

# A Unanimous Court Against Mr. Nixon?

The long-shrouded fact that the Supreme Court concealed its division in the historic 1954 school integration case to produce a public facade of unanimity suggests the President's cold war against the high court over the White House tapes may backfire.

The unanimous 1954 decision in *Brown vs. Board of Education* reflects a modern tendency by the Supreme Court toward overwhelming, often unanimous, decisions on paramount constitutional questions when opinion within the court may really be divided. That tendency might produce a one-sided decision ordering Mr. Nixon to turn over his tapes to Special Prosecutor Leon Jaworski, confounding the President's strategy.

Although the record of Supreme Court deliberations is top secret, the fact is that the 1954 court, headed by Chief Justice Earl Warren, split 6 to 3 in its pre-ruling deliberations over school desegregation. But when the justices actually voted, the three in the minority joined the majority to make the decision unanimous.

Legal scholars believe that the White House refusal to say it would obey an adverse finding is designed to warn the high court that a presidential refusal to obey could lead to the worst constitutional crisis since the Civil War. Leaving aside the merits of the case, that argument could conceivably

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impress some justices, leading to a closely-divided split decision. Even if that decision went against Mr. Nixon, it would leave the issue confused and subject to interpretation.

In fact, as the record in the 1954 case indicates, the court tends to congeal into a strong or unanimous majority in major constitutional cases. Thus, the White House cold war could boomarang, simply fortifying a potential anti-Nixon vote angered at the implicit White House threat.

Although Rabbi Baruch Korff is threatening legal action for our report that the June 9 testimonial luncheon for President Nixon was run by the White House, the truth is that presidential aides on the public payroll intervened to prevent a fiasco.

When we reported that the widely publicized pro-Nixon rally was staged by the White House, Korff telephoned us in fury to call the col-

umn an "outright lie" and an affront to his "integrity." He would check with his lawyers to see what "action under the law" he could take.

The rabbi did dream up the luncheon sponsored by his National Citizens Committee for Fairness to the Presidency. But the White House was stunned to learn that he had announced a long list of celebrities (including two most unlikely ones, Chief Justice Warren Burger and Democratic Sen. Harold Hughes of Iowa) would attend though he had talked to none of them.

Korff then just let the White House make his press release come true. Although even they could not produce Burger and Hughes, presidential aides did come up with four Cabinet-rank officials—and Mr. Nixon himself. The White House also ordered the U.S. Marine Corps band to play for the "private" party, at taxpayer expense. Bruce Henschel, the presidential aide who travels the country on taxpayers' money drumming up opposi-

tion to impeachment, was in charge of arrangements.

The repeated flat assurance by Air Force top brass that the new B-1 super-bomber could get along without any new tanker force has been blithely forgotten now that Congress has given full-speed-ahead for the B-1.

Thus, hidden away in the Pentagon's new budget for fiscal year 1975 is a \$4.5 million item to start a "study" on a so-called "cargo-tanker" that has a future minimum price tag of \$5 billion (with the initial study probably to be done by Lockheed, Douglas and Boeing).

To the Air Force, the "cargo-tanker" tag is a way to get around its pledge that the B-1 (itself a \$100 million-a-copy item) would not need a new refueling system, despite unprecedented requirements for low-level, long-range attack. As recently as last month, a top general in the Strategic Air Command (SAC) was asked: "Will the B-1 need a new tanker?" His answer: "No."

One rationalization for now requesting advanced new tanker-cargo aircraft was the squeeze on airlift capacity during the October Arab-Israeli war.

Secretary of Defense James Schlesinger wants more airlift of the C-5 variety or larger; the Air Force wants a new B-1 tanker. So, they got together to do either or both.