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UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

In Re Proceedings of The Grand Jury
Impaneled December 5, 1972:

Application of Spiro T. Agnew
Vice President of the United States

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: Case Number
: Civil 73-965
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MEMORANDUM FOR THE UNITED STATES
CONCERNING THE VICE PRESIDENT'S
CLAIM OF CONSTITUTIONAL IMMUNITY

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. See, e.g., United States v. Dionisio, 410 U.S. 1 (1973); Branzburg v. Hayes, 408 U.S. 665 (1972); United States v. Ryan, 402 U.S. 530 (1971). Thus in ordinary circumstances we would oppose 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

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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 a 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.^{2/}

The Department believes that this deference to the House of Representatives at the post-indictment stage, though not constitutionally required, is 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 the statute of limitations and preserve the matter for subsequent judicial resolution.

^{2/} 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.

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.

STATEMENT

A grand jury in this District, impaneled December 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 moved to enjoin "the Grand Jury from conducting any investigation looking to his possible indictment * * * and from issuing any indictment, presentment or other charge or statement pertaining to [him]" (Motion, p. 1). 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 with or disclosing to any person any such testimony, document or materials" (Motion, pp.1-2).

The Vice President's motion is based on two contentions: (1) that "[t]he Constitution forbids that the Vice President be indicted or tried in any criminal court," and (2) that "officials of the prosecutorial arm 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 * * *" (Motion, p. 2).

On September 28, 1973, this court directed that the Department of Justice submit its brief on the constitutional issue on October 5 and its brief on the remaining issue on October 8, that the Vice President's counsel file a reply brief on October 11, and that oral argument be had on October 12. This Memorandum is submitted on behalf of the United States, the grand jury, and the individual respondents named in the motion, in opposition to the claim that the grand jury should be enjoined because the Vice President cannot "be indicted or tried in any criminal court" (Motion, p. 1).

I

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 for 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 an immunity, the natural inference is that no immunity exists where none is mentioned. Indeed, any other reading would turn the constitutional text on its head: the construction advanced by counsel for the Vice President requires that the explicit grant of immunity to legislators be read as in fact a partial withdrawal of a complete immunity legislators would otherwise have possessed in common with other government officers. The intent of the Framers was to the contrary. Cf. United States v. Johnson, 383 U.S. 169, 177-185 (1966).

In the face of this strong textual showing it would require a compelling constitutional argument to erect such an immunity for a Vice President. Counsel for the Vice President contend that such an argument is provided by Article I, Section 3, Clause 7, by Article II, Section 4, and by the Twelfth Amendment. We will examine each of these contentions in turn.

B. The Meaning of Article I, Section 3, Clause 7.

Article I, Section 3, Clause 7 provides:

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.

Counsel for the Vice President argue that this clause means impeachment must precede indictment. The

records of the debates of the constitutional convention, however, show that the Framers contemplated that this sequence should be mandatory only as to the President.

During most of the debate over the impeachment clause, the Framers' attention was directed specifically to the Office of the Presidency, and their remarks strongly suggest an understanding that the President, as Chief Executive, would not be subject to the ordinary criminal process. See 2 Farrand, Records of the Federal Convention, 64-69, 626 (New Haven, 1911). For example, as the memorandum submitted on behalf of the Vice President points out (Memo., p. 9), Gouverneur Morris observed that the Supreme Court would "try the President after the trial of impeachment." 2 Farrand, supra, at 500. It is, of course, significant that such remarks referred only to the President, not to the Vice President and other civil officers.

However, the Framers 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 upon 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

*/ As a recent commentator has observed:

One thing is clear: in the impeachment debate the Convention was almost exclusively concerned with the President. The extent to which the President occupied center stage can be gathered from the fact that the addition to the impeachment clause of the "Vice President and all civil officers" only took place on September 8, shortly before the Convention adjourned. [Berger, Impeachment: The Constitutional Problems 100 (Cambridge, Mass., 1973)]

to cover the Vice President and other civil officers only toward the very end of the convention. Berger, Impeachment: The Constitutional Problems 146-147 (Cambridge, Mass., 1973). Indeed creation of the Office of the Vice Presidency itself "came in the closing days of the Constitutional Convention." S. Rep. No. 66, 89th Cong., 1st Sess., p. 9 (1965). 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.

