

PART FOUR: THE ROLE OF LOCAL BLACK LAWYERS IN THE LEGAL HISTORY OF THE CIVIL RIGHTS MOVEMENT

The legal history of the Civil Rights Movement was shaped and influenced not only by the work of the N.A.A.C.P. Legal Defense Fund, Inc., but by the pioneering advocacy of local black lawyers. Prominent among this early group of black lawyers identified with Movement era cases in Tennessee and Alabama were Z. Alexander Looby, Arthur Shores, Charles Langford, Fred Gray and Solomon Seay, Jr.

Z. Alexander Looby was admitted to the Tennessee Bar in 1929, after receiving his undergraduate degree from Howard University and his law degree from Columbia University. He later worked with the N.A.A.C.P. Legal Defense Fund and filed the first *post-Brown* case challenging public school segregation in Nashville. Mr. Looby represented the students involved in the February, 1960 Nashville sit-ins, and it was the bombing of his home in April of 1960 by white opponents of desegregation that prompted a mass march by several thousand students from Tennessee State University, Fisk University, Pearl High School, and others to City Hall to confront Mayor Ben West with the challenge to publicly announce his support for the desegregation of places of public accommodation.

As *Brown v. Board* became a reality, in 1955, Arthur Shores and Thurgood Marshall represented Autherine Lucy, seeking a federal order that her petition to enroll at the then all-white University of Alabama be approved. The *Lucy* case proved to be the precursor of an era of cases challenging the racial segregation of public universities throughout the south, including Mr. Shores' later case on behalf of Vivian Malone and James Hood. Arthur Shores was at the center of the representation of students and adults subjected to the mass arrests orchestrated by white supremacist police and fire commissioner Theophilus Eugene "Bull" Connor in Birmingham in 1963, and Mr. Shores was among attorneys like Z. Alexander Looby whose homes were bombed by violent white groups seeking to preserve a culture of racial segregation and white supremacy.

Fred Gray's most notable line of cases began with *Browder v. Gayle*, the Montgomery Bus Boycott Case, and extended to *Gomillion v. Lightfoot*, *N.A.A.C.P. v. State of Alabama (with Arthur Shores)*, *Dixon v. Alabama State Board of Education*, and *Williams v. Wallace*. His book, *Bus Ride to Justice* (New South Books 2002) and Solomon Seay, Jr.'s book *Jim Crow and Me* (New South Books 2009) paint the portrait of the seven black lawyers in Alabama and the few others in each state of the south in the 1950's and 1960's who were significantly responsible for the defeat of "Jim Crow" segregation. Their advocacy, in their singular cases, and in their collaborative efforts with the N.A.A.C.P. Legal Defense Fund, is found in every challenge to race discrimination in public education, access to public accommodations, employment, and voting rights, and in the defense of the First Amendment right to protest racial segregation and petition for the redress of the effects of segregation.

In 1957, after he received his law degree from Howard University, Solomon Seay, Jr., the subject of our video interview for Part Four, joined this group of pioneering black lawyers as the third black lawyer in the City of Montgomery, along with Fred Gray and Charles Langford (practicing for the next twenty years as the law firm of Gray, Seay and Langford). Randall Williams of New South Books writes that Mr. Seay attended Howard because the State of Alabama would not allow him to attend a state university law school, but would fund his attendance at Howard University. Once at Howard, Solomon Seay, Jr. was exposed to the most famous foundations of legal education in civil rights advocacy.

With Gray, Seay, and Langford, and then in his own practice, Solomon Seay, Jr. litigated significant cases in every area of civil rights, including the representation of the Carr family in Carr v. Montgomery County Board of Education (See Part One of the text materials and our interview with Arlam Carr, Jr.).

Other notable cases: Gilmore v. The City of Montgomery (and Mayor W.A. Gayle, who had been named in Browder v. Gayle, the Montgomery Bus Boycott case), 176 F. Supp. 776 (M.D. Ala. 1959) was one of Solomon Seay's earliest cases, raising the issue of social segregation even before the 1960's sit-in cases. Remember that in 1896, in Plessy v. Ferguson, the Supreme Court had viewed constitutional citizenship as recognizing that the new status of black citizens in America included civil rights, meaning the right to make contracts and to own, lease or convey property, to sue and be sued, and arguably to enjoy the right of free speech and the free exercise of religion. But the Fourteenth Amendment was not held to subsume political rights, and the majority opinion in Plessy explicitly held that social equality or inequality was a matter of human interaction, not to be included in any Constitutional definition of civil rights. See J. Balkin, "Plessy, Brown and Grutter: A Play in Three Acts," 26 Cardozo Law Review 1689 (2005).

