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ABROAD AT HOME

Reagan's Law

By Anthony Lewis

BOSTON, Jan. 22 — In no other country is law remotely as important a strand in the social fabric. We live in a Madisonian system, our freedoms enforced by law. A disparate and fractious people, we have been held together by law. For us law has been both a liberating and a stabilizing force: both of those because on tense issues it has offered a hope of ordered change.

It is in terms of his contribution to that broad concept of law that an Attorney General of the United States must be judged. And it is in those terms that William French Smith will be rated by history as one of the weakest figures to hold the position: a man who saw law not as an enlarging vision of justice but as a narrow political instrument.

Mr. Smith's record is marked by three major endeavors. He undid what he could of his predecessors' achievements in civil rights enforcement. He helped in the most relentless and lawless campaign for government secrecy in American history. And he worked to create an imperial Presidency, unrestrained by the constitutional power of Congress.

A single episode in the civil rights field forever defined Mr. Smith as an Attorney General unwilling or unable to hold his President to established principles of law. That was the affair of tax exemptions for segregationist private schools.

In the Nixon Administration, in 1970, the Internal Revenue Service ruled that schools discriminating on racial grounds were not eligible for favored tax treatment. For more than a decade, under Administrations of both parties, the Justice Department defended that ruling in the courts.

But in January 1982, President Reagan's Justice and Treasury Departments announced that they had changed the position. It was a switch so devoid of support in the law that it was attacked by both Republicans and Democrats in Congress, and by many Justice Department lawyers.

President Reagan squirmed desperately to escape the political heat. He said he wanted Congress to prohibit the tax exemptions. He said he had not realized that there was a Supreme Court case pending — he thought "that the problem of segregated schools had been settled." Then the truth leaked out: He had ordered the change at the suggestion of a Mississippi Republican.

Through all this undignified mockery of the law William French Smith sat silent. When his Justice Department would not argue against the tax

exemptions, the Supreme Court appointed a private lawyer to do so — and barred the exemptions in an 8-to-1 decision.

One of Mr. Smith's first actions as Attorney General was to tell all Government agencies to be less generous in responding to Freedom of Information requests. Since then secrecy has been one of his main themes.

On the day his resignation became known, it was reported that his Justice Department had persuaded a Federal Court of Appeals to prohibit publication of a trial judge's opinion because it criticized department lawyers. It was a unique prior restraint: a perfect symbol of William French Smith's disregard for the tradition of American freedom.

Of the many Reagan secrecy measures, the broadest and most novel was the President's order of March 11, 1983, creating a lifetime censorship system for 27,500 persons cleared for sensitive national security information. The order was drafted by one of Mr. Smith's ideological appointees, Deputy Assistant Attorney General Richard K. Willard.

Legally speaking, the most astonishing thing about the March 11 order was its assumption that a President could so drastically change the American system on his own, without asking Congress for legislation. Censorship has been anathema in the United States from James Madison on, yet here was a President purporting to impose that hated concept without a shred of legislative authority. Congress, resisting, has postponed enforcement of the order until April 15.

The same disregard for the constitutional system of limited power, dividing authority among the three branches of government, was evident in Mr. Smith's attitude toward questions of war. He supported President Reagan's bold attempts to arrogate the war-making power to himself, in Lebanon and Central America.

A wise President wants a Minister of Justice in his Attorney General: a man of character, independent enough to tell him no when the law so counsels. William French Smith had no visible independence from his President. He came across in Washington as a society figure, without the intellectual strength that earns respect.

And now it seems we are to have Edwin Meese 3d, a man who is just as much a creature of Ronald Reagan's — and has just as narrow, rightist a view of the law. It was Ed Meese who in 1981 called the American Civil Liberties Union a "criminals' lobby." Will the Senate care about the continued denigration of a once great office?