In the

# Supreme Court of the United States

CAROLYN BRADLEY, ET AL.,

Petitioners

vs

No 72-1322

SCHOOL BOARD OF CITY OF RICHMOND, ET AL.,

Respondents.

Washington, D. C.
December 5, 1973

Pages 1 thru 35





HOOVER REPORTING COMPANY, INC.
*Official Reporters*
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
|---|---|---|
| CAROLYN BRADLEY, ET AL., Petitioners, | : | |
| v. | : | No. 72-1322 |
| SCHOOL BOARD OF CITY OF RICHMOND, ET AL., Respondents. | : | |

Washington, D. C.
Wednesday, December 5, 1973

The above-entitled matter came on for argument at 1:49 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLIAM T. COLEMAN, JR., ESQ.,
Philadelphia, Pennsylvania; for the Petitioners.

GEORGE B. LITTLE, ESQ., 1510 Ross Building,
Richmond, Virginia 23219; for the Respondents.

- - -

C O N T E N T S



* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-1322, Carolyn Bradley v. School Board of City of Richmond.

Mr. Coleman, you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLIAM T. COLEMAN, JR., ESQ.,

ON BEHALF OF PETITIONERS

MR. COLEMAN: Good afternoon, Mr. Chief Justice, and may it please the Court:

The issue here is a propriety under section 718 of the 1972 School Aid Act or under the Fourteenth Amendment and related jurisdictions subject to the Civil Rights Act statutes of the reversal by the Fourth Circuit of the District Courts' award of counsel fees for petitioners' successful efforts in obtaining an injunction which required the Richmond School Board to adhere to its constitutional and statutory duty to desegregate its public schools.

The issue tendered here predates and has nothing whatsoever to do with the subsequent Richmond area school case which this Court heard last term.

Petitioners here are black school children and their parents who live in Richmond and who were required to return to the District Court on March 10, 1970 to force respondents to adopt an effective desegregation plan. I say "required," because on May 30, 1966, after five years of litigation, the

school board had proposed and the District Court had ordered a freedom of choice plan for the 1966 school year. Such plan, however, specifically provided -- and now I call your attention to page 23 of the record -- that if such plan did not produce efficient results, significant results during the 1966-1967 school year, it would have to be modified.

The plan also provided for desegregation of the school faculty. Moreover, on May 26, 1968, this Court decided Green, which held that freedom of choice plans which did not result in a unitary school system were unconstitutional. The schools in Richmond, both pupils and faculty, however, despite the 1966 plan and despite Green, remain non-unitary. Respondents did nothing whatsoever.

So finally, on March 10, 1970, petitioners were forced to move in the District Court for further relief. The motion included a request for counsel fees. The motion, after extensive litigation, resulted in the school desegregation order of April 5, 1971, which incidentally is the order under which the schools in Richmond are now being operated.

The District Court then, as part of the equitable relief, awarded counsel fees for petitioners of $43,000 and costs of $13,000. Before making this award, the District Court determined that on the record before it the award was justified by respondents' conduct, both in making necessary petitioners' 1970 reopening of the case and in the course of the litigation

thereafter.

Ultimately, the court held that the fee award was justified by the fact that petitioners had acted as private attorneys general in securing respondents' compliance with the Fourteenth Amendment, and such award was required to give complete and effective equitable relief.

For a moment, I would like to call the Court's attention to the findings of fact on which the District Court's order was based. At page 133a of the record, the court found that since 1968 at the latest, the school board was clearly in default of its constitutional duties to take steps which would result in a unitary school system. But when brought into court, even though the school board admitted non-compliance, it put petitioners to the effort of showing that governmental action was behind the segregated school attendance prevailing in Richmond. That is at page 115a of the record and page 133a of the record.

The trial judge further found that respondents would take no steps whatsoever to end segregation in Richmond unless and until sued by petitioners and then only as ordered by the District Court. And that is the finding on page 133a of the record and 134a of the record.

The counsel fee award was based in part upon these findings, thus we do not understand the observation of the Fourth Circuit on page 167a of the record, that the District

Court does not seem to have based its award on the inaction of the school board prior to March 10, 1970.

The District Court also found that the first two plans of desegregation which were filed by respondents as a result of the court order were clearly deficient. That finding is on page 117a and 116a of the record. And two out of three subsequent plans filed by the respondents were clearly deficient, thus time and effort was spent by petitioners in demonstrating the invalidity of the proposed plans until finally the court accepted plan three.