The Gilmore case came before Judge Frank Johnson, Jr., and alleged that Montgomery City Ordinance 21-57, and the custom of denying black citizens permission to use "white-only" public parks owned and operated by the City violated the guarantees of the Fourteenth Amendment to the federal Constitution because whites were permitted open access to such public facilities. The eight black plaintiffs (citizens of the City) petitioned for an injunction prohibiting operation of the City's recreational facilities on a racial basis, *i.e.*, designating those parks that were operated exclusively for black citizens, and those operated exclusively for white citizens (available to blacks only if they used the park in their capacity as a servant of a white family). The Ordinance provided, *inter alia*:

"Section 1. It shall be unlawful for white and colored persons to enter upon, visit, use or in any way occupy public parks or other public houses or public places, swimming pools, wading pools, beaches, lakes, or ponds except those assigned to their respective races.

Section 2. It shall be unlawful for any person, who, being the owner, proprietor, keeper or superintendent of any public park or other public houses or public places, swimming pool, beach, lake, or pond to allow or knowingly permit white

and colored persons to enter upon, visit, use or in any way occupy a public park or other public houses or public places, swimming pool, wading pool, beach, lake, or pond, except those assigned to their respective races.”

Under Ordinance No. 21-57, use of a white-only park by a black citizen, except in the servant capacity noted above, was a misdemeanor. The plaintiffs’ original petition was first directed to the Parks and Recreation Board and then to the Board of Commissioners of the City of Montgomery, Alabama. The petition requested that the City terminate its policy of racial segregation and allow the appropriate use of any public park without regard to race. The petition was rejected. The Board affirmed its refusal to operate integrated public parks and effective December 30, 1958, closed all parks indefinitely, while continuing to maintain them.

The federal trial court recognized plaintiffs’ lawsuit as a class action, finding that the City was operating under a policy, practice, custom, and usage of enforced racial segregation in its city parks – and held that Ordinance No. 21-57 violated the Equal Protection Clause of the Fourteenth Amendment. It is important to note that, because the City was continuing to enforce the segregation of its parks during the proceedings, and had retained authority to continue the segregation of its parks on the basis of race (under the Ordinance), the plaintiffs were entitled to both declaratory and injunctive relief. The Court reasoned that, in the absence of such an injunction, the City would be free to re-open the parks and operate them on a segregated basis.

The plaintiffs’ success in this early case was diminished somewhat by Judge Johnson’s holding that the injunction did not require the re-opening of any City park(s), but only that, should the City reopen any or all of its parks, the injunction required that such park(s) be open to the public for appropriate use, without regard to race or color. The City and other nominal defendants appealed Judge Johnson’s decision, and in City of Montgomery v. Gilmore, et al., 277 F.2d 364 (1960), Mr. Seay’s case was heard by a panel of the Fifth Circuit Court of Appeals. At the time of the appeal the parks of the City of Montgomery remained closed.

In an opinion authored by Judge Richard Rives, the Circuit Court noted that, under Rule 8 of the Federal Rules, the defendant City officials had admitted their policy of enforced racial segregation in the City’s public parks. Judge Rives restated Judge Johnson’s holding that the enforced Ordinance, and the policy and custom upon which it was based, was unconstitutional under the Fourteenth Amendment. The Circuit Court then acknowledged that Judge Johnson’s order enjoined the City from enforcing the Ordinance or otherwise enforcing a policy or custom of segregating its City parks in a manner that required black citizens to use only those parks designated exclusively for their use. Judge Rives wrote that the defendants could not seriously argue that the Ordinance, and its policy and custom of racial segregation of its parks were constitutional. The defendants’ responded that the federal constitutional question was therefore rendered moot when the City closed all of its parks. Rejecting the defendants’ view of the case, rather than declaring the constitutional question moot, the Circuit Court modified Judge Johnson’s injunction for such time as was advisable, and retained the

right to enter further orders, or vacate the injunction, if the City were to decide to reopen and operate its parks for use by all of its citizens, without regard to race. Judge Rives reasoned that, by the time the case came to the Circuit Court, the City's parks had been closed for more than a year, and that this deprivation of public recreational facilities by a City imposed a serious inconvenience, injuring the health, welfare, and well-being of the City's residents, as well as the industrial life of the City.

