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Mr. Saxbe's Retroactive Shudder

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IN AN INTERVIEW appearing in the current U.S. News & World Report, Attorney General William Saxbe has any number of interesting things to say on the subject of the President's plight—never mind that many of them are as illogical as they are political in nature. What particularly caught our attention was an exchange on the subject of compelled testimony and the grant of limited immunity. It went like this:

Q. Are there legal problems of self-incrimination involved in the investigations into Watergate? On the one hand, President Nixon is under pressure to turn over records and recordings of his most intimate conversations; on the other hand, witnesses are being granted immunity from prosecution so they can testify without fear of self-incrimination—

A. The right of non-self-incrimination is being stretched very far when a man who comes before a jury or comes before a Senate committee can be told, "We will grant you immunity so that you cannot take the Fifth Amendment, but you better damn well testify, because if you refuse, then we'll get you on contempt." Nowhere in the First Amendment, nor the Fifth, does it say that you can give a guy immunity and thereby make him testify. I think that's an absolute bar to be being forced to testify . . . I hope the Supreme Court gets another chance to review whether you can offer a guy immunity and then hold him in contempt if he doesn't reply.

Q. The Supreme Court has upheld the present immunity procedure, hasn't it?

A. The Supreme Court has upheld it. But I still shudder at that because of the constitutional guarantee you have not to testify.

We do not cite this exchange as evidence that the Attorney General holds some wholly indefensible or exotic view of the immunity procedures in question. Indeed, in language that was more elegant but no less passionate, Justice William Douglas and Justice Thurgood Marshall each rendered a separate dissent to the Supreme Court opinion Mr. Saxbe has in mind. And prior to enactment of the legislation from which these most recent immunity procedures flow — the Organized Crime Control Act of 1970—a good deal of testimony was heard from civil libertarians who challenged both the wisdom and constitutionality of the provision compelling testimony (on pain of a contempt citation) in exchange for a limited grant of immunity from prosecution. They argued that the measure, designed to help catch "higher ups" in the world of organized crime by forcing lesser underworld figures to tell what they knew, would violate the protections afforded every citizen under the Fifth Amendment and work to undermine our constitutional system as a whole where the rights of witnesses were concerned.

Whatever the merits of their case, the argument sounds pretty odd now coming from Attorney General Saxbe by way of defending the Nixon administration and the wrongdoers within it against subjection to the rigors of the law. And that is the point. For this particular "crime fighting" measure did not just appear on the statute books from nowhere. It was recommended to the Congress for its presumed efficacy by Mr. Nixon himself in April of 1969. ("First, we need a new broad general witness immunity law to cover all cases involving the violation of a federal statute. I commend to the Congress for its consideration the recommendations of the National Commission on Reform of Federal Criminal Laws. Under the Commission's proposal, a witness could not be prosecuted on the basis of anything he said while testifying, but he would not be immune from prosecution based on other evidence of his offense. Furthermore, once the government has granted the witness such immunity, a refusal then to testify would bring a prison sentence for contempt.")

It should be at least of incidental interest to Mr. Saxbe that the National Commission on Reform of Federal Criminal Laws made its recommendation largely on the basis of a study prepared for it by Professor Robert G. Dixon Jr.—who is currently serving as Assistant Attorney General in charge of the Office of Legal Counsel in Mr. Saxbe's own Justice Department. Again, the provision itself, once law, was upheld by the Supreme Court in an opinion written by a Nixon appointee, Justice Lewis F. Powell, and concurred in by Chief Justice Warren Burger. What they upheld, of course, was the constitutionality of the congressionally enacted statute. And you will have guessed by now that when this legislation, which makes the Attorney General "shudder," breezed through the Senate 73-1, it was voted for by Sen. William Saxbe.