Finally -- and this finding I think is quite important -- the District Court found that the character of school desegregation cases by 1970 and 1971 had become such that full and appropriate equitable relief should include the award of expenses of litigation. That finding, sirs, is made on page 137a of the record. And that counsel of great expertise was needed to aid the court, and that finding is on page 141a of the record.

The Court of Appeals, nevertheless, reversed the award of counsel fees. Petitioners submit that there are five separate and distinct legal grounds, each of which require that the judgment of the District Court be reinstated.

First, this Court's decision in the Mills case and in the Hall case, cited on pages 21 and 23 of our brief, permit legal fees to be awarded because petitioners' actions benefited

an ascertainable class, namely the school -- all of the school children in Richmond.

Second, petitioners are entitled to counsel fees because they acted as private attorneys general in bringing this action which vindicated important constitutional and congressional policy.

Third, section 718 of the School Aid Act of 1972, which we set forth on page 8 of our brief, enacted while this case was pending on appeal, expressly requires the award of counsel fees in school desegregation litigation.

Fourth, it was within the discretion of the District Court, sitting as a court of equity, to award counsel fees as necessary for afford full, complete, equitable relief in this particular school desegregation case.

And, finally, the legal fees here were required by the District Court's findings supported by the record that the respondents acted unreasonably in refusing to desegregate voluntarily the Richmond school system, and persistently proposing a series of unworkable desegregation plans. It should be noted that only the fifth ground requires consideration of whether, as the District Court found, respondents' conduct was unreasonably obstinate.

Q Mr. Coleman, I realize you are not relying exclusively on the 1972 act, by any means. I suppose had a final order been entered here prior to the enactment of that statute,

that ground would have been taken away, wouldn't it?

MR. COLEMAN: Well, it never would have existed. What you are saying, by final order, Your Honor, that the award of counsel fees had been denied, an appeal was taken, and that was denied, and thereafter Congress enacted a statute, then clearly that statute would not be applicable, you could not go back and reopen the litigation on the counsel fees.

Q So by the fortuitous circumstances that the final order was not entered, at least you have an additional ground in your position?

MR. COLEMAN: I wouldn't use the word fortuitous. I would say by the correct thing that Congress did, that that is an additional ground which we can --

Q Is the statute capable of being applied to services rendered after its effective date? I take it your position is that it applies to all services, as long as the statute is applicable.

MR. COLEMAN: Yes, sir. Well, why don't I go right to section 718. It is on page 8 of our brief, Your Honor. As we understand it, section says that where there is a final order to desegregate the schools, and there is a finding of fact that proceedings were necessary to bring about the compliance, then the court may award counsel fees to the prevailing party.

That statute was enacted on either June or July 27,

1972. It was enacted while the case was pending on appeal. There is nothing in that statute which says it is not to apply to existing litigation. As we read your decision, particularly 4 U.S. Alabama, the one thing that is clear is that where you have a statute which does not by its term restrict itself to future events, that statute pertains to pending litigation.

Q Well, that is an historic rule, isn't it, that changes in the law apply to a case that is pending on appeal, normally?

MR. COLEMAN: Pardon?

Q Normally that's the rule?

MR. COLEMAN: Normally, that's the rule. In the absence of something extraordinary, that's the rule.

Q What's the rule, Mr. Coleman -- there was a statute that permitted awarding of 5 percent attorneys fees, or had some standard in it that applied to the litigation as it was going on, and then while the case was pending on appeal the statute is changed to 6 percent.

MR. COLEMAN: Yes.

Q Now, is it your argument that the 6 percent would apply to all the services that have been performed prior to the change?

MR. COLEMAN: Well, I would say that in the hypothetical you gave, Your Honor, yes. I mean I could see certain circumstances where the rule may be different, but if that is

all to the hypothetical, I would say in that case you would apply the statute.

Q Well, that is a fortiori in your case, I guess?

MR. COLEMAN: Oh, sure. This case, Your Honor, you have to hold ten, twelve cases before you could say that this statute would not be applicable. Now, the only thing that the respondents said, the only argument he has is that the statute has an effective date which says, you know, that it is effective July 1, 1972, but obviously that was before the case was decided by the Fourth Circuit and before you heard the case in this Court.