The Circuit Court's decision not to require the re-opening of the City's parks might be considered remarkable, because it suggested that the closing of the parks in fact relieved the plaintiffs of the effects of segregation. This observation was, however, quickly followed by the Court's emphasizing that such extreme action came at the expense of all of the City's residents. Nonetheless, the Court held that the City's determination to close all of its parks, even if based on the decision that operating integrated parks would be contrary to the public health, safety, and welfare, was a political decision beyond the reach of the federal Constitution. Recognizing the apparent mandate of Brown v. Board, Judge Rives nevertheless reasoned that the federal courts should avoid interfering with the independence of the states, when an issue such as the one presented by the instant case could be resolved by state or local administrative action.

More than a decade later, a divided United States Supreme Court continued to grapple with this aspect of southern resistance to racial integration. In Palmer v. Thompson, 403 U.S. 217 (1971), the United States Supreme Court considered a rather extraordinary case that raised Gilmore questions in Jackson, Mississippi. The City had desegregated its parks, auditoriums, golf courses, and the City zoo, but kept its public swimming pools closed, specifically to prohibit the use of these pools on a desegregated basis. The City leased one of its public pools to the YMCA, which operated the pool for whites only, and alleged that its other pools could not be safely or economically operated if they were desegregated. The black petitioners in Palmer, all citizens of the City, argued unsuccessfully in both the District Court and the Fifth Circuit Court of Appeals that the pool closings were a violation of the Fourteenth Amendment's Equal Protection Clause, and the Thirteenth Amendment. Both the District Court and the Court of Appeals (sitting *en banc* and affirming by a bare majority of 7-6) found no evidence of State action, and gave credence to "economic evidence" to support the City's decision to close the pools (*i.e.*, evidence that the pools could not be economically operated on an integrated basis because of white opposition to racial integration of swimming pools).

Rejecting the arguments of noted civil rights attorneys Paul Rosen and William Kunstler, and the briefs written by Arthur Kinoy and Ernest Goodman, Justice Black wrote for a scarcely sufficient 5-4 majority of the Supreme Court, affirming the lower courts' decisions. Justice Black recognized *ab initio* the presence of State action – the actual decision to close the pools. That alone was, however, not enough in the majority's view, to implicate the Equal Protection Clause's protection of black citizens from the segregation of public accommodations in a case that presented no affirmative operation of a public facility on a segregated basis. The pools were, in fact, closed to everyone, and regardless of motive, a complete closure of these facilities was, in the majority's view, beyond the reach of the Equal Protection Clause.

Justice Black distinguished Bush v. Orleans Parish School Board [138 F. Supp. 336 (E.D. La. 1956), 242 F.2d 156 (5th Cir. 1957), 187 F. Supp. 42 (E.D. La. 1960); 188 F. Supp. 916 (E.D. La. 1960), 364 U.S. 500 (1960), 308 F.2d 491 (5th Cir. 1962)], which had held that state laws allowing the Governor to close public schools rather than integrate them violated the Fourteenth Amendment. The Supreme Court majority in that case had emphasized Brown v. Board's recognition of public education as a uniquely important function of state and local governments. The majority in Palmer also emphasized that the legislation at issue throughout the legal history of Bush specifically stated the intent of the State to forestall integration. Justices Burger and Blackmun concurred, observing that the plaintiffs' argument would require a holding that once a city opens public facilities, the Constitution will not allow them to be closed. Resting on this premise, the Palmer majority reasoned that: "[The] growing burdens and shrinking revenues of municipal and state governments may lead to more and more curtailment of desirable public services. Inevitably every such constriction will affect some groups or segments of the community more than others. To find an equal protection issue in every closing of public swimming pools, tennis courts, or golf courses would distort beyond reason the meaning of that important constitutional guarantee."

Although it was beyond debate that Brown intended, and was interpreted to overturn, the third prong of Plessy – the attempt to perpetuate social segregation of two races – the Court limited the *post-Brown* jurisprudence by announcing that in a case that is not about public education, arguments about the City's racial motive were not sufficiently connected with constitutional precedent. The majority supported this observation by emphasizing that the City had desegregated all other public facilities and had closed only its swimming pools. Palmer is significant not only because of its emphasis of Brown as a case about public education, but because it divided the Court 5-4, on the fundamental definition of social inequality. Justices Brennan, Douglas, White and Marshall dissented. Agreeing with the six dissenters at the Court of Appeals level that the City closed its pools at least partly to prevent their use by black citizens, the dissent – in clear disagreement with the majority view of precedent – compared the City's action in Palmer to the action held unconstitutional in Bush v. Orleans Parish School Board.

