10-1973

Bradley v. School Board of the City of Richmond

Lewis F. Powell Jr.

Out

DISCUSS

LFP Out

PRELIMINARY MEMORANDUM

Conf: June 8, 1973
List 1, Sheet 2

R

No. 72-1322

BRADLEY, ET AL.

v.

SCHOOL BD. OF
CITY OF RICHMOND

Cert to CA 4, en banc
(Haynsworth, CJ., Craven, Russell, Field; Winter dissenting)

Fed/Procedure

Timely

Petrs were the successful plaintiffs in Bradley v. School Board of Richmond, 382 U.S. 103 (1965), and associated cases.[1/] At the close of

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Controlling Case: Thorpe v. Housing Authority of Durham, 393 U.S. 268, 281-182 (1969).

1/ See next page.

the long litigation, the USDC (E. D. Va.) (Merhige) awarded petrs $43,355 of attorneys' fees, plus costs. CA 4, en banc (Haynsworth, C. J., Craven, Russell, Field, with Winter dissenting) reversed as to the award of attorneys' fees. Petrs contend: (1) that CA 4 erred as a matter of federal law in reversing the award, and (2) that § 718 of the new "Emergency School Aid Act" (86 Stat. 235, 1972), authorizing federal courts to award attorneys' fees to successful plaintiffs in school desegregation cases, should have been applied in this case.

2. Facts:

(a) § 718 of the "Emergency School Aid Act" (86 Stat. 235), effective July 1, 1972, read in relevant part:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) or the United States (or any agency thereof), for failure to comply with any provision of this title or for discrimination on the basis of race, color, or national origin in violation of title VI of the Civil Rights Act of 1964, or the fourteenth amendment to the Constitution of the United States as they pertain to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

1/ See Bradley v. School Board of Richmond, 345 F.2d 310 (CA 4, 1965), and Bradley v. School Board of Richmond, 325 F. Supp. 328 (E. D. Va., 1971). This petition only deals with litigation concerning the schools within the city of Richmond. The subsequent orders of USDC (E. D. Va.) regarding Henrico and Chesterfield Counties, leading to the "Richmond School Case" (No. 72-549 and No. 72-550) recently aff'd by an equally divided Court, ____ U.S. ____ (May 21, 1973), are not involved.

Petrs commenced this case in 1961 to desegregate the public schools of Richmond. In March, 1964, after extended litigation, the USDC (E. D. Va.) approved a "freedom of choice" plan proposed by resp school board. Petrs appealed to CA 4 which affirmed the lower court's finding that freedom of choice satisfied the school board's constitutional obligations. Bradley v. School Board of Richmond, Virginia, 345 F.2d 310 (1965). Petrs then petitioned this Court to consider the freedom of choice plan. On Nov. 15, 1965, this Court declined to review the CA 4 decision, but did grant petrs certain additional relief regarding discrimination in the assignment of teaching personnel. 382 U.S. 103.

On March 30, 1966 the USDC (E. D. Va.) approved a freedom of choice plan submitted by the parties. The plan expressly stated that freedom of choice would have to be modified if it did not produce significant results. On May 27, 1968, this Court ruled that freedom of choice plans were not constitutionally permissible unless they actually brought about a unitary non-racial school system. Green v. County School Board of Kent County, 391 U.S. 430. On March 10, 1970 petrs moved in USDC (E. D. Va.) for additional relief under Green. Resp board conceded that the freedom of choice plan under which it had been operating was unconstitutional After considering a series of alternative and interim plans, the USDC approved a plan for the integration of the Richmond schools involving pupil reassignments and transportation only within the city of Richmond. 325 F. Supp. 828. Resp board took no appeal.

On Aug. 17, 1970, the USDC (E. D. Va.) directed the parties to attempt to reach agreement on the matter of attorneys' fees. When the parties were unable to reach agreement, memoranda were submitted to the court. On May 26, 1971, the USDC (E. D. Va.) (Merhige) awarded petrs attorneys' fees of $43,355 as well as costs and expenses of $13,064.65.

The USDC based its decision on two grounds: (1) that the actions taken and defenses entered by the defendant School Board during such period represented "unreasonable" and "obdurate" refusal to implement "clear constitutional standards"; and (2) apart from any consideration of obduracy on the part of the defendant School Board since 1970, it is appropriate in school desegregation cases, for policy reasons, to allow counsel for the private parties attorneys' fees as an item of costs. The USDC also held that:

> "exercise of equity power requires the Court to allow counsels' fees and expenses, in a field in which Congress has authorized broad equitable remedies 'unless special circumstances would render such an award unjust.'"

