issued to the President." circumstances a subpoena could be Aaron Burr "opined that in proper Chief Justice Marshall in the trial of and then in a footnote recalled that has a right to every man's evidence" from subpoena, reiterated as a "long standing principle" that "the public Amendment did not exempt newsmen for issuing a subpoena to a President. called attention to the only precedent decision in the Caldwell case which immune to judicial process. that no one, not even the President, is gation over the Ervin and Cox sub-poenas to Nixon. This is the doctrine which could decide the coming litiappointees subscribing to a doctrine The majority, in holding that the First Caldwell case found the four Nixon sion by the Supreme Court in the useful to notice that last year's deciing for. With that caveat, it may be You can always find what you're look-Like other Delphic oracles, the Su-It was a footnote to the majority good deal like reading tea leaves. Reading Supreme Court decisions is 1973 JUL 2 7 JUL 2 1973 By I. F. Stone

lous doctrines of separation of powers stitutional immunity under the nebuand executive privilege. Can a Presiprivilege." a President? Additional escape hatches tutional, common law or statutory those persons protected by a consti-The qualifying clause said "except for were also made available in a qualiin which a subpoena may be issued to What are the "proper circumstances" B "long-standing principle" they cited. fying clause the judges added to the This invites Mr. Nixon's claim of conthe wording of the footnote itself.

and suppress the evidence. and his entourage may commit crimes preme Court says he can, a President crimes by pleading either? If the Sudent block the investigation of possible

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

be willing to apply when Mr. Nixon rein the Blank Panthers, they may not newsman trying to protect his sources confronted with a New York Times

fusal to hand over those tapes comes

Their first escape hatch is indicated

before them.

were willing to assert as law when

tingencies. What the Nixon appointees with loopholes for unexpected conpreme Court always provides itself

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

and no doubt will be cited again cutor. These have often been cited in private correspondence with the prose-Marshall but made the assertions in recent years for Presidential privilege ed some bold and sweeping concep-Nixon's lawyers. tions of executive privilege in defying by

son's letters don't constitute much of But like Marshall's opinion, Jeffer-

a precedent. Jefferson-though breath-

mise to testify by deposition. court, and even offered as a comproprosecutor for presentation to over the ing defiance privately-quickly handed desired document to the the

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

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

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Flexible Record