

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: C. MARTIN LAWYER, III, Appellant v. DEPARTMENT  
OF JUSTICE, ET AL.

CASE NO: 95-2024

PLACE: Washington, D.C.

DATE: Wednesday, February 19, 1997

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Supreme Court U.S.

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   C. MARTIN LAWYER, III,                   :

4                   Appellant                   :

5                   v.                                   :   No. 95-2024

6   DEPARTMENT OF JUSTICE, ET AL.       :

7   - - - - -X

8   Washington, D.C.

9   Wednesday, February 19, 1997

10                   The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:30 a.m.

13   APPEARANCES:

14   ROBERT J. SHAPIRO, ESQ., Tampa, Florida; on behalf of the  
15                   Appellant.

16   RICHARD G. TARANTO, ESQ., Washington, D.C.; on behalf of  
17                   the State Appellees.

18   IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor  
19                   General, Department of Justice, Washington, D.C.; on  
20                   behalf of the Federal Appellee.

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23  
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1 PROCEEDINGS

2 (11:30 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in Number 95-2024 -- spectators are admonished not to  
5 talk until you get out of the courtroom. The Court  
6 remains in session.

7 We'll hear argument next in Number 95-2024, C.  
8 Martin Lawyer, III, v. the Department of Justice.

9 Mr. Shapiro.

10 ORAL ARGUMENT OF ROBERT J. SHAPIRO

11 ON BEHALF OF THE APPELLANT

12 MR. SHAPIRO: Mr. Chief Justice, and may it  
13 please the Court:

14 In this case, the district court used an  
15 unconstitutional process to achieve an unconstitutional  
16 result in the form of plan 386.

17 Before commencing my argument, I would like to  
18 make a correction in my reply brief which is important in  
19 that it's a reference to the record. On page 14 of the  
20 reply brief I referred to the preclearance denial letter  
21 of the Justice Department as R. 18 -- I'm sorry, as R. 13,  
22 and it's actually in the record at R. 18, and the full  
23 text is at R. 18.

24 I also would like to just briefly refer to the  
25 maps which are attached to the briefs.

1 (The maps referred to were presented to the  
2 Court.)

3 MR. SHAPIRO: If I may, the first map we have is  
4 Appendix A to the reply brief. This is the legislatively  
5 adopted plan which was approved by the Florida supreme  
6 court in 1992. It's called SJR 2G. This is District 21  
7 in yellow, which is all encompassed within Tampa,  
8 Hillsborough County, Florida.

9 The next map we have was the court-ordered plan  
10 as a result of the Justice Department's preclearance  
11 denial letter. They objected to it. Although there was  
12 absolutely no history of Voting Rights Act violations  
13 against black voters in Hillsborough County they were  
14 covered under section 5 because in Hillsborough County  
15 they did not print ballots in Spanish as well as English.

16 So there was no congressional finding whatsoever  
17 of any Voting Rights Act violations against blacks in  
18 Hillsborough County, and this is in the record at -- let's  
19 see, if I may.

20 Okay, it's at record at R. 104, which I didn't  
21 put in my brief. R. 104, page 3, specifically states  
22 that.

23 You can see that this district extends into  
24 Pinellas County. This is Hillsborough County. It goes  
25 into Polk County. It's called the Polk County finger, and

1 we have the --

2 QUESTION: Mr. Shapiro, is this the district  
3 that the Florida supreme court approved, that we're  
4 looking at now?

5 MR. SHAPIRO: This -- what you're looking at is  
6 the district that the Florida supreme court approved under  
7 the duress of the Justice Department's letter.

8 QUESTION: That's 4A of the brief?

9 MR. SHAPIRO: The --

10 QUESTION: Of the blue brief?

11 MR. SHAPIRO: This is Appendix B to the brief on  
12 the merits for appellant.

13 QUESTION: Yes, and this is the one that was  
14 superseded by the district that is now in question?

15 MR. SHAPIRO: That's correct. This was the one  
16 that was challenged by the plaintiff in his lawsuit, so  
17 this is the one that was the result of the preclearance  
18 denial letter by the Justice Department.

19 QUESTION: Mr. Shapiro, I had a question about  
20 the challenge and the choice of forum. You are attacking  
21 a decision of the Florida supreme court, and you come into  
22 a Federal court to do that.

