

FRIENDS OF THE COURT

Edited and Introduced
By VICKI SIMMONS

In 1915, the Supreme Court decided the famous grandfather clause case, *Guinn v. United States*. The state of Oklahoma had instituted a literacy test as a condition of voting, but exempted from the test anyone who had been eligible to vote in 1866. The exemption as such, applied only to whites, leaving Blacks, essentially the only group subject to the literacy test. The fledgling NAACP submitted to the Supreme Court an *amicus curiae* brief arguing that the Oklahoma law was violative of the Fifteenth Amendment in that it defeated the purpose of that amendment — the protection of the voting rights of Blacks. While one cannot say that the NAACP's arguments were determinative of the Supreme Court's decision to strike down the Oklahoma law, it did win for the NAACP the distinction of being one of the first groups to submit an *amicus curiae* brief for the purpose of the protection of minority group rights.

The role of the *amicus curiae* had traditionally been one of advising the court regarding points of law about which the court was doubtful. The brief submitted by the NAACP in *Guinn* is illustrative of the shift in the role of the *amicus* from that of the court's advisor to that of the advocate, at times, virtually indistinguishable from the original litigants. The importance this shift has had in the area of civil liberties cannot be over emphasized.

In the landmark case of *Mapp v. Ohio*, the Supreme Court overruled its earlier decision in *Wolf v. Colorado*, in which they held that the exclusionary rule which prohibited the Federal Courts from hearing evidence obtained in illegal search and seizures did not apply against the states. While even the appellant's counsel did not argue for a reversal of *Wolf*, the *amicus* brief submitted by the ACLU urged its reversal and the Court echoed the rationale of the *amicus*, that the Fourth Amendment included a protection for "the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure", and that this protection applied against the states through the due process clause of the Fourteenth Amendment. This was no small victory for the *amicus* as well as for the American people, and is indicative of the impact a well reasoned and argued *amicus* can have on the decision making process of the Court.

This term, as the Court considered *DeFunis v. Odegaard*, its deliberations were aided by twenty-eight *amicus curiae* briefs submitted as the result of the collaboration of sixty-eight groups. The high court's dismissal of the *DeFunis* suit does not mitigate its importance. The issues presented are still alive and the *amicus* briefs submitted mirror the concerns of all who realize that when the court finally decides to meet the issue head-on, there will be far reaching effects on the continuing struggle to end oppression in our society.

It is fitting that the BLACK LAW JOURNAL single out a few of the attorneys appearing on *amicus* briefs.

ARCHIBALD COX is a professor of law at Harvard University and one of the nation's leading authorities on labor law. He was thrust into the national limelight when he was appointed special prosecutor of the "Watergate" incident. While his forthright stance in the prosecution of his duties lost him that position, it won for him the respect of those who admire dedication to principle. This appointment was not his first in government service. During World War II, he served the government in various capacities and later, under President Truman, he served as Chairman of the Wage Stabilization Board. He joined the faculty of Harvard's Law School in 1945 and left sixteen years later to serve as Solicitor General of the United States under Presidents Kennedy and Johnson. He returned to Harvard in 1964.

At the height of student dissent and unrest of the '60's Professor Cox was asked to serve as Chairman of a commission which investigated the disorders at Columbia University and published as its report, a book length manuscript on the origins of the disturbances. Just one year later, in the fall of 1969, the President and Fellows of Harvard College delegated to Professor Cox the authority to determine how Harvard would respond to similar disorders, a responsibility he discharged through June, 1971.

To no one's surprise, Harvard once again called on Professor Cox, when it perceived that its interests were jeopardized by *DeFunis v. Odegaard*. In the brief, Cox contends that "Harvard and many other privately endowed colleges and universities receive government grants" and would unquestionably be affected by the Court's ruling in this case. He points out that every institution with more applicants than places must answer two questions. The first is, which applicants have the ability to benefit from the course of study and have the intellectual capacity which will not impede other students? This question can be decided on the basis of test scores and grades. The second question asks, by what criteria shall they select from fully qualified applicants the smaller number whom the institution can accommodate? The criteria used in this stage of the process, Cox maintains, should reflect the policy and educational philosophy of the university. It is the failure to grasp the essential distinction between these two questions which provides the basis for DeFunis' "misleading assertion that minority applicants were preferred despite [his] superior qualifications."

The first Black woman ever to be admitted to the bar in the state of Mississippi, MARIAN WRIGHT EDELMAN, is the attorney of record on the *amicus* brief filed for respondents by the National Urban League, the United Negro College Fund and some sixteen other organizations. She is currently the Director of the Children's Defense Fund of the Washington Research Project a signatory of the brief.

