APR 3 1973
NYTimes

The Choices in Watergate

By Theodore C. Sorensen

Although I decline with thanks the protection offered me by President Nixon's declaration extending executive privilege to all former White House aides, no previous White House counsel could be unmoved by the plight of the present counsel, John W. Dean 3d. No doubt mindful of the tradition among his predecessors to maintain their vows of secrecy at least until their memoirs are published, Mr. Dean has invoked the privilege in refusing to appear before a Senate committee, thereby provoking threats of his arrest by the Senate sergeant-at-arms.

The Senate has occasionally confined miscreants in contempt of its less-than-awesome powers to some Capitol chamber, hopefully out of earshot of floor debates in view of the ban on cruel and unusual punishment. But a body which still cloaks in secrecy many of its own committee deliberations should not be too hasty about arresting a guardian of Presidential secrets.

Mr. Nixon's insistence on preserving the confidentiality of his sources of information and advice may astonish those journalists who find his prosecutors unwilling to let them preserve the confidentiality of their sources. But his invocation of executive privilege nevertheless has come base in our Constitution and history.

Do not unfairly accuse Mr. Dean of "taking the Fifth"; he is "taking the Second." Article II of the Constitution vests all executive power in the President, with his exercise thereof normally accountable only to the electorate. Were he compelled to appear and undergo Congressional cross-examination on all of his official decisions, he could not exercise that power as freely and independently as the constitutional draftsmen intended. His aides and appointees, and the internal discussions and documents producing those decisions, necessarily share his immunity.

Thus over the years, to prevent Senator Joe McCarthy from hounding civil servants for their unpopular recommendations, and a Congressman Richard Nixon from publicizing their F.B.I. files; and to protect from premature exposure genuine military and diplomatic secrets and necessarily confidential working papers; and to facilitate the frankest advice on controversal issues from all appointees—many a President has invoked some form of executive privilege. Congress has generally conceded that White House aides deserve this protection more than officials subject to Senate confirmation (although this was before all policy-making and talent were concentrated in the White House). The Supreme Court, while never squarely confronting this issue, would reinforce the separation of powers, in President Nixon's memorable phrase, "as it always usually has."

But Mr. Nixon went too far in stating: "No President could ever agree to allow the counsel to the President to . . . testify before a committee." The privilege is not an imperative. Presidential aides, including Sherman Adams, James Landis and Peter Flanigan, have voluntarily appeared in the past without destroying their colleagues' shield; and there is no privilege on matters pertaining to legislative oversight or impeachment or not pertaining to official duties, policies or decisions of the President. Moreover, comity between branches of Government deters a President from resisting all legislative intrusions, just as it deters Congress from chopping all appropriations for the White House staff.

Mr. Nixon may therefore wish to reconsider how heavily to rely upon secrecy in an age when few secrets long remain. Not only Watergate defendants but also investigative journalists, former C.I.A. agents and even sons of former Presidents are rushing to tell all secrets they know and possibly some they don't. To his mixed dismay and relief, Daniel Ellsberg's defense witnesses have demonstrated that the "secrets" he released in the Pentagon Papers had either been previously leaked or published or never deserved to be secret.

Thus, Mr. Dean may lawfully either conceal or reveal the contents of F.B.I. files transmitted to him as White House Counsel, or his conversations in that capacity with Acting F.B.I. Director Gray, or his official report to the President on his Watergate inquiry. But if a Senate committee, carefully relating its questions to public purposes within its legislative jurisdiction, asks him not about his official duties or legal advice but whether he provided certain files to a political committee, placed G. Gordon Liddy, a Watergate defendant, with that committee, or had any other involvement with specified criminal activities, then Mr. Dean would have but two choices:

- To answer, accepting some public reproach in the process (which is another one of every White House aide's "executive privileges"); or
- To refuse on grounds of executive privilege, thereby signifying—regardless of the rationale offered—that the Watergate affair in fact involved Presidential policy, Presidential discussions or Presidential orders for which Mr. Nixon himself rather than his aides should be held responsible. That would be a most interesting response.

Theodore C. Sorensen, a New York attorney, was special counsel to President Kennedy.