23 Was there not a means by which you could have  
24 fought out your challenge to a district created by the  
25 Florida supreme court in the Florida State system so you

1 wouldn't have the embarrassment of a Federal court being  
2 faced with a decision of the Florida supreme court that it  
3 was impelled to reject?

4           Could you have gotten a remedy by appealing to  
5 the State system rather than running to the Federal  
6 courts?

7           MR. SHAPIRO: No, Your Honor, because this was a  
8 challenge based on what the Justice Department had forced  
9 the Florida supreme court --

10           QUESTION: But that doesn't tell me why you  
11 couldn't say -- I mean, the Equal Protection Clause  
12 governs the State of Florida, as it does the Nation. Why  
13 couldn't you then go into the State court system, make  
14 precisely the argument made in the Federal court?

15           MR. SHAPIRO: First of all, the Florida supreme  
16 court did not reserve jurisdiction over this issue. It  
17 reserved jurisdiction when it approved this district in  
18 597 So.2d. If you read the opinion of the Florida supreme  
19 court it says, we reserve jurisdiction. But when it  
20 approved 330 at the insistence of the Justice Department  
21 it did not reserve jurisdiction.

22           QUESTION: I don't mean in that case. Bring the  
23 case -- bring another case, in which you're saying,  
24 Florida supreme court, we know you've got precedent, but  
25 you were acting under the gun of the Department of

1 Justice, so we want to free you from that thrall.

2 MR. SHAPIRO: Well, Your Honor, the only thing I  
3 can say is that the plaintiff had the right to contest  
4 this district in U.S. district court, and under the Voting  
5 Rights Act.

6 QUESTION: Mr. Shapiro, I appreciate that you  
7 did, but there was a certain anomaly in you coming to a  
8 Federal court to in effect override a decision of the  
9 State court and then say that the Federal court has not  
10 been sufficiently respectful of the State authorities.  
11 Maybe you haven't in coming to the Federal court rather  
12 than a State court for the solution to your problem.

13 MR. SHAPIRO: Well, that issue was resolved in  
14 the trial court. There were motions -- there were  
15 actually motions to dismiss filed by the Attorney General  
16 in the State of Florida asserting that position. Those  
17 were denied by the district court, and that was not  
18 appealed.

19 QUESTION: Do you think you would have had much  
20 of a chance had you gone into a Florida trial court and  
21 said that what the Florida supreme court did was a  
22 mistake?

23 MR. SHAPIRO: I don't know that a Florida trial  
24 court would have jurisdiction in the Voting Rights Act  
25 case, Your Honor. I just don't know. I don't think so.



1 I think this would be exclusive jurisdiction in  
2 the Federal district court, and Mr. Lawyer had a right to  
3 make a Shaw claim in the U.S. district court, and again,  
4 there was a motion filed by the Attorney General to  
5 abstain, to transfer because of the DeGrandy litigation,  
6 which was in progress at the time. This district -- this  
7 plan was in U.S. district court in the Northern District.

8 QUESTION: Mr. Shapiro, may I just clarify, is  
9 anybody now claiming that plan should be defended?

10 MR. SHAPIRO: Well, yes. The -- in fact, and  
11 that's a critical aspect of this case, is that the -- at  
12 no time in this litigation did -- was there ever an  
13 adjudication that this plan was unconstitutional.

14 QUESTION: I understand, but is anybody now  
15 claiming that it is constitutional?

16 MR. SHAPIRO: Yes, because what they're saying,  
17 they reserve --

18 QUESTION: And if so, who?

19 MR. SHAPIRO: The Attorney General -- I'm sorry.  
20 The State appellants at the least, specifically in their  
21 settlement agreement said, we do not acknowledge that 330  
22 is unconstitutional, and we have a right -- if their  
23 settlement plan was rejected, they retained the right to  
24 contest that 330 was unconstitutional, and that's a key  
25 aspect of this case, in that there was never an

1 adjudication of liability that that 330 --

2 QUESTION: Well, I thought in this Court though  
3 they don't contest that it's unconstitutional.

4 MR. SHAPIRO: I believe they do. They do not  
5 concede that 330 was unconstitutional.

6 QUESTION: But how does that bear on the  
7 arguments you're trying to make?

8 MR. SHAPIRO: It doesn't bear on the arguments.  
9 I do not -- they do not admit that 330 is  
10 unconstitutional.

11 QUESTION: But then, why don't we go to the  
12 district which basically we're talking about here, I take  
13 it.

14 MR. SHAPIRO: That's correct. This is 386.  
15 This was the settlement plan that was approved by the  
16 Federal court.

