A Flexible Record

By I. F. Stone

Reading Supreme Court decisions is a good deal like reading tea leaves. You can always find what you're looking for. With that caveat, it may be useful to notice that last year's decision by the Supreme Court in the Caldwell case found the four Nixon appointees subscribing to a doctrine which could decide the coming litigation over the Ervin and Cox subpoenas to Nixon. This is the doctrine that no one, not even the President, is immune to judicial process.

It was a footnote to the majority decision in the Caldwell case which called attention to the only precedent for issuing a subpoena to a President. The majority, in holding that the First Amendment did not exempt newsmen from subpoena, reiterated as a "long standing principle" that "the public has a right to every man's evidence" and then in a footnote recalled that Chief Justice Marshall in the trial of Aaron Burr "opined that in proper circumstances a subpoena could be issued to the President."

Like other Delphic oracles, the Supreme Court always provides itself with loopholes for unexpected contingencies. What the Nixon appointees were willing to assert as law when confronted with a New York Times newsman trying to protect his sources in the Blank Panthers, they may not be willing to apply when Mr. Nixon refusal to hand over those tapes comes before them.

Their first escape hatch is indicated in the wording of the footnote itself. What are the "proper circumstances" in which a subpoena may be issued to a President? Additional escape hatches were also made available in a qualifying clause the judges added to the "long-standing principle" they cited. The qualifying clause said "except for those persons protected by a constitutional, common law or statutory privilege."

This invites Mr. Nixon's claim of constitutional immunity under the nebulous doctrines of separation of powers and executive privilege. Can a President block the investigation of possible crimes by pleading either? If the Supreme Court says he can, a President and his entourage may commit crimes and suppress the evidence.

This brings us to a widely misunderstood aspect of Chief Justice Marshall's action in the Burr case. In those days, Supreme Court Justices tried cases on circuit. It was in this capacity that Marshall presided at the trial of Aaron Burr for treason. He did rule that a subpoena could be issued against the President and he did issue such a subpoena to Thomas Jefferson requiring him to appear and produce the famous Wilkinson letter which led to Burr's arrest. But Marshall never tried to serve the subpoena on the President.

The Burr affair, insofar as that subpoena is concerned, was a stand-off. Marshall was a cautious man; he knew he had no way to compel service and appearance if the President balked.

Jefferson, on the other hand, asserted some bold and sweeping conceptions of executive privilege in defying Marshall but made the assertions in private correspondence with the prosecutor. These have often been cited in recent years for Presidential privilege and no doubt will be cited again by Nixon's lawyers.

But like Marshall's opinion, Jefferson's letters don't constitute much of a precedent. Jefferson—though breathing defiance privately—quickly handed over the desired document to the prosecutor for presentation to the court, and even offered as a compromise to testify by deposition.

Raoul Berger in a fresh and exhaustive study of executive privilege in the U.C.L.A. Law Review in August, 1965, showed that the prosecutor—and this is highly relevant to the coming confrontation—"was willing to show the entire letter to the court . . . to suppress so much of the letter as was not material to the case." This is one way the courts could handle Mr. Nixon's claim that the tapes contain extraneous and confidential matter.

The truth is that in the Marshall-Jefferson confrontation both men were embarrassed by their previous positions. Marshall was a Federalist and the Federalists were accused by the Jeffersonians of trying to place the President above the law. In the Burr trial Marshall was handing down Jeffersonian doctrine while Jefferson was talking like a Federalist. Even so great a libertarian had grown a little heady on the wine of Presidential office.

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