3. Reasoning of court to be reviewed: CA 4 en banc (Haynsworth, C. J., Craven, Russell, Field, with Winter dissenting) reversed as to the allowance of attorneys' fees. First, while noting that whether "the conduct of the School Board constitutes 'obdurate obstinacy' in a particular case is ordinarily committed to the discretion of the District Judge, to be disturbed only 'in the face of compelling circumstances,'" the CA 4 majority determined the USDC finding of obduracy in this case to be plain error. It observed:

> The record, as we read it . . . does not indicate that the Board was always halting, certainly not obstructive, in its efforts to discharge its legal duty to desegregate; nor does it seem that the District Court itself had always so construed the action of the Board . . . . All parties were awaiting the decision of the Supreme Court in Swann [402 U.S. 1 (1971(]. Before Swann was decided, however, the parties were engaged in an attempt to develop a novel method of desegregating the Richmond school system for which there was not at the time legal precedent. Nor can it be said that there was not some remaining confusion, at least at the District level, about the scope of Swann itself. The frustrations of the District Court in its commendable attempt to arrive at a school plan that would protect the constitutional rights of the plaintiffs and others in their class, are understandable, but, to some extent, the School Board itself was also frustrated. It seems to be unfair to find under these circumstances that it was unreasonably obdurate.

CA 4's majority also rejected the USDC's alternative ground of "sound public policy." The CA 4 noted:

> We find ourselves in agreement with the conclusion that if such awards are to be made to promote the public policy expressed in legislative action, they should be authorized by Congress and not by the courts. This is especially true in school cases, where the guidelines are murky and where harried, normally uncompensated School Boards must tread warily their way through largely uncharted and shadowy legal forests in their search for an acceptable plan providing what the courts will hopefully decide is a unitary school system.

Finally, CA 4 held that § 718 of the Emergency School Aid Act (86 Stat. 235) (effective July 1, 1972), which specifically authorizes federal courts to award attorneys' fees to successful plaintiffs in school desegregation suits against local education authorities, did not apply to this case, but only to successful suits after July 1, 1972. Petr's successes were all before this date.

Judge Winter filed a forceful opinion, dissenting on all grounds. Judge Winter emphasized that "As I read the record, I can only conclude that for the period for which an allowance of fees was made, the Richmond School Board was obdurately obstinate." More importantly, Judge Winter would hold that § 718 of the Emergency School Aid Act specifically provides for awards of attorneys' fees in such cases as this one. Judge Winter observes:

> [T]he issue of the allowance of counsel fees has been an issue throughout every stage of the proceedings; and the proceedings were not terminated when § 718 became effective on July 1, 1972, because this appeal was pending before us. This is not a case where a subsequent statute is sought to be applied to events long past and to issues long finally decided. Rather, it is a case which presents the concurrent application of a statute to an issue still in the process of litigation at the time of its enactment. United States v. Schooner Peggy, 1 Cranch 103 (1801), and Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), are the significant controlling authorities.
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> . . .
>
> I would therefore vacate the judgment and remand the case for a redetermination of the amount of the allowance -- in short, I would require that counsel be compensated for their services to and including April 5, 1971 and also their services on appeal in this case.

4. Contentions of the parties:

(a) (1) Petrs adopt the reasoning of Judge Winters as to the correctness of the USDC finding of "obstinate obduracy" and the proper applicability of § 718, Emergency School Aid Act, to this case. Failing to apply new legislation to pending controversies violates the plain words of Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969), that "an appellate court must apply the law in effect "at the time it renders its decision. . . . 'A change in the law between a nisi prius and an appellate

decision requires the appellate court to apply the changed law'. . . ." 393 U.S. 268, 281-182 (1969).

(2) Petrs argue that the decision below conflicts with decisions by this Court and other CAs sanctioning awards of attorneys' fees to a plaintiff who has successfully maintained an action that benefits, even in a non-pecuniary way, a large group of other people. Petrs particularly point out Mills v. Electric Auto-Lite Co., 396 U.S. 375, 392-393 (1970), and Yablonski v. UMW, 466 F.2d 424, 431 n. 10 (CA DC 1972).

(3) Petrs further argue that the decision below is inconsistent with decisions of this Court and at least five other CAs regarding the responsibility of state officials to dismantle dual school systems. Petrs emphasize that:

> This Court has long recognized that in equitable actions such as this the courts have the authority and responsibility to award attorneys' fees to a prevailing plaintiff where such an award is consistent with "fair justice." Sprague v. Ticonic National Bank, 307 U.S. 164, 164-65 (1939). Pursuant to this rule, at least five circuits have held that legal fees must be paid in school civil rights cases to plaintiffs who should not have been compelled to resort to litigation to vindicate their clear rights. McEnteggart v. Cataldo, 451 F.2d 1109 (1st Cir. 1971); Horton v. Lawrence County Board of Education, 449 F.2d 393 (5th Cir. 1971); Monroe v. Board of Commissioners of City of Jackson, 453 F.2d 259 (6th Cir.) cert. denied 406 U.S. 945 (1972); Clark v. Board of Education of Little Rock School Dist., 449 F.2d 393 (8th Cir. 1971); cert. denied 405 U.S. 936 (1972); 369 F.2d 661 (8th Cir. 1966); Kelly v. Guinn, 456 F.2d 100 (9th Cir. 1972).