17 Now, you can see what happened with the map that  
18 was produced at the "fairness hearing." There's no  
19 political subdivisions that are even included in this,  
20 when you talk about disrespect for political subdivisions.

21 Here's Tampa Bay. It's a huge body of water.  
22 Although there's the shoreline which is depicted, it  
23 doesn't really reflect which portion of Pinellas County --  
24 Pinellas County is over here. You don't know that because  
25 it's not on here.

1 QUESTION: We can't tell where Tampa Bay is on  
2 that map.

3 MR. SHAPIRO: Well, that's the whole purpose of  
4 our map. We have enhanced the map.

5 QUESTION: We now know where Tampa Bay is.

6 MR. SHAPIRO: This is a rather large body of  
7 water.

8 Now, if -- I'm sorry everybody can't see it, but  
9 this is -- you can now see the contours, for the first  
10 time, of the district. The district is a tiny portion of  
11 Pinellas County over here. I'm referring now to Appendix  
12 B of the brief on the merits for the appellants. This is  
13 in --

14 QUESTION: That's where St. Petersburg is,  
15 right?

16 MR. SHAPIRO: Yes, sir. Yes sir. St.  
17 Petersburg is over here, and that is a portion of Pinellas  
18 County, but this is all Pinellas County. They chose this  
19 portion of Pinellas County.

20 Now, what they did was, they eliminated that  
21 part that went over to Polk County, but they retained this  
22 at the insistence of the Justice Department.

23 Now, if you look at this little spit of land  
24 here, this was included as well, so it goes all the way  
25 across, and if you look back at the plan that was

1 presented to the court, it looks like one contiguous  
2 compact piece of land.

3 QUESTION: But much of that is the lake, is what  
4 you're saying.

5 MR. SHAPIRO: Yes, sir.

6 QUESTION: And you're suggesting that the judges  
7 down there didn't know where Tampa Bay was.

8 (Laughter.)

9 MR. SHAPIRO: Well, I don't know. Judge Tjoflat  
10 said, well, we assume there's no houseboats there. That's  
11 what he said in -- at the fairness hearing.

12 Well, there are no -- they have a lot of fish  
13 there, and they don't vote.

14 (Laughter.)

15 MR. SHAPIRO: But as we -- as Mr. Lawyer made  
16 clear this is only part of the picture though, the shape  
17 of the map and irregular aspect of it.

18 QUESTION: Is that unusual in Florida, to have a  
19 district separated by a body of water?

20 MR. SHAPIRO: Well, it is not unusual to be  
21 separated by a body of water, but it's a totally different  
22 proposition when there -- when a district has to be -- a  
23 piece of land has to be in some district, say in an  
24 island and the Florida supreme court stated this in their  
25 original decision.

1           They said, look, in Florida there's a lot of  
2 water, so just because a district encompasses water  
3 doesn't necessarily make it noncontiguous.

4           It's another proposition for the district to  
5 artificially reach over this huge body of water for the  
6 specific exclusive purpose of including black voters in  
7 order to boost the population of the entire district, and  
8 that was the exact purpose of the designers of this plan,  
9 was to go across at this highly dense black community in  
10 Pinellas, where they had been in their own district.

11           In fact, it's truly emblematic of this case that  
12 if you look at 21, whereas under their plan they presented  
13 to the court, the number 21 was in yellow, now the two is  
14 submerged in water, so it's -- so they have jumped across  
15 Tampa Bay and taken these counties, which used to be in  
16 other districts. They were in other districts.

17           QUESTION: But you're not claiming now, as I  
18 think was the case in the earlier district, that they put  
19 together rural areas with urban areas on both sides of the  
20 rivers, or the bay?

21           MR. SHAPIRO: No. As a matter of fact, that was  
22 eliminated, this finger, but when you create a monster,  
23 you can cut the fingers off, it's still a monster.