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 convictions upon impeachments. The President's immunity rests not only upon the matters just discussed but also upon his unique constitutional position and powers. See infra, pp. There are substantial reasons, 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 first Congress, many of whose members had been delegates to the Constitutional Convention, promptly enacted Section 21 of the Act of April 30, 1790, 1 Stat. 117, recognizing that sitting federal judges were criminally punishable for bribery and providing for their disqualification from office upon

conviction. And in 1796, Attorney General Lee informed Congress that a judge of a territorial court, a civil officer subject to impeachment, was indictable for criminal offenses while in office. 3 Hinds, Precedents of the House of Representatives 982-983 (Washington, 1907). These considerations, together with those rooted in the constitutional text and practicalities of government that we discuss below, have led subsequent commentators to conclude, with virtual unanimity, that the Framers did not intend civil officers generally to be immune from criminal process. See, e.g., Rawle, A View on the Constitution of the United States of America 169, 215 (Philadelphia, 1829); Simpson, supra, 52-53; Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 55 (1970).

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. This was the interpretation of the clause offered by Luther Martin, a member of the Constitutional Convention and Judge Chase's counsel, during Chase's impeachment. 14 Annals of Congress, 8th Cong., 2d Sess., p. 423. In truth, impeachment and the criminal process serve different ends so that the outcome of one has no legal effect upon the outcome of the other. James Wilson, an important participant in the Constitutional Convention,^{*/} put the matter succinctly:

^{*/} "James Wilson was the strongest member of this [the Pennsylvania] delegation and Washington considered him to be one of the strongest men in the convention. . . . He had served several times in Congress, and had been one of the signers of the Declaration of Independence. At forty-five he was regarded as one of the ablest lawyers in America." Farrand, The Framing of the Constitution 21 (New Haven, 1913).

Impeachments * * * come not * * * within the sphere of ordinary jurisprudence. They are founded on different principles; are governed by different maxims, and are directed to different objects; for this reason, the trial and punishment of an offense in the impeachment, is no bar to a trial of the same offense at common law. [Wilson, Works 324 (Cambridge, Mass., 1967).]

Because the two processes have different objects, 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.

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 manner 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 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, were 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, would confer upon the civil officer accused complete and — were the statute of limitations permitted to run — permanent immunity from criminal prosecution however

plain his guilt.^{*/} There is no such requirement in the Constitution or in reason. To adopt that view would give 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. The Framers certainly never supposed that failure to obtain conviction upon impeachment conferred permanent criminal immunity.

The conclusion seems required, therefore, that the Constitution provides that the "Party convicted" is nonetheless subject to criminal punishment, not to establish the sequence of the two processes, but solely to establish that conviction upon impeachment does not raise a double jeopardy defense in a criminal trial.^{**/} A similar conclusion has been reached under state constitutions containing provisions

^{*/} The Congress could only avoid this result by attending to complaints of criminal conduct against all civil officers so protected. Since the Office of the Vice President appears indistinguishable in this respect from that of other civil officers, the construction of the Constitution offered by counsel for the Vice President would place a significant burden on the Congress. As the result of historic experience, the Congress has chosen to make sparing use of its impeachment power. The House is not structured to act with any frequency as a prosecutor nor the Senate as a jury. A construction of the Constitution that forces the Congress to choose between impeachment or immunization would deprive Congress of the discretion of how and to what extent it wishes to exercise its impeachment jurisdiction. It might also frequently immobilize the Congress, preventing it from dealing with pressing national affairs, to the harm of both Congress and the country.

^{**/} Just as an individual may be both criminally prosecuted and deported for the same offense (see Fong Yue Ting v. United States, 149 U.S. 698 (1893)), a civil officer could be both impeached and criminally punished even absent the Article I, Section 3 proviso. Moreover, the civil nature of an impeachment under the Constitution renders the English precedent -- involving an impeachment process that was both criminal and political -- inapposite. Whereas conviction of impeachment under our Constitution has no criminal consequences, impeachment in England was designed to accomplish punishment as well as removal, for peers of the realm were not subject to ordinary criminal process. As a consequence, the relationship between the impeachment power and the criminal process in the two countries is wholly different. See generally, Berger, supra, 78-85.

modeled upon Article I, Section 3, Clause 7. These state constitutional provisions have been held not to bar prosecution of impeachable state officers while in office. See, e.g., Commonwealth v. Rowe, 112 Ky. 482, 66 S.W. 29 (1902); State v. Jefferson, 90 N.J.L. 507, 101 A. 569 (E. & A., 1917). Indeed, indictment, trial and conviction of state officers while in office has been common. See generally, Anno: Officer - Conviction of Crime, 71 A.L.R. 2d 593 (1960).

C. The Meaning of Article II, Section 4.

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 even 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 (See, e.g., Memo., pp. 2, 5-6). This assumption is without foundation in history or logic.