In Bush, the Supreme Court, without opinion, affirmed the decision of a three-judge panel that Louisiana Legislative Acts authorizing the Governor to close any public school which had been ordered to desegregate was unconstitutional, where, as in Cooper v. Aaron, 358 U.S. 1 (1958), the State argued that desegregation of its schools would risk disorder or violence. In light of the Supreme Court's holding in Cooper v. Aaron, the City of Jackson's speculative and unsupported concern that its pools could not be operated safely on a desegregated basis, could not justify closing the pools. Invoking the Ninth Amendment, the dissent observed that neither public education, nor access to public accommodations is dependent upon an affirmative formal provision in the Constitution. More specifically, the dissent explained, if the City's pools could be eliminated from the public domain by legislative or executive action, then parks, athletic activities, and libraries could also be closed. Finally, the dissent illuminates Brown's *rejection* of the fundamental principle identified with Plessy – that the social segregation of the races was beyond the reach of the federal Constitution.

The dissent criticized the attempted limitation of Brown beyond public education, noting quite critically that the City's action separated the races and encouraged private racial discrimination. The dissent emphasized that the Thirteenth, Fourteenth and Fifteenth Amendments established a principle of equality that is denied by racial segregation, because segregation creates a hierarchy in race relations. When the effect of the City's action is "to chill the assertion of constitutional rights by penalizing those who choose to exercise them," the dissent finds a violation of the Fourteenth Amendment.

The dissent accepted the assertion that a state or city may indeed discontinue certain municipal services for legitimate reasons, such as the cost of operation, *e.g.*, economic exigencies or long-term economic conditions. However, the dissent distinguished such reasons from closing such facilities to continue the policy or custom of racial apartheid, or the desire to prevent the development of a multi-racial community. If the latter is, in fact, its reason, then the discontinuance of a designated public service, or the closing of a public facility becomes a device for perpetuating and enforcing a denial of social equality based on race, and that violates the fundamental premise of Brown v. Board.

Thus, the dissenting Justices concluded that such action is clearly unconstitutional under Bush v. Orleans Parish – and other precedent cases, including Muir v. Louisville Park Theatrical Assn., 347 U.S. 971 (1954), as applied in Mayor and City Council of Baltimore v. Dawson, 350 U.S. 877 (1955) and Holmes v. City of Atlanta, 350 U.S. 879 (Holding that State and City officials could not enforce a policy of racial segregation of public beaches and public golf courses).

Because the majority's holding included the acceptance of the City's asserted cost of operations as the basis for closing its pools, the dissent found it necessary to reveal the disingenuous nature of that argument. The dissent noted that, as late as 1963, the City of Jackson operated generally segregated public parks, golf courses and swimming pools, arguing that the operation of "separate but equal" facilities was constitutional, despite the decisions in Brown, Muir, Dawson, Browder, and other cases. In response to litigation at that time, the City's Mayor had made comments (praised later by Mississippi Governor Ross Barnett), that economic considerations were stable with regard to the operations of its public pools, and that the City's reasons for closing the pools was its concern with "agitators" pressuring the City to desegregate its pools, and the City's determination to prevent racial "intermingling" in the use of its pools.

Arguably most important is the language of Justice White's dissenting opinion, recalling Brown's holding that the enforced racial segregation of public schools implied the inferiority of black children. Justice White observed that it was this central observation of Brown that was immediately applied in other contexts. Thus, it is inconsistent with Brown v. Board to say that the City's closing of its public pools (a decision which, if approved by the Supreme Court, could be applied to permit the closing of any public facility), equally affects white and black citizens. The reality, Justices White, Brennan, and Marshall observed, is that the pool closings were a pronouncement that black citizens were somehow unfit to swim with white citizens, a public policy that stigmatizes black citizens and thus violates the Fourteenth Amendment.

The Court's divergent views of the constitutionality of this practice meant that southern lawyers achieved only partial victories over "Jim Crow" social segregation on the basis of race for two decades after Brown v. Board, as black citizens waited in frustration for political solutions. The legal history of social equality thus remained a difficult, but promising uphill climb challenging the N.A.A.C.P. Legal Defense Fund, and demanding the courage, resolve, and Constitutional expertise of local lawyers who played a central role in this aspect of Brown's legacy.