24           This finger was cut off that led to Polk County,  
25 which was rural, but the NAACP opposed the plan of joining

1 Pinellas County over here, because they said there's not  
2 even a cohesive black community in the Tampa-Hillsborough  
3 area, much less the Pinellas area. They opposed it.

4 But what the Justice Department did was, it  
5 insisted that in order to create an additional majority  
6 district, that they must join the populations.

7 QUESTION: I thought this wasn't a majority --

8 MR. SHAPIRO: It is not a majority, but the  
9 purpose was to create a majority --

10 QUESTION: Why did the NAACP oppose it? What  
11 was -- why did they think that would harm the interests of  
12 the black voters?

13 MR. SHAPIRO: Because they -- they were correct.  
14 This plan -- this is striking. Sixty-four percent of all  
15 Pinellas County's blacks are now in plan 386.

16 Even more, 74 percent of Manatee County's blacks  
17 are in the plan, so they bleach -- and the NAACP said,  
18 look, you're bleaching the surrounding areas of their  
19 influence, because you're taking a pocket of black voters,  
20 and you're forcing them into that plan where they don't  
21 belong.

22 Now, the Justice Department --

23 QUESTION: Before you leave that, may I just  
24 ask, does the NAACP -- are they a party to the appeal?  
25 They don't challenge it now, do they?

1 MR. SHAPIRO: No. They are not a party to this  
2 appeal, and they were not involved in this litigation.

3 But when the -- here's the point. When the  
4 Florida supreme court considered the idea, at the  
5 insistence of the Justice Department, that they cross  
6 Tampa Bay to pick up this pocket of black voters, the  
7 Florida supreme court in the 601 So.2d copy said, but  
8 these -- this is not a compact group of black voters.

9 QUESTION: Mr. Shapiro, let me understand. I  
10 think --

11 MR. SHAPIRO: Yes.

12 QUESTION: You're talking about the NAACP  
13 opposition to the plan that the Florida supreme court  
14 adopted, the one that we saw before with the finger --

15 MR. SHAPIRO: That's correct.

16 QUESTION: -- and that was a concern with  
17 packing into that district, right?

18 MR. SHAPIRO: This plan, that's correct.

19 QUESTION: But we have nothing to say that the  
20 NAACP opposes the plan that the --

21 MR. SHAPIRO: No.

22 QUESTION: -- court approved, that the Federal  
23 court approved.

24 MR. SHAPIRO: No, we don't. But those comments  
25 that they made before the Florida supreme court are

1 directly relevant to this case, because they said -- they  
2 said to the court they objected to any plan -- any plan  
3 which would cross Tampa Bay and join these populations.

4 QUESTION: But they objected because to do so  
5 was packing.

6 MR. SHAPIRO: That's correct.

7 QUESTION: And if the packing is now less, I  
8 don't know that it follows that they still find it  
9 objectionable. You've only got -- your district is what,  
10 30-some-odd percent black now?

11 MR. SHAPIRO: It's 36-percent black.

12 QUESTION: So I don't know that there -- I don't  
13 know that we can infer that there's -- that they would  
14 still object, when in fact they have not done so.

15 QUESTION: Or that it makes any difference  
16 whether they object or not.

17 MR. SHAPIRO: I'm just pointing that out to say  
18 that there was a substantial -- that the Florida supreme  
19 court was saying, we do not believe that we're obeying our  
20 traditional neutral districting principles by doing this,  
21 but we're doing it because under duress of the Justice  
22 Department --

23 QUESTION: I'm sorry to get you into this,  
24 Mr. Shapiro.

25 MR. SHAPIRO: Yes, sir.



1 QUESTION: I was just curious. You shouldn't  
2 waste a whole lot of your time on it. I was just curious  
3 as to --

4 MR. SHAPIRO: No, of course.

5 QUESTION: -- why the NAACP would seem to be on  
6 the other side of this.

7 MR. SHAPIRO: Okay.

8 QUESTION: I understand it now.

9 QUESTION: Well, could you explain what your  
10 position here is? You say you never consented to this  
11 final plan --

12 MR. SHAPIRO: That's correct.

13 QUESTION: -- 386, and --

14 MR. SHAPIRO: We never consented to it.

15 QUESTION: -- that you've never agreed with it,  
16 and that you did not get relief at the State level, and  
17 you assert that the plan, 386, violates this Court's  
18 constitutional standards.