We agree that conviction upon impeachment is the exclusive means for removing a Vice President from office. Although 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.^{2/} But it is clear from history that a criminal

^{2/} We do not here address the question of whether 18 U.S.C. §201(e) constitutionally operates to remove a civil officer (footnote can't on next page)

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 (Memo., pp. 14-15), 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.^{*/} Judge John Warren Davis of the United States Court of Appeals for the Third Circuit and Judge Albert W. Johnson of the United States District Court for the Middle District of Pennsylvania, were both indicted and tried while in office; neither was convicted, and each continued to hold office during trial. See Borkin, The Corrupt Judge 95-186 (New York, 1962). Judge Kerner of the Seventh Circuit, whose conviction is currently pending on appeal, has not yet been removed from office. Similarly, the criminal conviction of Congressmen does not act to remove them from office: "the final judgment of conviction [does] not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." Burton v. United States, 202 U.S. 344, 369.

^{*/} (footnote from previous page)

without impeachment. We only note that the federal statutes contain no general provision, as do the statutes of many states providing that a vacancy exists in any civil office whenever the incumbent is convicted of a serious crime. These statutes have been upheld as operating to remove the officer without impeachment. See State v. Sullivan, 188 P.2d 592 (Ariz. 1948). See generally, Anno: Officer - Conviction of Crime, 71 A.L.R. 2d 593 (1960). If such a statute were passed by the Congress, its application to judges, who serve during "good behavior" (Article III, §1) might be different than its application to the Vice President, who has a term of office of four years (Article II, §1).

^{*/} Apparently neither Burr nor his contemporaries considered him constitutionally immune from indictment. Although counsel for the Vice President assert that Burr's indictments were "allowed to die" (Memo., p. 15), that was merely because "Burr thought it best not to visit either New York or New Jersey." Parment & Hecht, Aaron Burr: Portrait of an Ambitious Man, 231 (New York, 1967).

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 powers of the Vice Presidency. But the relationship between trial and punishment, on the one hand, and actual removal from office, on the other, is far from automatic. As perhaps the leading American commentator on impeachment has observed (Simpson, A Treatise on Federal Impeachment 52 (Philadelphia, 1916)):

A public officer may be criminally convicted of trespass, though acting under a claim of right, or for excessively speeding his automobile, yet neither would justify impeachment. If, however, the conviction was followed by imprisonment, impeachment might be well maintained, for the office would be brought into contempt if a convict were allowed to administer it. It may be said that, in that event, impeachment would depend on the severity or lenity of a trial judge, and this would be so, but for the office's sake, a man may be said to be guilty of a "high misdemeanor" if he so acts as to be imprisoned.

Whether conviction of and imprisonment for minor offenses must lead to removal on conviction of 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 the impeachment power as the means of his removal from office.

D. The Twelfth Amendment

Counsel for the Vice President suggest (Memo., pp. 7-8, 18) that adoption of the Twelfth Amendment, providing for separate elections of the President and Vice President, in some way supports immunity for a Vice President. In fact, the implication of the Amendment is the contrary.

The original constitutional plan was that each elector should vote for two persons for President. The man receiving the greatest vote was to be President and the runner-up was to be Vice President. The Vice President was thus the next most powerful contender for the Presidency. The Framers, however, did not foresee the development of political parties which ran "tickets," one man standing for President and the other for Vice President. An elector would then cast one ballot for each of these candidates which had the embarrassing result that Thomas Jefferson and Aaron Burr, though regarded by their party as candidates for, respectively, President and Vice President, received an equal number of votes. There being no constitutionally elected President, the election was thrown into the House of Representatives.

The Twelfth Amendment, adopted in response, provided separate elections so that a man wanted only as Vice President should not thus block the election of the man wanted as President. The adoption of the Twelfth Amendment, therefore, was recognition that the Vice President, under a party system, is not the second most desired man for President but rather an understudy chosen by the presidential candidate. That recognition does not magnify the constitutional position of a Vice President.^{2/}

^{2/} Counsel for the Vice President additionally argue that since
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II

THE STRUCTURE OF THE CONSTITUTION AND THE
WORKINGS OF THE CONSTITUTIONAL SYSTEM DO
NOT IMPLY AN IMMUNITY FOR A VICE PRESIDENT

The Constitution is an intensely practical document and judicial derivation of powers and immunities is necessarily based upon consideration of the document's structure and of the practical results of alternative interpretations. McCulloch v. Maryland, 4 Wheat. 316 (1819); Stuart v. Laird, 1 Cranch 299, 308 (1803); Field v. Clark, 143 U.S. 649, 691 (1892); United States v. Midwest Oil Co., 236 U.S. 459, 472-473 (1915); United States v. Curtis-Wright Corp., 299 U.S. 304, 328-329 (1936). We turn, therefore, to a structural and functional analysis of the Constitution in relation to the immunity claimed for Vice Presidents.

