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# Mr. Nixon, the Tapes, and Common Sense

Reply by Raoul Berger,
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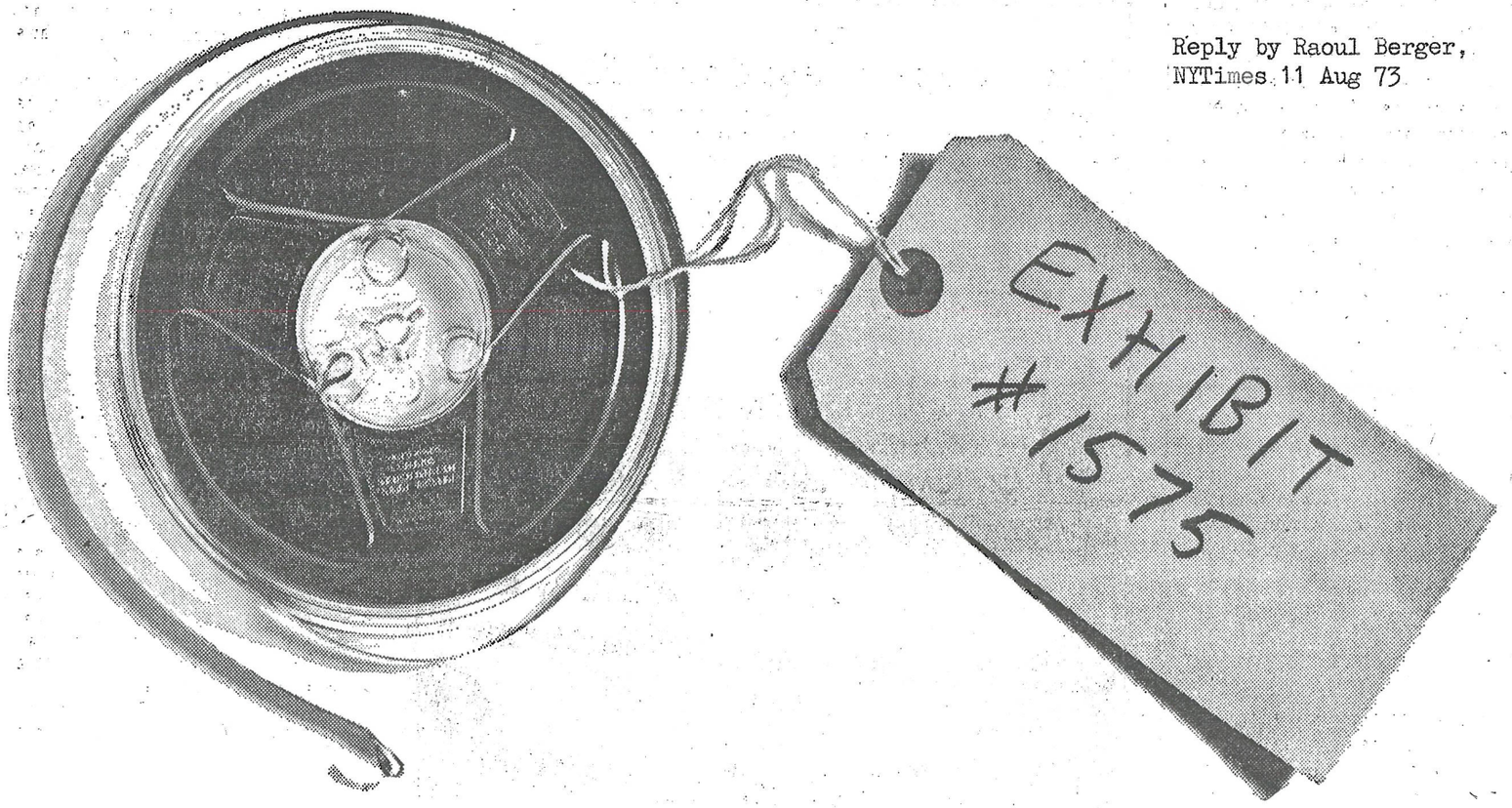

## By Charles L. Black Jr.

NEW HAVEN — Mr. Nixon is dead right in refusing compliance with subpoenas, whether issued by a committee of the Senate, by a grand jury, or by any other authority, commanding the production of written or taped records of consultations held by him as President. I think this refusal is not only his lawful privilege but his duty as well, for it is a measure necessary to the protection of the proper conduct of his office, not only by him but, much more importantly, by his successors for all time to come.

Since there are no precedents, judicial or otherwise, covering this case, and since the Constitution does not expressly speak to the issue, we must have recourse to common sense, which ought to underly and inform consideration of every constitutional question. It is hard for me to see how any person of common sense could think that those consultative and decisional processes that are the essence of the Presidency could be carried on to any good effect, if every participant spoke or wrote in continual awareness that at any moment any Congressional committee, or any prosecutor working with a grand jury, could at will command the production of the verbatim record of every word written or spoken. Does anybody really think that Franklin Roosevelt, or Lincoln, could have managed the Presidency on those terms? That the means by which Lyndon Johnson secured the cloture vote on the Civil Rights Act of 1964 would have been usable, under those conditions?

The framers of our Constitution, as one of their first acts, unanimously resolved that all their proceedings should be inviolably secret, and that the Convention should in the end go before the public with a result, rather than with a record of the tortuous process by which that result was reached. The Supreme Court confers in the strictest secrecy, never violated, and is judged by its public decisions and its publicly uttered reasons. These facts should be pondered, just for a little moment, by those who would lave with the perfume of sanctity the public's so-called "right to know."

It is true that the Constitution does not expressly set up an "executive privilege." I doubt it ever occurred to the framers that anyone would come to contend that the President had no right to take effectively private counsel, or to hold private conversations. In any case, his right to that privacy rests only on functional implication; he cannot efficaciously conduct his office without it. But it is equally true that the Constitution does not expressly confer any investigative power, or power of subpoena, on Congress or on its committees; this power, too, rests on implication, or at best on the judgment that investigation is "necessary and proper" to the exercise of the textually named Congressional powers. But is there anyone so far gone in literalism as to hold that the President does not also possess those immunities "necessary and proper" to the effective exercise of the Presidency, even though those very words do not occur in the Constitution?

Two subsidiary but practically important points must be added. First, the decision that the President's records may be subpoenaed and forcibly publicized would certainly generate its own abuses, for the surest high road to wide publicity, for any Congressman or Senator controlling the subpoena power, would be to use it on the President. Secondly, all attempts to frustrate secrecy in serious decisional processes must fail, and will almost always do more harm than good, for the secrecy, being necessary, will surely continue sub rosa, without even the responsibility imposed by a permanent record and by relatively formalized procedures.

It is the ultimate constitutional foolishness to let the merits of a particular case rush the country into a disastrous precedent. We have to think not only of Mr. Nixon and Senator Ervin, but of President Eisenhower and Joe McCarthy, and of every possible future combination. Let us judge Mr. Nixon on his public record, and not convert our judgment of that record into a precedent that will embarrass and degrade the Presidency for the whole future.

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