To the extent that there is legislative history, my understanding of the law, Your Honor, if the legislative history is neutral, then clearly the rule of law applies. To the extent that there is legislative history, the only legislative history that you can find here is that at one time the bill specifically provided that it would only be applicable to legal services performed after the effective date of the act. That was then deleted from the bill.

Now, to the extent that there is any -- that is it. And also -- and then I will be finished with this point, Your Honor -- if you recall, in Goldstein v. California, which was decided last term, Mr. Chief Justice, when you wrote the opinion for the Court, you spent two paragraphs completely -- twice quoting language which showed that Congress intended

specifically only to apply the statute in the future. And it was clear that but for that specific language you then would apply that statute to actions which already took place.

Not only 718, Your Honor, do I think that this case has to be reversed and the order of the District Court reinstated, but under your decision in Hall, where you said there it was simply a congressional statute which said that if an employee -- if a member of the labor union was kicked out of the union, he could sue. You indicated there that part of the relief, since what he did was for an ascertainable class, part of the relief could be the award of counsel fee. And once again, the District Court awarded counsel fee and the sole issue is whether you should upset it. And the issue is not here whether if they had not awarded counsel fee what would be the result. Here you have a case where the court did exercise the power.

In addition, the cases make it clear that where the petitioner acts as a private attorney general, he is entitled to counsel fee as part of the award. And the one thing that is clear in this country, that private persons who are forced to bring law suits to vindicate constitutional rights which resulted in the desegregation of public schools.

Q Piggie Park?

MR. COLEMAN: Piggie Park, there is the Lee case in the Firth Circuit, there are other cases which say that where

it happens. And the government here, in its amicus brief, freely concedes that it just did not and could not bring the litigation which resulted in the desegregation of public schools, and under those circumstances we certainly were vindicating the rights of a private person.

Now, as I understand the respondents' brief, he pretty much concedes that if you read Knowles, if you read Hall, if you read the private attorneys general cases, clearly the law should be that under those circumstances the black petitioners were entitled to counsel fees. But he says that because Congress has now passed section 718, for some reason, you forget the one group of people that stood in the trenches, that took the risks, that supplied the legal talent to change the society peacefully, and by the use of law rather than by being in the street, and somehow they should be penalized.

We also think there is some merits in the government's position that the best thing here for the Court, for all court, is to award the fee on the basis of the Hall case of a private attorney general, because district courds, and frankly we don't like to be in litigation with school boards as to whether they were obstinate or not. Now, if you really want to have a lot of litigation, that is the only rule you would go for. But if you go for the Hall rule or the Mills rule, or if you apply section 718, then you don't have these problems.

Now, on the being obstinate, I think the findings are

there, and if rule 52 means anything, I think you have to carry out the rule, the finding of the District Court. After all, it was Judge Mehridge that dealt day and day with the litigants, day in and day out. He was the one with the nuances of how cooperative you are being, the things that you just can't put in the record, and he was the one that made the determination, based upon everything that had happened before him, he felt that the award should be made on that basis.

He also was the one -- and I think you ought to give some weight to the experiences of the great federal district judges that have really worked this problem out locally. He was the one that, having these cases and knowing cases, talking to his brother, I am pretty sure realized that the effort involved in bringing this type of litigation requires it to be competent counsel, counsel has to be skilled, counsel has to spend a lot of time, and since that you are benefiting the public here, that for that reason you ought to award the counsel fee.

I think Brown, number two, if it teaches anything, it teaches that in this type of litigation that sometimes the rights of individuals have to be suberdinated to the rights of the entire group, and that clearly by bringing the litigation, having the class action, you are functioning to change the whole society and if the cases which we cite in our brief have any significant at all, it is clear that in this instance that

you ought to indicate that there is -- that we were functioning as a private -- or Mr. Greenberg and the other people, I had nothing to do with the case -- were functioning as private attorney generals, and on that basis you should reinstate the order of the District Court.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coleman.

Mr. Little?

ORAL ARGUMENT OF GEORGE B. LITTLE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. LITTLE: Mr. Chief Justice, and may it please the Court:

The issues could be narrowed very quickly. We take no issue with the fundamental soundness of the rational advanced by this Court in Mills, in Newman v. Piggie Park, in Hall v. Cole, and cognite cases. But we must question the applicability of the rationale of those cases to pre-Swann school desegregation litigation.

Accordingly, we take the position that the judgment of the lower court should be affirmed since the unique nature of pre-Swann school desegregation litigation renders the traditional equitable standard of obdurate obstinancy entirely appropriate for litigation in that era, that the record fully exonerates the District Court's findings with respect to the conduct of this board, and for the reason that section 718

does not reach services concluded more in 17 months prior to the effective date of the act.