A. Immunity Should be Implied for an Officer Only if Subjecting Him to the Criminal Process Would Substantially Impair the Functioning of a Branch of Government.

The real question underlying 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

* / (footnote con't from previous page)

the Framers could not have intended the President, through his Attorney General, to harass political rivals, therefore the Vice President must be immune from criminal process (see Memo., p. 18). This argument appears unsound. Once he accepts the secondary office, the Vice President is rarely, if ever, an important political rival of the incumbent President. Moreover, the logical implication of the argument is that all major politicians -- Senators, Governors, and many persons not even holding office -- must be freed of responsibility for criminal acts.

before being tried on impeachment. The answer to that question must necessarily vary with the nature and functions of the office involved.

1. We may begin with a category of civil officers subject to impeachment whom we think may clearly be tried and convicted prior to removal from office through the impeachment process: federal judges.*/ A judge may be hampered in the performance of his duty when he is on trial for a felony but his personal incapacity in no way threatens the ability of the judicial branch to continue to function effectively. There have been frequent occasions where death, illness, or disqualification has removed all of the available judges from a district or a circuit and even this extreme circumstance has been met effectively by the assignment of judges from other districts and circuits.

Similar considerations apply to Congressmen, and these practical judgments are reflected in the Constitution. As already noted, Article I, Section 6 provides a very limited immunity for Senators and Representatives but explicitly permits them to be tried for felonies and breaches of the peace. This limited grant of immunity demonstrates a recognition that, although the functions of the legislature are not lightly to be interfered with, the public interest in the expeditious and even-handed administration of the criminal law outweighs the cost imposed by the incapacity of a single

*/ The Department of Justice is now contending that a United States court of appeals judge is subject to indictment, conviction, and sentencing prior to removal through the impeachment process. See United States v. Kerner, now pending in the Court of Appeals for the Seventh Circuit. This, of course, is the historic position of the Department. See page 12, supra. It seems too clear for argument that other civil officers, such as heads of executive departments, are fully subject to criminal sanctions whether or not first removed from office.

legislator. Such incapacity does not seriously impair the functioning of Congress.

2. 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 (Memo, pp. 5-8), so it is not in dispute. It will be instructive to examine the basis for that immunity in order to see whether its rationale also fits an incumbent Vice President, for that is the crux of the question before the Court.

As we have noted, page 6, supra, the Framers' discussions assumed that impeachment would precede criminal trial because their attention was focused upon the Presidency. See also, 2 Farrand, Records of the Federal Convention, supra, p. 500, and Hamilton, The Federalist, Nos. 65 and 69. 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 duties that only he can perform unless and until it is determined that he is to be shorn of those duties by the Senate.

The scope of the powers lodged in the single man occupying the Presidency is shown by the briefest review of Article II of the Constitution. The whole "executive Power" is vested in him and that includes the powers of the "Commander in Chief of the Army and the Navy," the power to command the executive departments, the power shared with the Senate to make treaties and to appoint ambassadors, the power shared with the Senate to appoint Justices of the Supreme Court and other civil officers, the power and responsibility to execute the laws, and the power to grant

reprieves and pardons. The constitutional outline of the powers and duties of the Presidency, though more complete than noted here, does not flesh out the full importance of the office, but this is so universally recognized that we do not pause to emphasize it.

The singular importance of the Presidency, in comparison with all other offices, is further demonstrated by the Twenty-Fifth Amendment, Sections 3 and 4. The problem, as we have noted, is one of the functioning of a branch of government, and it is noteworthy that the President is the only officer of government for whose temporary disability the Constitution provides procedures to qualify a replacement. This is recognition 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.

3. 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 a 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, as has been discussed above (page 12, supra), 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.