19 MR. SHAPIRO: That's correct, and it does so for  
20 several reasons. Number 1, this was called a hybrid  
21 consent decree. That's what the majority of the court  
22 called this. The notion of the consent decree, however,  
23 is you have to have consent.

24 QUESTION: And your client did not consent.

25 MR. SHAPIRO: That's correct.

1 QUESTION: Although was a party below.

2 MR. SHAPIRO: That's correct, and he objected to  
3 it. He objected ad nauseam to 386, and he insisted upon  
4 an adjudication that 330 be declared unconstitutional.

5 What the court did was, instead it made a  
6 conscious decision that instead of actually adjudicating  
7 330 unconstitutional, that it would submit the matter to  
8 mediation, and the purpose of the mediation was to allow  
9 the parties to come up with a remedy or a substitute plan.

10 The problem is, that does an end run around the  
11 Florida legislature, which in the traditional cases that  
12 this Court has said over and over and over, including  
13 Miller, this Court has said it's the province of the State  
14 legislature --

15 QUESTION: But is it not true that if there had  
16 been a finding of violation, and then after hearings the  
17 court had imposed this plan, you would still make  
18 precisely the same objections you're making now?

19 MR. SHAPIRO: Absolutely.

20 QUESTION: But -- so if you win -- well, you  
21 started by saying this is not a good plan, the new plan.  
22 You win or you lose. All right. So if you win that's --

23 MR. SHAPIRO: If I --

24 QUESTION: So if you win that's --

25 MR. SHAPIRO: -- in the way it was done.

1 QUESTION: I under -- let's -- suppose --

2 MR. SHAPIRO: I'm sorry.

3 QUESTION: Suppose we were to say that this new  
4 plan violated the Constitution -- you know, the cases  
5 we've held -- you'd win and that would be the end of it,  
6 right?

7 MR. SHAPIRO: Yes, sir.

8 QUESTION: All right. Now suppose we were to  
9 say the opposite, that you lose if this plan's okay  
10 constitutionally. Now, is that the end of this case as  
11 far as you're concerned?

12 MR. SHAPIRO: I would take the position that  
13 Mr. Lawyer -- that's a complicated question, because in a  
14 usual consent --

15 QUESTION: No, I mean, because you could say now  
16 that this is what you really wanted. You wanted an  
17 adjudication of whether this plan is good or bad.

18 MR. SHAPIRO: That's right.

19 QUESTION: And that would eliminate a whole set  
20 of complex procedural issues.

21 MR. SHAPIRO: It --

22 QUESTION: So what I think you're going to say  
23 is no, that isn't the end.

24 MR. SHAPIRO: No.

25 QUESTION: Okay. Now, if that isn't the end of

1 it, why not precisely, because now what you're doing is,  
2 you're attacking the procedure, so even if this is a good  
3 result, the procedure was wrong.

4 MR. SHAPIRO: That's -- it's wrong on both  
5 counts. The procedure was wrong because the footprint of  
6 the Federal judiciary, in this case the district court,  
7 was put on the process and a coercive order was entered  
8 without any adjudication.

9 QUESTION: All right. Now, my question on that  
10 is this. Suppose the four people, Mr. Scott, Mr.  
11 Hargrett, Mrs. Simms, and Mr. James, and your client, five  
12 people -- now an imaginary case -- an imaginary case.  
13 Those five people sue somebody for something.

14 MR. SHAPIRO: Yes, Your Honor.

15 QUESTION: And they want an injunction, and  
16 now --

17 MR. SHAPIRO: From the court?

18 QUESTION: Yes. They want -- I'm just making up  
19 a case.

20 MR. SHAPIRO: Okay.

21 QUESTION: They sue somebody. Mr. White they  
22 sue, okay, and they say, Mr. White, you're doing a bad  
23 thing here, and he says no I'm not, and now they say, four  
24 of the five, not your client but the other four say, we'll  
25 settle. White says, I won't settle if I have to admit I

1 was wrong.

2 We won't make you admit it. Okay. So four of  
3 them settle with Mr. White, and the judge then simply  
4 enters a decree embodying their settlement which doesn't  
5 admit liability.