By way of an overview to reach our position, we must go back to 1970. That is the area of time involved. We can gain a proper perspective to determine what is a proper standard to measure the conduct of the board with respect to pre-Swann litigation.

Through a very brief review of the actual factual realities confronting the Richmond School Board, the precise issue that gave rise to all of this litigation, and a very brief review of the state of the law as it then applied particularly to the issue involved.

The dilemma confronting the Richmond School Board at the time of the filing for motion for further relief on March 10, 1970, prior to Swann, is very easy to describe to the Court. We had a large metropolitan system, majority black, characterized 99 percent by marked residentially segregated neighborhoods. The first plan submitted by the school board, based entirely on the efforts of HEW -- they prepared the plan, the first plan, which was rejected. The principal deficiency in that plan was the failure of HEW -- and I am not saying it is their responsibility, it is the school board's responsibility -- but in drawing the plan, they refused to use transportation over and above what was then being done in Richmond.

Every bit of the litigation from that point on

narrowed down to even a much more restricted aspect of the transportation issue. This is in the summer of 1970. Specifically, the issue narrowed down as fine as this, the necessity for buying buses to alter the racial composition of 19 elementary schools, because the interim plan that was approved by Judge Mehridge, which was the second plan submitted, did the job at the high school level, at the middle school level, and at the elementary level, with the exception of these 19 schools, 12, more than 90 percent black, on one side of town, and 7, more than 90 percent white, on the other side of town.

The racial composition of these 19 schools was the major deficiency which the court found in the interim plan which was implemented in September of '70. It formed the basis for the plaintiffs' motion for mid-year implementation of additional relief beginning in January of 1971, which the lower court denied, and it was the reason why Judge Mehridge ordered further relief on April 5, 1971.

Now, on this issue, there was no disagreement, that the only way these 19 schools could be desegregated was by the extensive cross-town transportation of elementary age children. It was also agreed, Richmond had never operated a transportation system, with the exception of I think eight buses used in special education, and that public transportation was not then available, with capacity to do the job. They were not disputed issues.

Now, so much for the factual dilemma. Let's come to the state of the law as it existed on this issue. In the same month that the motion for further relief was filed, the Chief Justice, in Northcross, pointed out that whereas the objective of a unitary system, none in racial discrimination did not exist, it was perfectly clear that the means were left largely unresolved. Specifically, the Chief Justice mentioned one of the issues as being the extent to which transportation may or must be used as a desegregation tool.

In Swann, this Court frankly acknowledged the enormity of the problem, the complexities of the problem, as it did beginning with Brown I, as it repeated in Brown II, because bear in mind, school desegregation litigation set a precedent in our history of jurisprudence. It was the first time of which I am aware that constitutionally declared rights had to be deferred because of the complexities of the problem. Thus, it was not until May -- I beg your pardon, April 20, 1971 that there was any occasion for this Court to ever have addressed itself to the metropolitan school problem.

As this Court noted in the Swann decision, it was its first effort to deal with this subject of transportation. Now, what was the law in the Fourth Circuit? Bear in mind, we lived in virginia, under the law of Briggs v. Elliot for fourteen years prior to this decision in Green, when no less a jurist than John J. Parker interpreted Brown to mean that

there was nothing in the Constitution to require integration. So the light has not dawned too early in Virginia.

The first time that the Fourth Circuit had occasion to address either transportation or metropolitan school districts were in its deicisions in Swann and Brewer. Now, these decisions were both decided after the HEW plan had been rejected. In other words, at the time of the preparation of the first plan that was submitted by HEW, there were no guidelines from this Court or from the Fourth Circuit with respect to metropolitan school districts.

Now, significantly, the District Court found that the interim plan, which we submitted within 19 days after the decision in Brewer, fully complied with the Fourth Circuit's test of reasonableness as it then existed in the Fourth Circuit, and that it represented -- this is the Judge's language -- a sincere effort to comply with the guidelines. He was not thinking in terms of bad faith at that time. That reference is 317 Fed Supp., at pages 573 and 575.

Now, the precise issue that we were wrestling with and the state of law with respect to that issue provides a setting for our conclusion that the Court of Appeals did not err in applying the conditional equitable standard with respect to fees or in concluding that the board -- that the record exonerated the board under this standard.

