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A Decent Respect

ABROAD AT HOME

"If one man is allowed to determine for himself what is law, every man can. That means first chaos, then tyranny."

—Mr. Justice Frankfurter, 1947.

By Anthony Lewis

BOSTON, Nov. 28—An original provision of the Constitution bars any member of the House or Senate from appointment to a Federal office "which shall have been created, or the emoluments whereof shall have been increased" during the member's term. The nomination of Senator William Saxbe as Attorney General runs squarely into that prohibition, because he was in the Senate when Cabinet salaries were raised in 1969.

At President Nixon's request, the Senate has passed a bill attempting to duck that problem by lowering the Attorney General's pay to its pre-1969 level. But the language of the Constitution is explicit: It bars members of Congress when salaries are increased, and it does not say that the ineligibility can be cured later.

Now it can be argued that the provision is "an anachronism," as Senator John Tower said. Or one could take a broad view and argue that its purpose was being met by lowering the Attorney General's pay. But the words of the Constitution do happen to be there, and on a strict construction—really a straight reading—they make Senator Saxbe ineligible for the job.

The Saxbe question is especially interesting in one respect: for what it says about attitudes toward law and the Constitution. President Nixon has made a great point of saying that he believes in "strict construction" of the Constitution. But here he is trying to read the document in a way that avoids its plain meaning.

Nor is that the only matter on which Mr. Nixon's talk of "strict construction" has proved to be, well, just talk. No President in the history of this country has claimed war powers so broad or so distant from the restraints of the Constitution. The extreme Nixon claims of executive privilege have been built not on any language of the Constitution at all but on asserted inferences from its structure.

We do not expect Presidents to be entirely consistent in their attitudes toward law and the Constitution. Like most of us, they are affected by the end they desire. But no President has treated the law so cavalierly as Richard Nixon—has made it so plain that he regards law as a mere instrument of power, without any content of consistency or principle.

The most acute current example of the Nixon attitude toward law is of course the handling of the White House tapes and other evidence subpoenaed by the special prosecutor. It may be somewhat easier to appreciate the significance of what has happened there if we put it in the context of, say, an antitrust case.

Suppose that a Federal grand jury were investigating alleged price-fixing by the Grand Motor Company. Grand's chairman told an investigator that he had a crucial conversation of last April 15 "on tape." When the prosecutor asked for that tape, he was told that the chairman had meant only that he had dictated his recollection of the talk onto a belt.

Then it was learned that nine significant conversations had been taped. In July the chairman refused to turn the tapes over voluntarily. He had listened to some, he said, and he thought they confirmed his company's innocence—though others might disagree.

The prosecutor subpoenaed the tapes. Grand claimed they were privileged. For four months the company fought against the subpoena in the courts, while its representatives assured the judge that the evidence was being carefully preserved. Finally, having lost in two courts, Grand agreed to produce the evidence. It then transpired that:

- Two of the tapes did not exist.
- The critical eighteen mintes of a third tape had been wiped out when the chairman's secretary "inadvertently" pushed the recording button of an expensive, sophisticated tape recorder carefully designed to prevent such accidents.
- The chairman's lawyer assured the court that he had learned of the latter defect only recently, but a document he submitted said he had known it six weeks earlier.
- The dictabelt on which the chairman said he had summarized the April 15 talks was mysteriously missing.

If all that had really been done by a private company, the chances are that some of its employes would be facing charges of contempt by now, and its lawyer would be in grave professional difficulty. The reason is simple. Our legal system depends on good faith. Cheating on subpoenas, if it became widespread, would undermine the system.

It is for Special Prosecutor Jaworski to allege and the courts to decide whether there has been contempt of court in the handling of the White House tapes. But the ordinary citizen knows that there has been contempt in a nontechnical sense: contempt for the legal process and for the opinion of Americans. The attitude in the case of the tapes has once again been: Law is what I say it is.