Other examples of the scope of the practice of pioneering local civil rights lawyers in the south: In addition to Gray, Seay and Langford's representation of black families in most of the seminal Alabama school desegregation cases that followed Brown v. Board, Solomon Seay, Jr. was a principal example that local black lawyers were also involved in criminal cases that raised federal constitutional issues, and cases seeking to enforce the equal employment opportunity provisions and fair housing provisions of Title VI and Title VII of the 1964 Civil Rights Act.

An early example of Mr. Seay's criminal law practice is Hulett v. Julian, 250 F. Supp. 208 (M.D. Ala. 1966). In this case, Mr. Seay challenged the legal process itself in cases before Justices of the Peace who had the power to convict, and then levy fines and forfeitures in cases involving driving offenses. Mr. Seay filed suit against J. B. Julian, a Justice of the Peace in Lowndes County, Alabama. The issue in the case was of significant concern to the N.A.A.C.P. Legal Defense Fund, which assigned Jack Greenberg to join Mr. Seay in pursuing the lawsuit. The case came before a federal three-judge panel, including Circuit Judge Richard Rives, and District Judges Harlan Grooms and Frank Johnson, Jr.

Hulett was arrested for alleged reckless driving, and was to appear before Justice of the Peace Julian. On Mr. Seay's motion, the federal court granted a temporary restraining order enjoining Judge Julian from trying Mr. Hulett. Mr. Seay and the Legal Defense Fund argued that the Justice of the Peace had a direct interest in convicting Mr. Hulett, and thus the trial process was a violation of Mr. Hulett's federal constitutional right to Due Process under the Fourteenth Amendment. Noting that it should intervene only if Mr. Hulett had no adequate way to raise this issue in State court, the federal Circuit Court (The federal Court of Appeals) held that, under Alabama law, Hulett was required to submit to trial and conviction, and then to allege abuse of power. Finding this remedy inadequate, the federal Circuit Court took jurisdiction to decide the federal question presented.

The federal court cited Alabama statutes providing for fines and forfeitures collected upon convictions of any person to be forwarded to a public treasurer, and then to be credited to the highway patrol fund. The statute had been interpreted by the State Attorney General's Office to prohibit a Justice of the Peace from withholding money from any fine or forfeiture in order to pay costs, or to provide a fund from which to pay costs in cases where the person charged was acquitted. The practice had been that the judge obtained his fees when the defendant was convicted. In other words, by Judge Julian's own testimony in the federal case, when the defendant before him was not

convicted, he did not receive his pay. In cases of conviction, the judge submitted the fine and fee for the State, and the fine or fee for the County, and retained or withheld his fee as judge; but in cases of acquittal, he received nothing. The federal court also found that the fine and forfeiture fund was inadequate to pay the defendant's fees to the Justice of the Peace Court if he were acquitted. Citing Tumey v. State of Ohio, 273 U.S. 510 (1927), the federal court held that it is a deprivation of a criminal defendant's constitutional entitlement to due process when his liberty or property is subject to the ruling of a judge who has a direct, personal, and substantial pecuniary interest in ruling against him in his case.

Many of Solomon Seay's employment discrimination cases grew out of the school desegregation cases. An example is Lee v. Conecuh County Bd. of Education, 634 F.2d 959 (5th Cir. 1981), a part of the legacy of another prominent post-Brown desegregation case, Lee v. Macon County, arising from the petition of Anthony Lee and fourteen other black students to enroll in Tuskegee High School in the early 1960's. The case ultimately affected school districts throughout the State of Alabama, in a line of cases that continued throughout the decades that followed.

A typical case was one that arose out of the allegation by Samuel Gantt, a black teacher, that the Conecuh County Board of Education and the Superintendent of Schools rejected his promotion to the position of principal because of his race. Following the analytical approach to disparate treatment employment cases under Title VII of the Civil Rights Act of 1964, Gantt alleged that he was qualified for the promotion, based on his having earned a Master's Degree in School Administration, his Rank I certificate in administration and supervision from the Alabama Department of Education, and his prior service as principal in Conecuh and Escambia Counties for 19 years. These credentials, he asserted met the requirements for promotion to principal.

