



by T. Maxfield Bahner and Russell W. Gray

## The *Other* Brown Case: The Promise of the U.S. Constitution at Work in Chattanooga

Many people know and appreciate the historical significance of the U.S. Supreme Court's seminal decision, *Brown v. Board of Education of Topeka, Kansas*, striking down the "separate but equal" doctrine and leading to the desegregation of schools in the United States. Few people, particularly outside of Chattanooga, Tenn., know and appreciate another "Brown" case—*Brown v. Board of Commissioners of City of Chattanooga, Tennessee*, 722 F. Supp. 380 (E.D. Tenn. 1989) ("*Brown v. Commissioners*"). That case, filed 25 years ago, had its own far-reaching and positive impact. It changed a prominent city in the Southern United States and the way its people govern themselves. It gave effect to an underlying promise in the U.S. Constitution—namely, that each citizen has the right to participate in choosing his or her own government. It demonstrated the crucial role of the federal courts to vindicate the Constitutional rights of political minorities.

### Historical Background—The Context for *Brown v. Commissioners*<sup>1</sup>

#### From Ross' Landing to Communication Crossroads

Chattanooga had been Indian country. The village of Ross' Landing, named after a Cherokee Chief, John Ross, was the nucleus from which the city grew. The name was changed to Chattanooga in 1838. The name "Chattanooga" is widely understood to derive from the Creek or Cherokee language and mean mountain that comes to a point, referring to the sharp profile of Lookout Mountain which overlooks the city.

Between 1840 and 1850, Chattanooga developed as a communications center with East-West communication on the Tennessee River and railroad with connections South to Atlanta. These together facilitated shipment of cotton and other products of the Tennessee Valley.

Before the Civil War, few slaves were in the area because they

were unnecessary in the small-scale farming that predominated. Before the Civil War, some free blacks, who at that time had the right to hold property, vote and testify in court, lived in the area. However, in 1834 the Tennessee Constitution was amended to remove those rights. By the time of the Civil War, slaves and free blacks comprised about 12 percent of Chattanooga's population.

During the latter part of the Civil War, when the Union Army occupied Chattanooga, many slaves looking for freedom came to Chattanooga from other states in the South. Chattanooga's black population grew to about 46 percent.

#### Political Disenfranchisement of African Americans

After the Civil War, black political clout enabled the election of black public officers and appointments of blacks to patronage posts. In 1881, seven blacks served on Chattanooga's twelve-person police force. Former slaves occupied positions in fire companies, on the board of education, as justices of the peace and in other significant offices including constable and deputy sheriff. This black political strength and its patronage rankled whites.

In 1883, in a deliberate effort to disenfranchise blacks, the Chattanooga City Charter was amended to provide for a poll tax, special voting registration procedures, police force under control of a commission appointment by the governor of Tennessee, and a reduction in the number of alderman to six, five of whom had to reside in the particular ward that they represented. Efforts to diminish black political power continued. The Tennessee legislature enacted other laws designed to disenfranchise blacks including advance registration requirements, provisions that favored literacy and a poll tax.

In 1901, the Tennessee legislature revised the Charter of the City to create a bicameral city government that included both aldermen and councilmen. After this, blacks were essentially eliminated as members of the Board of Aldermen. A decade later, in 1911, the government was again changed, and that Chattanooga was governed

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*T. Maxfield Bahner was appointed by Hon. Curtis L. Collier, chief judge of the Eastern District of Tennessee, to chair the U.S. Court Historical Society's program on the Brown case to mark Judge R. Allan Edgar's retirement as a senior judge. Bahner, a graduate of the UVA Law School, received the Chapter Service Award from the Chattanooga Chapter of the FBA in 2012, following his many years of service as chair of the Attorney Admissions Committee. He is a senior member with Chambliss, Bahner & Stophel, P.C., is a past president of the Chattanooga and Tennessee Bar Associations. Russell W. Gray, managing shareholder in the Chattanooga office of Baker Donelson, concentrates his practice in litigation and labor and employment issues. He also has more than 15 years of experience in commercial and business litigation, including litigation involving contractual matters, trade secrets, stock valuation and real property. He has litigated matters before courts or government agencies in approximately 20 states. Gray received his B.A. from the University of Tennessee and his J.D. from American University, Washington College of Law, summa cum laude.*



by a city commission whose members were elected at large. Even though African Americans made up a substantial part of the population of the city, not one African American citizen was elected to the city commission until 1971 when John Franklin was elected a commissioner.