The universal acknowledgement by every court in this

country of the enormity and the complexity of this type of litigation prior to Swann underlies the decision and the determination by every court of appeals in this country which has passed on the issue that the appropriate pre-Swann standard is the traditional equitable standard of obdurate obstinancy in every suit that has been brought under section 1983.

I don't think we should presume that the Fourth, the Fifth, the Sixth, the Eighth and the Ninth Circuits have been oblivious to either the vital importance of the constitutional rights being vindicated, to the public benefit that has resulted, or to the fact that the plaintiffs in a very real sense were acting as attorney generals.

Q Mr. Little, I am not sure that I understand that. What had been the --- how many decisions have there been prior to 1972 allowing attorneys fees in school desegregation cases?

MR. LITTLE: Oh, there have been any number of decisions allowing them, sir, but always on the standard of what has been referred to as --

Q Obdurate obstinance?

MR. LITTLE: Yes, sir; with the exception of the District Court in this case, no court in this country at the circuit court level or at the district court level has ever made an award against a school board other than on the obdurate obstinancy test, that is for services rendered pre-Swann.

Q And pre the legislation of 1972?

MR. LITTLE: Oh, yes, sir. I am addressing myself prior to that.

Q And there have been numerous judgments allowing such fees on that basis?

MR. LITTLE: Yes, sir, but solely on that basis.

Q I understand.

MR. LITTLE: Without exception, which is a unique thing to be able to say with that many courts involved and that amount of litigation.

Q How many circuits, four or five?

MR. LITTLE: Five, sir. The Fourth, Fifth, Sixth, Eighth and Ninth.

Q I guess it is the standard of the statute, I take it?

MR. LITTLE: No, sir. The standard of the statute has been set by this Court, and we have no -- in Northcross, in June of this past year -- we have no objection to that. But that addresses itself -- and we will come to section 718, but I am bringing out what the absolute uniformity has been prior to that.

Now, these same factors, that is the enormity of the problem, the complexities involved, the frequent admonition by this Court, beginning with Brown II, that equitable standards shall govern, and the courts construed that to mean the traditional equitable standard with respect to the award of fees,

has been the basis for distinguishing this type of litigation from every other form of civil rights litigation of which I am aware.

The recognition of this distinction, the nature of pre-Swann litigation, has led the Firth Circuit subsequent to the decisions of Hall v. Cole and Northcross by this Court to expressly reject the reasoning of the District Court in this case and to reaffirm the traditional equitable standard of obdurate obstinancy even though -- and I call the Court's attention to this particularly -- the Firth Circuit had previously extended the Newman rational to other civil rights actions brought under sections 1981 and 1982, but it said not so in light of the uncertainties of the law that existed.

The rationale, why the Fifth Circuit refused to do this, is well stated on page 29 of our brief, the blue brief, it is a part of the quotation from Johnson v. Combs. This complete uncertainty of the law which has led to this uniform adoption by all of the circuits underlies the basic fallacy in the District Court's finding as to the conduct of this board in this case.

The basic premise that Judge Mehridge used to substantiate his conduct finding was that the Richmond School Board had ignored clear legal directives. Such a finding, in light of what we have just reviewed as to the unsettled state of the law at that time, compelled a reversal by the Fourth

Circuit on that ground, as the District Court throughout this litigation itself had made repeated references to the unsettled state of the law at that time.

Let me cite just one. Eight weeks before this opinion came down finding bad conduct and clear -- ignoring the clear legal authorities, this is what the District Court itself was cautioning us about. This was on March 4, 1971, prior to Swann. We were all groping, may it please the Court, we did not know what this Court would ultimately do in Swann.

The District Court said we ought to contemplate that there may be some expression in the law which would advocate neighborhood schools for children in grades one through five. This was eight weeks before his opinion of May 26.

Moreover, the Court of Appeals could hardly have concurred in what the judge below had singled out as the real failure of the Richmond School Board, namely its failure to buy buses until ordered to do so. If you will look on pages 133, 134 and 135 -- I beg your pardon, on page 118 of the record, the judge said the school board had in August still taken no steps to acquire the necessary equipment. He is addressing himself to August of 1970. This is a quote from his May 26, 1971 opinion. And yet what did the judge himself say on August 7, 1970, the same month, in open court, and I quote: "It seems to me it would be completely unreasonable" --

Q Where are you reading?