He alleged that from 1971 through 1978, principal vacancies were filled by white candidates holding lower rank certificates that qualified them to serve as teachers, but not as principals [This advancement by black candidates of their superior qualifications for promotion was to become significant. In Ash v. Tyson Foods, 546 U.S. 454 (2006), the United States Supreme Court ultimately suggested that an employer's argument that it selected the most qualified applicant for a position could be rebutted as pretextual for discrimination by a minority applicant's proof that s/he was, in fact, clearly more qualified than the candidate who was selected for the position under the employer's own criteria].

The United States Supreme Court case applying Title VII of the Civil Rights Act that is considered to be comparable in significance to Brown v. Board of Education was Griggs v. Duke Power Corporation, 401 U.S. 424 (1970). In Griggs, a unanimous Supreme Court held that Title VII (42 U.S.C. §2000e, as amended in 1972) prohibited a covered employer (including a State employer) from imposing job qualifications that resulted in the disproportionate exclusion of black applicants, when the credentials or criteria required were not related to the successful performance of the job in question.

In the second case of first impression under Title VII, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Court held that that Title VII also prohibited intentional discrimination, *i.e.*, the disparate treatment of employees or applicants based on race, or other traits that are the subject of Title VII of the Act. Although it may be said that Griggs was the more important theoretical case remediating the present effects of the historical discrimination against black applicants and employees generally (as a class of applicants), the disparate treatment theory became ultimately popular, especially after the passage of the 1991 Civil Rights Act, which amended Title VII to allow for jury trials, compensatory and in some cases punitive damages, in cases of intentional discrimination.

Gantt's case was a disparate treatment case, relying on Section 1983 of the Civil Rights Act, in which the trial court followed the McDonnell Douglas analytical approach applied in Title VII cases. The McDonnell-Douglas approach allows an alleged victim of employment discrimination to create a *prima facie* presumption of discrimination by showing that s/he was a member of a class protected by Title VII of the Civil Rights Act (*e.g.*, that in his case the issue was race); that s/he was qualified for the position in question and was rejected, despite his qualifications; and that following the position, the employer (here the school district) continued to seek similarly qualified applicants or held the position open. The causation aspect of Gantt's case rested on the allegation that, but for the consideration of his race in its decision to deny him a position as principal, he would have been promoted. This causation requirement thus, at the time, allowed the school district to show that it would have denied Gantt the position in any event absent considerations of his race.

Although the ultimate clarification of so-called "mixed motive" cases would not come until Congress' enactment of the 1991 Civil Rights Act [*i.e.*, 42 U.S.C. §2000e-2(m), and the Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003), the court in Lee held that, because the school board had not established written, objective nonracial criteria for selecting principals, it could not show an evidentiary basis for legitimately rejecting Gantt. The court noted that Gantt had specified three particular principal positions for which he applied and was rejected. In each case, the court observed, the only objective evidence revealed that he was clearly the superior candidate for the position, because the other candidates lacked the basic and fundamental certification that Gantt held. The court also rejected the board's assertion that Gantt was unfit as based only on inconclusive and largely irrelevant testimony concerning his personal finances and a rumor of a single incident involving the nonpayment of a school invoice. Finally, the board's allegations of his unsatisfactory teaching were based on the evaluations of one supervisor.

In any event, the court held, Gantt had the opportunity under the McDonnell-Douglas analysis (later re-affirmed and explained by the United States Supreme Court in Texas Department of Community Affairs v. Burdine, St. Mary's Honor Center v. Hicks, and Reeves v. Sanderson Plumbing), to prove that the board's proffered reasons were a pretext for discrimination based on race. On the issue of pretext, Gantt's superior qualifications were coupled with evidence that, since earlier federal decisions requiring

the desegregation of public schools, *i.e.*, the disestablishment of the dual system of black schools and white schools, there had been a 70% decline in the number of black principals and that black candidates had been appointed to only 19% of the vacancies in principal positions. Such evidence of the broad scale rejection of black candidates for principal positions was considered relevant to Gantt's assertion that the board's subjective criticism of his administrative ability was pretextual for race discrimination.