Meantime, in 1965, the federal government had enacted a Voting Rights Act. But after passage of that act, no changes occurred to the form of Chattanooga's city government. Racial tensions increased with lunch counter sit-ins and some violence, but overall the city remained calm, at least on the surface. The disenfranchisement of African Americans continued to fester. This was reflected among various ways in a school desegregation case that lasted several years and was decided by U. S. District Judge Frank W. Wilson. Later decisions by Judge R. Allan Edgar, a successor to Judge Wilson, regarding motions filed in efforts to implement that decision bothered both blacks and whites. The African American population sought to correct Chattanooga's discriminatory government structure through ordinary political processes, but the historical imbalances were too entrenched and the political majority was not yet willing to make the change. An attempt to change the city charter by vote, although supported by most African Americans as well as many forward-looking whites, was voted down by the entrenched political majority.

### **From the Legislature to the Courts**

Unable to correct the discrimination by political processes, activists looked to the court system. Lorenzo Ervin, a Chattanooga activist, did a considerable amount of research about the issues concerning effective disenfranchisement of blacks in Chattanooga. A number of leaders in the African American community began to coalesce around his efforts in the late 1980s. Ultimately, eleven persons continued to meet about the issues and became plaintiffs in the lawsuit. Dr. Tommy Brown, one of these eleven persons, said that there needed to be an understanding about the burden of being black and the situation for blacks in Chattanooga who for decades had the quality of their lives diminished because of actions of selfish and shrewd persons who deliberately calculated how to dilute the black vote even after the Voting Rights Act of 1965. As Dr. Brown observed, the group that was discussing these issues consisted of persons who were not an angry group, but true patriots who were protectors of the Constitution. All they wanted Chattanooga to do was to live by the laws of the land.

Lorenzo Ervin talked with Annie Thomas and Maxine Cousins about his vision and his plan. Ultimately, it was decided to approach the ACLU with a request to represent the group.

Ervin went by bus from Chattanooga to Atlanta and talked with Laughlin McDonald, a lawyer with the ACLU. They spent the better part of an afternoon talking about the problems with Chattanooga's commission form of government and other problems. McDonald became convinced that there was a reason for a lawsuit so that all citizens of Chattanooga could participate fairly in the elective process.

McDonald talked with Richard Dinkins, now a member of the Tennessee Court of Appeals, who had been recommended to him. Dinkins agreed to be co-counsel.

Voting rights lawsuits raise unique, and frequently insurmountable, difficulties. They are as difficult to win as antitrust, environmental, and death-penalty cases. They can be prohibitively

expensive to sustain, requiring many expert witnesses, including demographers, statisticians, and political scientists. They require careful analysis and differentiation of numerous state voting rights statutes and local voting rights ordinances from around the county, interviews of countless witnesses, and diligent research of the racial and social history of the location of the perceived discrimination.

### **The Case Reaches the Court**

After decades of fermentation, the case finally reached federal court. In 1987, Dr. Brown, Ervin, Cousins, Thomas, and seven other plaintiffs filed suit against the Chattanooga Board of Commissioners (Chattanooga's governing body) and the elected members of the Board of Commissioners. In that suit, the plaintiffs contended that the at-large system for selecting Chattanooga's Board of Commissioners violated the Voting Rights Act of 1965 as well as the U.S. Constitution. McDonald and Dinkins represented plaintiffs Ervin, Cousins, Thomas and Bobby Ward in the case. Margaret Carey and Charles Victor McTeer of the Center for Constitutional Rights, and Myron Bernard McClary of Chattanooga represented the remaining plaintiffs: Dr. Brown, Leamon Pierce, Rev. Herbert H. Wright, J.K. Brown, Johnny W. Holloway, George A. Key, Norma Crowder, and Buford McElrath.

