

Experts Vote Agnew's Stand

By Bill Richards

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The crucial question of whether a sitting vice president is subject to criminal indictment, as any other lower government official would be, is likely to be decided against Spiro T. Agnew, according to a sampling of constitutional experts interviewed this week.

Of a half-dozen constitutional scholars interviewed yesterday, only one, Yale Law School Prof. Alexander Bickel, said that a strong possibility exists that the Vice President's case for nonimpeachability rests on constitutional grounds.

Other constitutional experts, however, said that the major points in the Vice President's brief—that Agnew is protected by the Constitution from impeachment and that his position is so important that indictment before impeachment would affect the running of the government—are not sufficiently strong to prevent a decision against him.

The most persuasive point in the Vice President's favor, Bickel said, is the inevitability of his succession should the presidency suddenly become vacant.

"He can succeed at any moment and there's no way we can avoid this succession," Bickel said. "If the moment comes when there's suddenly a vacancy the Vice President becomes automatically the president. You could find yourself with a vice president in jail and his

aides bringing in the little hydrogen bomb black box. It's unthinkable.

"It's a risk which is admittedly minor but it would be horrible if it ever materialized and the dice have come up with so many thousand-to-one shots in recent months that I just wouldn't want another one."

Bickel's argument is not one that was made strongly by Agnew's attorneys in their brief filed with U.S. District Court Judge Walter E. Hoffman Sept. 28. But Bickel said that Hoffman can consider arguments other than those in the brief in making his decision.

The opposing briefs filed by the Vice President's attorneys and Justice Department lawyers in the Vice President's case brought into the open a legal dilemma with virtually no constitutional precedent and far-reaching consequences for both Agnew and President Nixon.

In their 23-page brief filed last week the Justice Department's attorneys contended that while the Vice President is no more immune to indictment than any other lower official, the President cannot face indictment in office because of the crucial nature of his official position.

Hoffman is expected to rule on Agnew's indictability after hearing oral arguments from both sides Friday. His ruling is almost certain to be appealed to the Supreme Court for a final decision.

"This administration is bizarre in its capacity to generate issues of constitutional law never before authoritatively reviewed," said William Van Alstyne, professor of constitutional law at Duke University Law School.

Van Alstyne and the other legal experts rejected the premise of Agnew's lawyers that the Constitution provides a clear basis for the protection of the Vice President from indictment before impeachment.

The Vice President's attorneys have rested part of their case heavily on Article II, Section 4 of the Constitution, 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 or misdemeanors."

Van Alstyne, who also prepared testimony for the House Judiciary Committee during an impeachment attempt against Supreme Court Justice William O. Douglas in 1970, said, "You don't have to treat the President and the Vice President alike in this regard. There has to be a cutoff point somewhere and the Justice Department position is an eminently plausible policy one."

In agreement with Van Alstyne in this position were Arthur Miller, professor of constitutional law at George Washington University,

Raoul Berger, a senior fellow and impeachment scholar from Harvard University Law School, and Philip Kurland, a constitutional expert from the University of Chicago.

"The only person I know who claims the Vice President should have immunity in this situation is Bickel," said Kurland.

Berger called the Justice Department's stand on the Vice President "incontrovertible."

"It has to be if you look at the language in the text of the Constitution," said Berger. "This is the startling

point and the be all and end all of constitutional rights."

Berger said that not only the Vice President but the President as well is subject to impeachment under the language of the Constitution.

"The problem with the Justice Department's brief," Berger said, "is that they're trying to ride two horses in opposite directions. The United States is bigger than any one president. The insistence that a criminal if convicted must remain in office because the government can't function without him is appalling to me."