Ms. Edelman's record demonstrates a sustained commitment to the advocacy of the poor and powerless. Prior to assuming her present position, she served as Director of Harvard University's Center for Law and Education, an OEO-financed resource center for Legal Services. Before that, Ms. Edelman was Director of the NAACP Legal Defense and Education Fund, Inc. in Jackson, Mississippi and a partner in the

Washington Research Project of the Southern Center for Public Policy.

It is the broadened mandate of the latter group that she now carries forward in Children's Defense Fund. This organization engages in advocacy for children along a broad range of issues — exclusion from school, classification while in school, juvenile justice and child health. In her brief, Ms. Edelman describes the group as having "a broader focus on children's rights, seeking

systematic reforms on behalf of all the nation's children, but with special attention to the special problems of minority and poor children." Her work to vindicate the rights of all children depends, primarily, on eliminating the vestiges of discrimination against particular children at all levels of public education.

Thus, follows, her professional and personal concern about *DeFunis v. Odegaard*. In its conclusion, her brief states, "what is important about this case is not that [DeFunis] is asking the Court to interfere with the discretionary admissions process of a law school. Rather it is that [he] is asking the Court to cripple efforts in this country to exorcise, at long last, the effects of our heritage of racial discrimination."

DERRICK BELL is the attorney for the *amicus* brief filed by the National Conference of Black Lawyers. As a professor of law at Harvard, he has spent much of his professional career working on and writing about the problems of racial discrimination. Last year, Little Brown & Co. published his *Race, Racism and American Law*, an analysis of the role of racism in the law. He was a staff attorney for the NAACP Legal Defense Fund from 1960 to 1966, and served as Deputy Director of HEW's Office of Civil Rights from 1966 to 1968. A 1957 graduate of the University of Pittsburgh School of Law, where he was an associate editor of the Law Review, he now teaches law courses that focus on individual and minority group rights. His current projects include a multi-discipline study of racial problems undertaken with five other Black

professionals, and a book on judicial decisions concerning slavery and race from 1700 to 1900, which will be co-authored by the Honorable A. Leon Higginbotham, Jr. of the Third Circuit Court of Appeals.

When Howard Moore, former co-chairman of the National Conference of Black Lawyers asked Mr. Bell to file an *amicus* brief in the *DeFunis* case, he found it a request "which could not easily be turned down." He believes that Black lawyers "should make their voices heard" because the case involves, "quite directly, perhaps, the most crucial civil rights issue of our time." That issue, as Mr. Bell sees it, is whether "white society, the great majority of which is committed to the principle of integration, [will] give up the economic status and psychological advantages which have been enjoyed at the expense of Blacks and other minorities?"

MICHAEL J. MOOREHEAD, is the attorney of record for the *amicus* brief filed for the respondents by the Council on Legal Education Opportunity. He is the executive director of that organization, and is currently on a two year leave of absence from Howard University, where he is a professor of law.

In 1969, upon graduating cum laude and having served as Editor-in-Chief on Howard University's Law Journal, he clerked for the Honorable Spottswood W. Robinson III of the United States Court of Appeals for the District of Columbia Circuit. Prior to his clerkship, he utilized his legal expertise for the Department of State in the Office of the Legal Advisor for African Affairs. He is a member of the Association of American Law School's Minority Groups Subcommittee on Minority Admissions and is

the editor of their newsletter.

The Council on Legal Education Opportunity, popularly known as CLEO, is both federally and privately funded. Its purpose is to provide economically disadvantaged students, many with nontraditional admissions qualifications, an opportunity to attend an accredited law school and ultimately enter the legal profession. He believes writing ability is essential in order for one to

achieve success in law school and is now in the process of promulgating such a writing program into the six week summer program CLEO students.

Mr. Moorehead is very optimistic about the pending *DeFunis* decision. He believes the Supreme Court's recent favorable decisions concerning affirmative action minority programs in the employment labor areas could be of predictive value because of the similarity of the issues involved. Mr. Moorehead stated, and the *amicus* brief argues, that minorities admitted by the University of Washington Law School were in fact qualified students and their acceptance into the law school was not tantamount to exclusion of non-minority students on the basis of race. This factor may be decisive in the ultimate determination of the case.

Mr. Moorehead's long-range goal is to aid in attaining numerical parity between minority and white students attending law school. He will be returning to Howard University's Law School this fall to resume his teaching career. We are certain that Mr. Moorehead will remain in the forefront of the struggle for racial equality in this country.