After about two years of discovery and resolution of numerous pretrial issues, the lawsuit came to trial in 1989 before Judge R. Allan Edgar and lasted several weeks. After the trial, Judge Edgar issued an opinion in which he found that the Chattanooga commission form of government deliberately disenfranchised African Americans. He ordered that a new form of government be devised.

Courageously, the city commission decided not to appeal Judge Edgar's decision. Instead, it worked with the plaintiffs and their counsel to outline a new form of government which was then approved by the court.

### **Twenty-Five Years After**

Recently, the Chattanooga Chapter of the Federal Bar Association teamed with the Brock-Cooper Inn of Court in Chattanooga, the U. S. District Court Historical Society for the Eastern District of Tennessee, and the Chattanooga Bar Association to produce a seminar on the positive effects of *Brown*. The event, which took place on the campus of the University of Tennessee at Chattanooga, rejoined key players in the case, including the presiding judge, R. Allan Edgar, representatives of the plaintiffs and representatives of defendants. It led to a lively and informative discussion of the past, present, and future.

Presenters during the seminar, including Judge Edgar and current Chief Judge of the U.S. District Court of the Eastern District of Tennessee, Hon. Curtis L. Collier, emphasized that the process of law is as important, if not more important, than the concept of the rule of law. The case showed how the U.S. legal system can work even from a grass-roots level. As recognized during the program, the plaintiffs had to overcome numerous obstacles to bring the case and see it to its conclusion. They did not have sufficient financial support or resources. Some of them lived in public housing and had limited transportation. They also had to face the fears of possible retaliation from a disagreeing white public. Furthermore, they had to find willing and skilled support, which they found with Laughlin McDonald, Judge Dinkins, the ACLU, and other counsel. Through it all, including their own disagreements and dissensions, they persevered.

Judge Dinkins observed that progress is not inevitable. Change is not inevitable. It takes people who are willing to step out and make it happen. The individuals who became the plaintiffs in *Brown* did just that. They had more than just a vision. They, along with their counsel, created a path for making that vision a reality. With courage they followed that path, which was a very challenging one.

Praise for the plaintiffs and their counsel was not limited to them during the recent seminar. Presenters praised Judge Edgar for his commitment to the rule of law in a challenging political and social climate, his hard work in understanding the case from both a factual and legal point of view, and his well-reasoned and comprehensive opinion in the case. There was also praise for the defendants who saw fit not to appeal the case and who worked diligently with the plaintiffs to create a new form of government after Judge Edgar issued his opinion.

