than the President, the principal operative effect of Article I, Section 3, Clause 7, is solely the preclusion of pleas of double jeopardy in criminal prosecutions following the convictions upon impeachments. The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers. There is substantial reason, embedded not only in the constitutional framework but in the exigencies of government, for distinguishing in this regard between the President and all lesser officers including the Vice President.

Notwithstanding the paucity of debate or contemporaneous commentary on the issue, it is clear that the framers and their contemporaries understood that lesser impeachable officers are subject to criminal process.

The sole purpose of the caveat in Article I, Section 3, that the party convicted upon impeachment may nevertheless be punished criminally, is to preclude the argument that the doctrine of double jeopardy saves the offender from the second trial.

Because the two processes have different objectives, the considerations relevant to one may not be relevant to the other. For that reason, neither conviction nor acquittal in one trial, though it may be persuasive, need automatically determine the result in the other trial. To take an obvious example, a civil officer found not guilty by reason of insanity in a criminal trial could certainly be impeached nonetheless.

Johnson Trial Cited

The argument advanced by counsel for the Vice President, which insists that only a party actually convicted upon impeachment may be tried criminally, would tie the two processes together in a man-

ner not contemplated by the Constitution. Impeachment trials, as that of President Andrew Johnson reminds us, may sometimes be influenced by political passions and interests that would only be rigorously excluded from a criminal trial. Or somewhat more than one-third of the Senate might conclude that a particular offense, though properly punishable in the courts, did not warrant conviction on impeachment.

Hence, if Article I, Section 3, Clause 7 was read to mean that no one not convicted upon impeachment could be tried criminally, the failure of the House to vote an impeachment, or the failure of the impeachment in the Senate, could confer upon a civil officer accused complete and—or the statute of limitations permitted to run—permanent immunity from criminal prosecution however plain his guilt. There is not such requirement in the Constitution or in reason. To adopt that view would give the Congress the power to pardon by acquittal or even by mere inaction, since the officer would never be a "party convicted" upon impeachment, even though the Constitution lodges the power to grant clemency exclusively in the President.

C

Article II, Section 4 provides:

"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 Vice President's contention that he is immune from criminal process while in office rests heavily on the assumption that the initiation of the process of indictment, trial, and punishment upon conviction, would effect his practical removal from office in a manner violative

of the exclusivity of the impeachment power. This assumption is without foundation in history or logic.

We agree that the conviction upon impeachment is exclusive means for removing a Vice President from office. Although no non-elective civil officers in the executive branch may be dismissed from office by the President, and Senators and Representatives may be expelled by their respective houses, historically the President, Vice President, and Federal judges have been removable from office only by impeachment. 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.

As counsel for the Vice President point out, one of his predecessors, Aaron Burr, was subject to simultaneous indictment in two states while in office, yet he continued to exercise his constitutional responsibilities until the expiration of his term.

This is not to say that trial and punishment would not interfere in some degree with an officer's exercise of his public duties, although, as the case of Aaron Burr illustrates, mere indictment standing alone apparently does not seriously hinder full exercise of the Vice-Presidency.

But the relationship between trial and punishment, on the one hand, and the actual removal from office, on the other, is far from automatic. Whether conviction of and imprisonment for minor offenses must lead to removal on conviction or impeachment therefore depends, in any given case, on the sound judgment of the Congress and the President's exercise of his pardoning power. Certainly it is clear that criminal indictment, trial, and even conviction of a Vice President would not, ipso facto, cause his removal; subjection of a Vice President to the criminal process therefore does not violate the exclusivity of impeachment power as a means of his removal from office.

Operation of Government

The real question unlying the issue of whether indictment of any particular civil officer can precede conviction upon impeachment—and it is constitutional in every sense because it goes to the heart of the operation of government—is whether a governmental function would be seriously impaired if a particular civil officer were liable to indictment before being tried on impeachment. The answer to that question must necessarily vary with the nature and functions of the office involved.

Almost all legal commentators agree, on the other hand, that an incumbent President must be removed from office through conviction upon an impeachment before being subject to the criminal process. Indeed, counsel for the Vice President takes this position, so it is not in dispute.

Without in any way 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 government than are the functions of the President. Although the office of the Vice-Presidency is of course a high one, it is not indispensable to the orderly operation of government.

There have been many occasions in our history when the nation lacked a Vice President, and yet suffered no ill consequences. And at least one Vice President successfully fulfilled the responsibilities of his office while under indictment in two states. There is, in fact, no comparison between the importance of the Presidency and the Vice-Presidency.

The inference that only the Vice President is immune from indictment and trial prior to removal of office also arises from an examination of other structural features of the Constitution. The framers 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 (Article I, Section 3). And then they gave him "power to grant reprieves and pardons for offenses against the United States, excepting cases of impeachment" (Article I, Section 2, Clause 1), a power that is consistent only with the conclusion that the President must be removed by impeachment, and so deprived of the power to pardon, before criminal process can be instituted against him.

A Vice President, of course, has no power either to control the prosecutions or to grant pardons. The functions of the Vice-Presidency are thus not at all inconsistent with the conclusion that an incumbent may be prosecuted and convicted while still in office.