Law and the President

By Anthony Lewis

LONDON, July 25—President Nixon's argument against letting the Watergate investigators hear his secret tapes rests, in the end, on the premise that the President must decide on his own where the public interest lies. He has played the tapes and given his judgment. His discretion must be absolute.

It is a familiar vision in this White House: a Presidency free of all the entangling constraints of law, free of the need for accommodation with Congress. Such a view of Presidential power informed Mr. Nixon's conduct of the war in Vietnam and its extension into Cambodia. Such a view underlay the Watergate crimes.

There it was in John Ehrlichman's testimony, the same assumption of Presidential hegemony. He saw nothing "embarrassing" about White House agents breaking into the office of Daniel Ellsberg's psychiatrist, he said, because Presidents have inherent power to do that. And he said Mr. Nixon agreed: "He considered it to be well within the constitutional obligation and function of the Presidency."

It is so easy to slide from an asserted national security need to a claim of absolute Presidential power to meet it. There is a glimpse of that thought process just now in an unlikely place: "First Monday," a monthly journal published by the Republican National Committee.

The July issue contains a defense of the secret internal security plan adopted by President Nixon in 1970, then rescinded five days later because of J. Edgar Hoover's objections. That was the plan for wiretapping, bugging, burglary, opening of citizens' mail and other surveillance. Mr. Nixon approved it despite advice that it included "clearly illegal" measures.

The defense in "First Monday" consists largely of an extended argument that there was in fact a genuine threat to internal security in 1970. The paper quotes various authorities on the extensive political violence across the United States between 1968 and 1970, especially on campuses. The implied conclusion is that this entitled the President to do what he did.

One may agree that campus and other political violence in that period was extremely serious. I do. But it does not follow that the President was therefore justified in acting on his own, in secret, in disregard of Congress. In the setting of American constitutionalism, it would be hard indeed to think of a greater non sequitur. For the Constitution entrusts the lawmaking power to Congress—

AT HOME ABROAD

"in both good and bad times," as Justice Hugo Black once wrote.

One way to test the legitimacy of the 1970 Nixon security plan in terms of democratic theory is to try to imagine what might have happened if the President then had put to Congress the case for emergency police measures. Would legislation authorizing burglary and eavesdropping in the sole discretion of the executive have passed? Hardly.

There was strong concern in Congress then about revolutionary bombings and violent demonstrations. But there was also concern about official lawlessness — about the invasion of Cambodia, for example, and the Kent State murders that Federal and state authorities did not prosecute, and there would have been the deepest resistance to the creation of a secret police apparatus in the United States.

In short, whatever legislation Congress enacted would have been a compromise of conflicting interests. That is the way democracy works: slowly, perhaps frustratingly, but more safely than systems of concentrated power.

All that is obvious enough. What is extraordinary is that it should be overlooked by men who call themselves conservatives. For it is the conservatives in modern American history who have opposed concentration of power, especially in the Presidency.

The great legal battle was fought against a liberal Democratic President —Harry Truman, when he seized the country's steel mills to prevent a strike in 1952. The Supreme Court found that he had tried to exercise a power confided to Congress, the power to legislate.

"Absence of authority in the President to deal with a crisis," Justice Frankfurter wrote, "does not imply want of power in the Government. Conversely the fact that power exists in the Government does not vest it in the President. The need for new legislation does not enact it."

The Ehrlichman testimony and the President's refusal to disclose the tapes, taken together, suggest that there has been a basic decision in the White House to concede nothing—to stand on the theory of unlimited Presidential power. The constitutional answer that will come from the courts in due course is foreshadowed by the steel case: Presidents, too, are bound by the law.