### **The Legacy of *Brown v. Commissioners*—Progress Through Process**

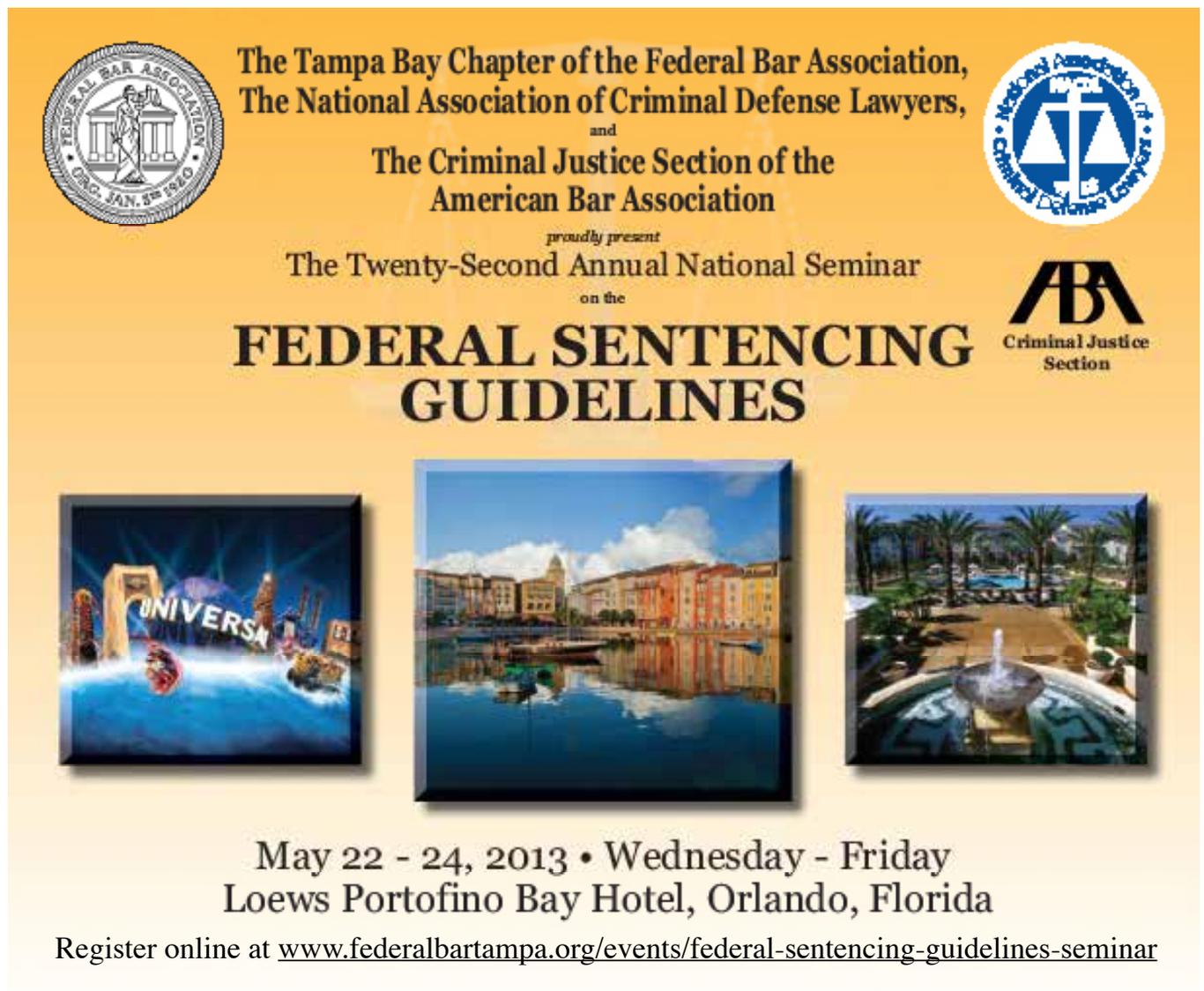
People may seek change in many different ways. They may, for example, seek change by electing new leaders or seeking new

legislation. But what is to be done when the political processes break down, fail to represent the interests of all of the people, and discriminate against some on behalf of the majority? In many countries, the only remaining choice is revolution or terrorism. In the United States, however, the politically disenfranchised have one more avenue of recourse, the court system. In our tripartite scheme, the courts are the final arbiters of Constitutional rights.

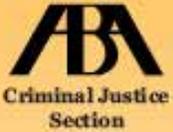
Although the promises of the decision in *Brown* have not altogether been met, the lesson that progress can be accomplished through the judicial process is critical. Like the more famous U.S. Supreme Court *Brown* case, the Chattanooga *Brown* case demonstrates that the rule of law and the American judicial system do work as a peaceful and orderly way to effect change. They provide a path for hope and justice. ☉

### **Endnote**

<sup>1</sup>Most of the historical information in this section derives from Judge Edgar's opinion.



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