A Vice President has only three constitutional functions: (1) to replace the President in the event of the President's removal from office, or his death, resignation, or inability to discharge the powers and duties of his office (Twenty-Fifth Amendment, Sections 1, 3, and 4); (2) to make, together with a majority of either the principal officers of the executive departments or such other body as Congress may by law provide, a written declaration of the President's inability (Twenty-Fifth Amendment, Section 3); and, (3) to preside over the Senate, which Vice Presidents rarely do, and cast the deciding vote in case of a tie (Article I, Section 3).^{*/}

None of a Vice President's constitutional functions is substantially impaired by his liability to the criminal process.^{**/} The only problem that might arise would be the death of a President at the time a Vice President was the defendant in a criminal trial.^{***/} That would pose no practical difficulty, however. The criminal proceedings could be suspended or terminated and the impeachment process begun. This would leave the nation in the same practical situation

^{*/} The Framers assumed that Vice Presidents would not regularly preside over the Senate, for they expressly provided in Article I, Section 3, Clause 5 for the election of a President pro tempore to act in the Vice President's absence.

^{**/} Counsel for the Vice President stresses the importance of the Vice President's role, under the Twenty-Fifth Amendment, with respect to a declaration of Presidential inability. But that responsibility is not an active, continuous executive function. It is, to the contrary, a responsibility -- never yet exercised -- that entails only a single act, one that could be performed by a Vice President who was, for example, under indictment. Moreover, it is a responsibility that is shared with a majority of the Cabinet members, who are themselves subject to the criminal process.

^{***/} We assure, for reasons stated above (p. 13, supra), that conviction and imprisonment of a Vice President, or any civil officer, would lead to prompt removal through impeachment.

as would the institution of impeachment proceedings against an incumbent President, the sole legal difference being that the successor to office would be the Speaker of the House of Representatives rather than the Vice President.

B. The Functions of the President are not only Indispensable to the Operation of Government, They are Inconsistent with His Subjection to the Criminal Process; There is no Similar Inconsistency in the Case of a Vice President.

The inference that only the President is immune from indictment and trial prior to removal from 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 they gave him "Power to grant Reprieves and Pardons for Offenses against the United States, except in 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 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.

C. Basic Considerations of Law Enforcement Militate Against Extension of Immunity to Officers other than the President.

Thus we conclude that considerations derived from the structure of the Constitution itself indicate that only a President possesses immunity from the criminal process prior to impeachment. The position of a Vice President would appear

to be similar to that of judges, Congressmen, and other civil officers. There are also, however, practical considerations that point in the same direction. Such considerations are entitled to weight in the absence of compelling constitutional reasons for an immunity of the sort we have shown exist only for the Presidency. In many cases, for instance, problems will be posed by the presence of co-conspirators and the running of the statute of limitations.

An official may have co-conspirators and even if the officer were immune, his co-conspirators would not be. The result would be that the grand and petit juries would receive evidence about the illegal transactions and that evidence would inevitably name the officer. The trial might end in the conviction of the co-conspirators for their dealings with the officer, yet the officer would not be on trial, would not have the opportunity to cross-examine and present testimony on his own behalf. The man and his office would be slandered and demeaned without a trial in which he was heard. The individual might prefer that to the risk of punishment, but the courts should not adopt a rule that opens the office to such a damaging procedure.

This practical problem is raised by the motion here which asks this Court to prohibit "the Grand Jury from conducting any investigation looking to the [Vice President's] possible indictment" and to enjoin the prosecutors from presenting any evidence to the grand jury "looking to [his] possible indictment" (Motion, p. 1).

The criminal investigation being conducted by the grand jury is wide-ranging, and the Vice President is not its sole subject. The evidence being presented, while it touches on the Vice President, involves others also. It

would be virtually impossible to exclude all evidence relating to the Vice President and at the same time present meaningful evidence relating to possible co-conspirators. Thus, enjoining the investigation and presentation of evidence "looking to the possible indictment of [the Vice President]" would require the investigations of other persons also to be suspended. The relief therefore would plainly "frustrate the public's interest in the fair and expeditious administration of the criminal laws" (United States v. Dionisio, supra, 410 U.S. at 17).

The statute of limitations with respect to some of the possible illegal activities being investigated will run as early as October 26, 1973. A suspension of the grand jury's investigation of the Vice President and others could therefore jeopardize the possibility of a timely indictment. Should this Court suspend the grand jury investigation the result would likely be to accord the Vice President and other persons permanent immunity from prosecution through the running of the statute of limitations even though it is unlikely he is entitled even to the temporary immunity, pending conviction upon impeachment, that his counsel claim for him.

CONCLUSION

Nothing we have said is intended to deprecate in any way the high office of the Vice Presidency or its importance in the Constitutional scheme. We acknowledge that the issue raised by counsel for the Vice President is a momentous and difficult one for any court. However, in order to assist the Court in resolving this troublesome question, we have set forth arguments that counter those advanced by counsel for the Vice President.

For the reasons stated, applicant's motions
should be denied.

Respectfully submitted.

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