

No Final Answer

Nixon's Tapes Offer

Washington

President Nixon's chief justification for action he announced last night on the disputed Watergate tapes was in his words, his desire "to avoid any possibility of a constitutional crisis."

But the effect of his decision, to constitutional experts interviewed immediately following his state-

**A
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Analysis**

that the President had instead created the biggest constitutional crisis of this already crisis-ridden year.

For the President said he would not appeal the Court of Appeals ruling last week, upholding District Judge John J. Sirica's order that the President give him the tapes. At the same time, the President said that he would not give the court the tapes. To legal experts, this decision means, simply, that the President is now violating the law.

Harry Kalven, professor at the University of Chicago Law school, expressed it this way: "If he's not appealing it, it becomes final. It represents the uttermost authority of the law in its final form."

QUESTION

The obvious question to both lawyers and laymen therefore is, how can the President be forced to obey the law? Or, indeed, can he be forced to obey it? As Kalven sees it, the only possible way to enforce the law is via impeachment.

The enforcement question arises because the courts themselves appear to have little, if any, power, in this case at least, to enforce their ruling.

In the normal proceeding there is no problem. If it is a civil case and a judgment is entered against a defendant, a damage assessment in a car accident case for inst-

ance, the court can have the defendant's house or other assets attached.

In a criminal case if a man is found guilty and sentenced to prison, law enforcement officers can physically take the person into custody.

MARSHALS

But in this case there is little possibility of that. Even if court marshals could get into the White House, judges would be reluctant to order such action. Indeed, this fact was one of the arguments raised by some people in support of the President in the tapes dispute. If the courts have no power to enforce an order, the argument went, then they do not have the power to make it.

But the Court of Appeals in its ruling last week flatly rejected this argument.

"The legality of judicial orders should not be confused with the legal consequences of their breach; for the courts in this country always assume that their orders will be obeyed, especially when addressed to responsible government officials," the court said.

Then, in apparent reference to the White House's statement of the summer

that the President would comply with a "definitive" decision of the highest court, the court of appeals added, "indeed, the president has, in this case, expressly abjured the course of setting himself above the law."

EVIDENCE

Under the law, defendants are entitled to any evidence that the government has which tends to exculpate them. Conceivably there is evidence on the tapes that would exculpate persons who may be charged. It is quite likely, experts say, defendants will be able to contend that the President's "summary" of the tapes' comments is insufficient.

"Certainly in some cases," Yale Kamisar of the University of Michigan law school noted, "the judge may say, 'the guy can't defend himself.' Or the court may say that if the government doesn't want to give the information, it pays the price of losing the case."

Both he and Kalven pointed out that the decision would depend on the case in question, that some cases might be dropped and others not.

Already, as Archibald Cox noted in his statement last

night, there have been signs that at least one case may fall in the tapes are not produced. Thursday in New York City, Federal Judge Lee P. Gagliardi suggested that John W. Dean III, a key prosecution witness, may not be allowed to testify in the obstruction of justice trial of former Attorney General John N. Mitchell and former Secretary of Commerce Maurice Stans in the relevant tape is not produced, or in the alternative, if the government cannot prove that there is no relevant tape.

Then, of course, there is the possibility that the tapes may disclose damaging evidence against people not yet indicted.

RAISED

There are other legal questions, of course, raised by the President's action last night. The chief one — raised by the special prosecutor Cox, among others — is what will happen to pending and future prosecutions of persons involved, or allegedly involved, in the Watergate scandal?

Cox and others forecast that at least some of these prosecutions would have to be thrown out.

Dean gave damaging testimony to the Senate Watergate hearings about Mr. Nixon and some of his former White House aides, such as John Ehrlichman and H. R. Haldeman. If his testimony is to be believed, the tapes contain evidence confirming his testimony. On the other hand the tapes could contradict his testimony.

Senator John C. Stennis is to listen to the tapes and then "authenticate" Mr. Nixon's summary of the tapes' contents, but as Kamisar put it, "How do we know he is hearing all the tapes?"