MR. LITTLE: I am reading, sir, from our brief, our appendix, 85a, 85a in the appendix, sir.

Q Thank you.

MR. LITTLE: Now, this is what the judge thought the law was about buying buses in August of 1970: "It seems to me it would be completely unreasonable to force a school system that has no transportation, and you all don't have any to any great extent, to go out and buy new buses when the United States Supreme Court may say that is wrong."

Now, the District Court on three occasions, in June of '70, in August of '70, and January of '71, had refused to order us to buy buses, despite requests to do so, because he knew at that time that the law was unsettled.

I think, in view of time, I had better move to the significant reasons why we say that section 718 should not be applied to pre-Swann services.

First, the Fourth and Fifth Circuits are the only two that have had occasion to rule on the applicability of section 718 to pre-Swann services. Both have refused or declined to do so, to apply section 718 to those services. One of the grounds cited by both of the courts was that the inconclusive legislative history of section 718, and both courts determined that the legislative history was inconclusive, did not overcome the historic presumption against the prospective operation of statutes, absent clear and unambiguous intent to the

contrary.

Now, Mr. Justice White, we feel that that rule is perfectly consistent with the teachings of United States v. Schooner Peggy and with Thorpe.

As Judge Winters conceded in his dissent in this case, and you will see on page 192 he doesn't like this interpretation of Peggy Schooner, but he does concede that the facts in Schooner Peggy and much of the opinion -- this deals with the effect on a change in law pending appeal -- is that the proper statement of the rule is that when there is a change in law, of course, the appellate court is required to consider that law. That is not saying applying it. It is to examine that law to try to determine whether or not it was intended to cover transactions which had transpired prior to its enactment. This was exactly what this Court did in both U.S. -- Chief Justice Marshall did in U.S. v. Schooner Peggy, and I submit what was done in Thorpe. Now, let's mention Thorpe for just a moment.

No one can deny the existence of the historic presumption of retroactivity -- I mean against retroactivity of a congressional enactment. We can't agree with Judge Winters who says that Thorpe reverses that presumption. In his view, once a law is changed, you presume it applies to a pending case unless there is intent to the contrary. When you look at Thorpe, there are two things I would invite the Court's attention to.

The court there went and construed the regulation involved, the HUD regulation involved, and after construing it as applying to all tenants still residing in the project -- this was an ejectment suit, suit for eviction under housing act -- it then decided that it applied to this lady whose litigation was then in process. In addition, Thorpe is one of those cases that we members of the bar have a hard time determining the proper scope of, for the reason that in Thorpe this Court judiciously avoided a fundamental question of due process by a very reasonable interpretation of the regulation before it.

So much for the first reason for not applying section 718. Another one is well stated by the Fifth Circuit in Johnson v. Combs, and I will read just a portion of the quotation. It is found on -- to apply this statute retroactively would place a wholly unexpected and unwarranted burden on these districts who have done no more than litigate what they in good faith believe to be demands which exceeded the Constitution's demands. This rationale is expanded but time does not permit me to read any more from it. But that is the second ground that has been used as a basis for not applying section 718 to pre-Swann services.

And as I mentioned earlier, the Firth Circuit reaffirmed the same standard for pre-Swann services even after the decision of this Court in Northcross and in Hall v. Cole.

They did that in Henry v. Clarksdale.

Q Mr. Little, if Congress would change the witness fee that is recoverable as an element of cost, say, from $10 to $20, would the same presumption against retroactivity that accompanies substantive legislation apply with equal force there, to say that you shouldn't apply that retroactively?

MR. LITTLE: No, sir. I think when you are in the area of procedure, I think any change in procedure other than a -- I am using the term very restrictively as procedure -- as long as it doesn't affect the jurisdiction, of course, as procedure I think there would be less hesitancy to apply it to every pending case.

Q Well, isn't there some analogy between increasing taxable costs and making attorneys fees recoverable?

MR. LITTLE: Sir, I think that the analogy has to be the section 718, what is it in that that gives rise to an attorneys fees. And this brings me right to this point of another basis for not applying it, and that is the entry of an order of compliance, in other words an order necessary for compliance. And the Fourth Circuit of course said, well, there was no order of compliance on appeal, or there was even pending at the time of the effective date of section 718. And that is another basis.