6 MR. SHAPIRO: Yes.

7 QUESTION: Common, garden variety, every day of  
8 the week.

9 The fifth person doesn't agree.

10 MR. SHAPIRO: Yes, Your Honor.

11 QUESTION: Well, I can understand why the fifth  
12 person can attack the merits. He can say, Mr. White,  
13 you're doing a bad thing still. But I don't understand  
14 how that fifth person could object to the fact that the  
15 other four have settled with Mr. White.

16 MR. SHAPIRO: The answer to your question is  
17 that a nonconsenting plaintiff cannot have substantive  
18 issues resolved against them in the context of a consent  
19 decree.

20 QUESTION: Well, doesn't it happen every day of  
21 the week that people are in cases where they have 10  
22 plaintiffs, 9 of them settle, the judge looks it over, he  
23 says, this is fine. The tenth one doesn't agree, so the  
24 judge says, okay, tenth one, you don't have to agree. You  
25 can maintain your suit, but I'm entering the decree as to

20

1 the other nine. That's fair.

2 MR. SHAPIRO: As to the other nine, but  
3 Mr. Lawyer lives in 386, and in fact he's the only  
4 plaintiff in this case who had standing to challenge 330.

5 QUESTION: But didn't the district court rule  
6 against him on the merits?

7 MR. SHAPIRO: Exactly. It's a coercive order.

8 QUESTION: Yes, well --

9 MR. SHAPIRO: They couched it in terms of a  
10 consent decree.

11 QUESTION: But you've been arguing now for 20  
12 minutes. You've only got 10 minutes left, and you  
13 challenged the decree on the merits, I take it.

14 MR. SHAPIRO: Yes, Your Honor.

15 QUESTION: Why don't you get to that part of  
16 your case?

17 MR. SHAPIRO: I will.

18 The -- 330 itself -- 386 was approved by the  
19 court. Now, what our position is on this case is that, as  
20 I said, the original district, 330, was never declared  
21 unconstitutional, but it was a product of coercion by the  
22 Justice Department.

23 Now, what happened here is --

24 QUESTION: Why does that bear at all on the  
25 validity of the most recent plan, the court-ordered plan?

1 MR. SHAPIRO: Because -- it absolutely does,  
2 because the coercive order of a Federal court is based  
3 upon adjudication. A Federal court can only order a  
4 remedy where there has been an adjudication, or there has  
5 been some admission of liability. Here, there was never  
6 an admission of liability.

7 QUESTION: Mr. Shapiro, since you are making  
8 much of this point, Mr. Lawyer submitted a statement  
9 together with Plaintiff Scott and others, a statement of  
10 the case, representing to the district court as a result  
11 of this Court's decision in the Miller case there are no  
12 issues of law to be decided by the court in this matter.  
13 Accordingly, the only issue which would remain for the  
14 court to decide at the trial on this matter is the issue  
15 of the appropriate remedy.

16 Now, it seems to me that your first point about  
17 how the court has to declare the old district  
18 unconstitutional, this is a stipulation that your client  
19 joined and said, court, we all agree there's nothing for  
20 you to decide but the remedy for this constitutional  
21 violation.

22 MR. SHAPIRO: By the remedy he meant how much  
23 time -- this -- how much time the court should give the  
24 legislature to decide what the replacement plan would be.  
25 He did not specify that the court should actually decide

1 what the plan should be, so he didn't -- he said the  
2 remedy, meaning how much time to give the court, how much  
3 time to give the legislature.

4 QUESTION: Accordingly, the only issue for the  
5 court to decide at the trial -- at the trial -- is the  
6 issue of the appropriate remedy. Do you have a trial on  
7 how much time to give the --

8 MR. SHAPIRO: There was never a trial period in  
9 this case.

10 QUESTION: But I'm just reading the stipulation,  
11 trying to find out what that means. One thing it says,  
12 there's no issue of law dividing the parties. There's  
13 only the question of the appropriate remedy, and that's  
14 for trial.

15 MR. SHAPIRO: What he meant by that was that  
16 he -- the remedy meaning the court should determine --  
17 assuming that there's an unconstitutional district, the  
18 court should then determine how it's supposed to act, and  
19 it's supposed to act by referring it back to the  
20 legislature.