Petrs stress that the Richmond School Board resisted the clear message of this Court's decision in Green v. County School Board of New Kent, 391 U.S. 430, and deliberately failed "to satisfy its affirmative obligations under Green

"That responsibility should be enforced by requiring that parents and students who are still compelled at this late date to resort to litigation to obtain their well established rights be paid costs and attorneys' fees by the recalcitrant school board."

(4) Finally, petrs argue that the result below conflicts with Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968); Lee v. Southern Home Sites Corp., 444 F.2d 143 (CA 5 1971), and Knight v. Amciello, 453 F.2d 852, 853 (CA 1 1972). These cases held, according to petrs, that attorneys' fees are part of "full and appropriate relief" in school desegregation cases. The decision below erroneously restricts the broad equitable power of the USDC under 42 U.S.C. § 1983, and is "clearly at odds with this Court's recent holding that the mere absence of a provision for attorneys' fees" does not evince "a purpose to circumscribe the courts' power to grant appropriate remedies." Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391 (1970).

(b) The short response essentially adopts the reasoning of CA 4's majority, laid out above. Resps argue that the "obdurate obstinacy" test, applied by CA 4 below, has been uniformly followed by all CAs who have considered attorneys' fees in school desegregation cases. "The District Court applied this traditional standard, but the Court of Appeals reversed the holding simply because the record failed to support the lower Court's findings that the School Board had exhibited that pattern of condemnable conduct which sustains an award of counsel fees."

Resps also argue that the enactment of § 718 of Emergency School Aid Act, while inapplicable retroactively to this case, eliminates any need for this Court to establish additional federal standards to govern awards of attorneys' fees in school desegregation cases. Resps note:

> The very congressional authorization it [CA 4] found as lacking vis-a-vis the period of time involved in this case became a reality with the passage of Section 718 of the Education Amendments Act of 1972. This explicit statutory allowance for awards of attorneys' fees to prevailing parties in school desegregation cases is, under the unanimous view of the Appeals Court, now fully applicable to any such cases pending before it.

Finally, resps contend there is no conflict with Thorpe v. Housing Authority of Durham, 393 U.S. 268 (1969).

> The gist of Petitioners' contentions is that Thorpe required the Court of Appeals to apply Section 718 regardless of whether or not this case came within the specific terms of the statute itself (the Court found it did not -- 472 F.2d 331-31; A. 61-62) and regardless of whether or not Congress clearly intended it to be applied retroactively (the Court found no such intention -- 472 F.2d 178; A. 79-80).

5. Discussion: The substantive issues raised by this case either: (1) hinge on the factual finding by the majority of CA 4, en banc, that there was no "obdurate obstinacy" by the resp School Board, or (2) have been resolved for all future cases by the new § 718 of the Emergency School Aid Act, 86 Stat. 236, laid out supra. There are no conflicts between CAs as to the "obdurate obstinacy" standard itself.[2/]

2/ See the Fourth, Fifth, Sixth, Eighth and Ninth Circuit school desegregation cases cited by resp's brief at p. 7, notes 13, 14, 15, 16, and 17.

Failure to apply the new § 718 to this case, however, does appear to conflict with the language of this Court in Thorpe v. Housing Authority of Durham, 393 U.S. 268, 281-282 (1969):

> "[I]f subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . This same reasoning has been applied where the change was constitutional, statutory, or judicial." 393 U.S. 268, 281-282 (1969).

Judge Winter argues that the pendency of this case in the CA 4 at the time § 718 became law should require an application of the Thorpe doctrine, particularly because the pending case raised the very issue resolved by the new legislation. This argument makes some common sense. If Judge Winter's dissent persuades, this case would be certworthy on the Thorpe issue.

There is a response.

Coquillette Op CA 4 in petr's appx.

5/29/73

DK

Conf 4/16/73

Court CA - 4 | Voted on ....., 19...

Argued ....., 19... | Assigned ....., 19... | No. 72-132

Submitted ....., 19... | Announced ....., 19...

CAROLYN BRADLEY, ET AL., Petitioners

vs.

SCHOOL BOARD OF CITY OF RICHMOND, ET AL.

3/29/73 Cert. filed.

out

Granted

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
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Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 11, 1974

Dear Harry:

Please join me in your opinion for the Court on 72-1322, Bradley v. School Board of City of Richmond, et al.

William O. Douglas

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 11, 1974

Re: No. 72-1322, Bradley v. Richmond School Board

Dear Harry,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 15, 1974

Re: No. 72-1322 - Bradley v. School Board of City of Richmond

Dear Harry:

Please join me in your opinion for the Court in this case.

Sincerely,

WHR

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 7, 1974

Re: No. 72-1322 - Bradley, et al v. School Board of City of Richmond, et al

Dear Harry:

Please join me.

Regards,

WEB

Mr. Justice Blackmun

Copies to the Conference

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
						12/17/73		
join HAB 5-8-74	join HAB 4-11-74	join HAB 4-11-74	join HAB 4-11-74	join HAB 4-19-74	out	1st draft 4/11/74 2nd draft 4/12/74	OUT	join HAB 4/15/74
					No. 72-1322	Bradley v. School Bd. of Richmond (I'm out)		