But I think the true test, Mr. Justice Rehnquist, is that how do we say that Congress, knowing that this rule of

obdurate obstinance has prevailed uniformally throughout the country and five circuits and how many district courts -- I don't know -- that they would come in and enact a statute intending to cover services rendered prior to its effective date I have very great difficulty in thinking that Congress intended to bring about a lot of relitigation because, bear in mind, school desegregation suits are unique in another sense, adhering to the admonishments of this Court. These cases are still within the realm of pending cases. There are a great many school desegregation cases of course still pending on the dockets. This Court's decision in this case will certainly have a bearing on whether or not this whole question of attorneys fees can be reopened in a great many other desegregation cases.

Q This case was pending though at the time the statute was passed.

MR. LITTLE: No order -- the Fourth Circuit draws a distinction, Mr. Justice White, between -- there was no order of compliance pending at the date this act became effective, because the last order --

Q At the time the act was passed, had the time passed -- let's assume the act had never been passed.

MR. LITTLE: Yes, sir.

Q And then the case was in the posture that it was when this act was passed. Would that have been too late for the lawyers representing the plaintiffs to request an

attorneys fee based on obdurate obstinance?

MR. LITTLE: No, no, no. I am not saying that, sir. I am not --

Q So it wasn't too late for the attorneys to request their fee?

MR. LITTLE: Oh, no, they had requested that right at the outset.

Q Well, in that event it seems to me the case must be considered as pending.

MR. LITTLE: Pending on the issue of attorneys fees, it was, sir.

Q Well, this is an unresolved issue of the case, and the question is the applicable law.

MR. LITTLE: Yes, sir. Then you have to go to the congressional intent --

Q Well, how do you answer Mr. Justice Rehnquist's question then?

MR. LITTLE: I say, under the rule of Schooner Peggy and Thorpe, that you start with the presumption against retroactive --

Q Do you rely on Schooner Peggy for the so-called rule, presumption against retroactive application?

MR. LITTLE: No, sir. I rely on U.S. v. Laramie Stock Yards and Green for the rule. But I am trying to relate United States v. Schooner Peggy and Thorpe to the normal rule

of prospective application, absent clear and unambiguous intent to the contrary.

Q Yes, but the rule of prospective application, within the rule of prospective application is the application to pending cases.

MR. LITTLE: May I have that again, sir? I'm sorry.

Q Did you think it is a violation of the rule in favor -- if there is such a rule -- in favor of prospective application to apply it to pending cases?

MR. LITTLE: No, sir, but I find this, I find it difficult to believe that in Thorpe this case intended to modify the normal rule of prospective application without even referring to the rule. I have great difficulty there.

I would like to summarize, if I may. Our disagreement with the petitioners is a very narrow one. It is not any basic difference of philosophy regarding the propriety of fee shifting in civil rights cases. Indeed, we feel that the trend in Congress and in the courts to expand the concept of fee shifting in these cases is probably long overdue. And normally the standards embodied in section 718, as construed by this Court in Northcross and under other sections of the Civil Rights Act, are fully appropriate. But this is where we have trouble.

We have trouble and we must question whether conscientious school boards, laboring in the struggling sea of

pre-Swann uncertainty -- and that is what it was, may it please the Court, regardless of how conscientious the school board was -- should be held to be in the same legal shoes as those who callously deny explicit rights in such areas as public accommodation and housing and employment.

The expansion and extension of the doctrine of Mills and Newman and Hall v. Cole we think is fully appropriate to many forms of the civil rights actions which are being brought under section 1983. But we say that such an expansion is not warranted in pre-Swann school desegregation litigation because of the complexities which necessitated the evolutionary development of remedies in school desegregation.

We say that this record exonerates the school board under the obdurate obstinancy standard, and certainly would render the imposition of the stigma of bad faith unjustified. Admittedly upholding the award under section 718 or under any other theory, while more palatable would be incorrect for the reasons cited and would also create quite an inequity of subjecting these respondents, this school board as being the only school board in this country that has ever been held to that standard for pre-Swann litigation.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Little.

Do you have anything further, Mr. Coleman?

REBUTTAL ARGUMENT OF WILLIAM T. COLEMAN, ESQ.,

ON BEHALF OF PETITIONERS

MR. COLEMAN: Mr. Chief Justice, and may it please the Court:

In the first place, I have read a lot of cases of this Court and I don't know any case where you have used this O&O rule. Secondly --

Q Used what rule?

MR. COLEMAN: The obdurate obstinancy rule. I have never heard it in any of your opinions. I have never read it.