See also Lee v. Washington County Bd. of Education, 625 F.2d 1235 (5th Cir. 1980), brought by Mr. Seay on behalf of three teachers. In Lee, another in the long line of public school desegregation cases in Alabama, the Fifth Circuit refused to impose an affirmative requirement regarding the recruitment of black coaches and administrative staff, but held that the trial court acted improperly in requiring two of the individual plaintiffs to prove that they were "the most qualified" candidates for the position they were seeking, when class discrimination had been proven with regard to the appointment of principals. In such cases, the court held, the burden shifts to the employer to prove that the individual applicants or candidates would have been rejected even absent considerations of race. Again, this line of cases was clarified by Congress in the 1991 Civil Rights Act, 42 U.S.C., §2000e-2(m), and the Supreme Court's decision in Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003) (Holding that an employee or applicant may prevail and obtain limited remedies if s/he proves that race or gender was, in fact, a motivating factor in the employer's decision).

Finally, a significant aspect of the civil rights landscape for early practitioners like Solomon Seay, Jr. involved housing issues. Montgomery Improvement Association v. United States Department of Housing & Urban Development, 645 F.2d 291 (5th Cir. 1981) is an example. [The Montgomery Improvement Association is significant to many readers of civil rights movement history as the organization that elected Dr. King to lead the Montgomery Bus Boycott, beginning in late 1955. But, the organization emerged as a significant association of Montgomery's black citizens, with a continuing interest in all issues that generally affected low and moderate income black workers and families].

The instant case grew out of the claim of black residents of Montgomery that the City's application for federal funding from the Department of Housing and Urban Development, and implementation of plans for improvement of housing failed to comply with the Housing and Community Development Act of 1974. The Association and the nominal plaintiffs alleged that the City was deliberately failing, on the basis of race, to address the needs of lower-income residents in its Housing Assistance Plan, in violation of the 1974 HCDA, Title VI of the 1964 Civil Rights Act, and the federal Fair Housing Act (Title VIII of the Civil Rights Act of 1968). The Association and the nominal plaintiffs sought a declaratory judgment; an order enjoining the expenditure of further funds; and an affirmative order reallocating both expended funds and future funds.

Congress' intent in enacting the 1974 Act was to respond to a national concern for critical social, economic, and environmental conditions in local communities, with the objective of making recipient urban communities viable social, economic, and political entities. This broad vision was implemented through the allocation of funds through

block grants to eliminate slums and blight and to make these communities more attractive and viable places in which to live. Local governments, like Montgomery, could apply for such grants to finance improvements, subject to their submission of a Housing Assistance Plan assessing the needs of low-income families, and the assurance that their program of urban redevelopment would establish a realistic yearly goal, including explaining the number of persons to be assisted or the housing units to be renovated or constructed.

In the litigation, the Association presented a detailed analysis of census tracts showing that Montgomery had generally maintained racially segregated neighborhoods perpetuated by its Housing Assistance Plan, in violation of the 1964 Act, *i.e.*, that the City's plan did not provide assistance for renters, the elderly or single women, and that it had, in any event not been implemented by the City. The federal Circuit Court of Appeals held that the Association and the individual plaintiffs could bring a private cause of action under both the 1974 Act and Title VI of the Civil Rights Act of 1964, and that it was therefore unnecessary to reach the Fair Housing Act issue.

On remand, in Montgomery Improvement Association v. United States Department of Housing and Urban Development, 543 F. Supp. 603 (M.D. Ala. 1982), the District Court considered the question of the standard of review where the plaintiffs had filed civil actions against both a local government defendant and a federal agency, *i.e.*, the Department of Housing and Urban Development. Citing decisions by the U.S. Supreme Court and the Ninth Circuit Court of Appeals, the District Court held that, to the extent that its civil action challenged the decisions of the federal Department of Housing and Urban Development itself, the Montgomery Improvement Association would be entitled to a limited *de novo* judicial review if the federal agency's action was adjudicatory in nature and the agency's fact finding procedures were inadequate, or where issues were raised in a judicial action on the same subject that were not before the agency in a non-adjudicatory administrative enforcement proceeding.

In this case, the agency action had been adjudicatory in nature and the federal District Court therefore considered on remand whether the Department of Housing and Urban Development had itself discriminated in its administration of the Housing and Community Development Act. The federal District Court also held that it was proper to examine the administrative responsibility of HUD to insure that no person is excluded from the benefits of a Community Development Act funded program on the basis of race. The Court explained that the Department of Housing and Urban Development has the responsibility to determine whether any recipient of HCDA funds, *i.e.*, the City of Montgomery, is violating the federal nondiscrimination provisions of the HCDA.

[Following the completion of this Part of the text, the reader should refer again to the Oral Histories Section of the web site's Home Page and view Professor Bickel's video interview with Solomon Seay, Jr.].