Secondly, what really happened was in several cases where the District Court, for some reason, denied relief based upon all the findings of the court of equity, and the issue before the Court of Appeals was whether you should reverse the District Court, and that is when this expression appeared in a couple of opinions.

Thirdly, there have been very few cases that made an award. And in the Bradley case the award was $75. Now, while Mr. Lucas and Mr. Chachkin was litigating against the Richmond School Board, it so happened that the lawyer for the Richmond School Board, for this same period of time, received fees in excess of $86,000. This is public money from a school system which is 60 percent black, 40 percent white; clearly the decisions of this Court have indicated that the constitutional rights of the blacks were violated. It is only fair and

equitable, when the law suit was finally successfully won, that those who fought the school board ought to be compensated.

Q Mr. Coleman, in your view, was this obdurate obstinancy before or after the statement that Judge Mehridge made about the uncertainties and the unpredictabilities --

MR. COLEMAN: Could I come to that, because this is something that Mr. Little, as a very skillful advocate, has said, and he successfully convinced the Fourth Circuit of this. Judge Mehridge entered the order on April 5, 1971 based upon the state of law in his circuit, the Fourth Circuit, which had decided Swann. He did not wait for your opinion and obviously he couldn't determine what would be in this Court opinion a year later. And if there is any doubt about this, I would like to call your attention to the footnote, footnote one, of his opinion.

Q I directed my inquiry, Mr. Coleman, to the judge's, the trial judge's appraisal of the problem and necessarily the attitudes of the --

MR. COLEMAN: Well, he first indicated that because, since by 1968 anyone who could read or write knew that the Richmond School Board was violating the Constitution and nobody did anything. These litigants were forced to come into court. And in part his award is based upon that.

Q Are you saying that his remarks were directed at the details of remedy and not at the fundamental --

MR. COLEMAN: Well, sure, they had to do something, and certainly what you did, depending upon the local situation, the sincerity and sophistication of the school board. But what he says is that you take the law as it existed in my circuit in 1970 and 1971, the school board did not discharge its functions. And his opinion, when you read his opinion, which is the order of April 5, 1971, you will find where he stated "I have been told to hold this case until after the Supreme Court of the United States decides Swann, but I am not going to do that, I am going to decide it on the basis of the existing law."

So every one of these plans he threw out, he threw out solely because it did not comply with the law of the Fourth Circuit. He did not throw it out because he felt he knew that a year later you were going to decide a case where you would expand the rights of the party.

Now, in closing, Your Honor, on this question of the applicability of section 718, I know that every rule about appellate arguments, the one thing you don't do is read from a court opinion. But I just would call your attention to the Thorpe case where the Court says that the general rule, however, is that an appellate court must apply the law in effect at the time it renders its decision. And then footnote 38, "A change in the law between a nisi pri and appellate decision requires the appellate court to prior the changed law.

Now, that is the law. And as I understand the decisions of this Court, unless the respondents can point to a legislative history or specific words, as existed in Goldstein, which says you don't apply it to pending cases, you clearly apply it to the pending case.

Now, the Fourth Circuit said that the legislative --

Q Unless you have got some good reason not to.

MR. COLEMAN: That's right. If there is a grave injustice and if you talk about the presumption of Congress, which I never -- but I always felt that, just conceding that Congressmen read every case and know every statute, and anything he does, he knows the law -- and therefore if you think that those Congressmen had read and knew the obstinate rule which existed in the Fourth and Fifth Circuit, when you read those cases, I am pretty sure you are convinced there is no rule -- if that is the theory you are going to go on, which I really think just isn't so, Congress just don't read all the cases and they don't have time, but the rule which is certainly one that any legislature ought to know, is that when there is a federal statute enacted, that that statute would apply to existing cases unless Congress goes out of its way to demonstrate that that general rule is not to be applied.

Now, if you have got to compete between which presumption you should take of Congress, I think that that has to be the presumption, because that is the law in the federal

cases and it seems to be on that basis that you should apply section 718. If you do it, you avoid a lot of litigation, it becomes very simple and precise, you don't have this problem -- and I can understand why the school board would not want to be labeled with what it should be labeled with, namely that the fact is that it did deny the right to these black children, and it took a lot of litigation, and we finally converted them. But we converted them three or four years later. And while we were in there trying to convert them, I think that we are entitled to get compensated.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Coleman.

Thank you, Mr. Little. The case is submitted.

[Whereupon, at 2:44 o'clock p.m., the case was submitted.]

- - -