21 QUESTION: Well, I'm still so confused by your  
22 position here. Do you want this Court to just focus on  
23 the fact that --

24 MR. SHAPIRO: No.

25 QUESTION: Wait a minute. You didn't even hear



1 the question, and you've already answered it. Do you want  
2 to hear the question and then answer it?

3 You appear to be here arguing that the procedure  
4 followed by the Federal district court was erroneous  
5 because it didn't first find unconstitutionality of plan  
6 330, and furthermore it did not then await an opportunity  
7 for the legislature to adopt its own plan, so much of the  
8 argument centers on that.

9 On the other hand, do you have an argument here  
10 at all to the effect that, irrespective of that, what the  
11 court ended up with by virtue of the agreement of the  
12 other parties, other than Lawyer, is itself  
13 unconstitutional.

14 MR. SHAPIRO: Yes, I get to that.

15 QUESTION: Do you get to both of those arguments  
16 or not?

17 MR. SHAPIRO: Yes, we do.

18 QUESTION: I'm just so confused.

19 MR. SHAPIRO: Yes, we do. What happened in this  
20 case, the Court in approving plan 386 did not adequately  
21 apply the Miller standards. They held -- instead of  
22 determining and applying those -- that case very carefully  
23 they said, well, 386 is better than 330, so we're going to  
24 approve it. They said that it was benign and statute  
25 satisfactorily tidy, because it was better than 330.

1                   That's not an accurate -- an adequate  
2 application of Miller. Instead of using the community of  
3 interest analysis in Miller in looking at the actual  
4 objective evidence in terms of what these communities are,  
5 they held -- they used a fairness hearing as a referendum  
6 and said, well, we're -- because we have a fairness  
7 hearing and we've put a notice in the newspaper that  
8 anybody who wants to contest 386 could come to the court  
9 and do that, the court in this case, the district court  
10 said, well, nobody showed up and objected to plan 386, so  
11 therefore there must be a community of interest.

12                   The statistics of the case are also important.  
13 The statistics are that although 330 had 45 percent black  
14 voters of V.A.P., this plan had 36 percent, so that a  
15 significant number of black voters were moved from their  
16 place over here in Pinellas County into District 21 when  
17 they normally would not be there.

18                   There was no -- and one of the key aspects is --  
19 I know I've harped on this, but in adopting the procedure  
20 that the court used of using mediation in a secret  
21 sessions to design this plan, in effect there is no report  
22 or any evidence of the exact factors that the designers of  
23 the plan used.

24                   Miller absolutely mandates --

25                   QUESTION: Wasn't there one point that you had

1 an opportunity to examine the designer of the plan? Am I  
2 right that it was the State Senate's expert that was the  
3 designer?

4 MR. SHAPIRO: Correct. He -- his report went  
5 into the record, and I will tell you that Mr. Lawyer was  
6 threatened with sanctions in this case if he divulged the  
7 contents of the negotiation.

8 QUESTION: Was he -- did he have an opportunity  
9 to examine this witness and say --

10 MR. SHAPIRO: Yes. Yes, he did.

11 QUESTION: -- no, I don't choose to --

12 MR. SHAPIRO: Yes, he did. He did, but there  
13 was -- he was permitted to cross-examine the witness, but  
14 there was no oral testimony at that -- there was no one  
15 under oath, there was no oral testimony whatsoever at the  
16 fairness hearing, and there were no findings of fact,  
17 which is the most critical aspect of this case, really.

18 QUESTION: Did Mr. Lawyer have an opportunity to  
19 say, I want to call witness X, Y, and Z, I want to cross-  
20 examine, and was denied that opportunity?

21 MR. SHAPIRO: He wasn't denied the right to call  
22 witnesses, but there -- this was not -- the judge was  
23 asked at the pre-trial conference, is this going to be an  
24 evidentiary hearing? He said, I suppose you could find a  
25 judge somewhere who liked to hear evidence, but no, this

1 is not an evidentiary hearing.

2 So he specifically ruled that this would not be  
3 an evidentiary hearing, so to say that Mr. Lawyer had a  
4 burden at that hearing to prove the district  
5 unconstitutional, or that he failed to --

6 QUESTION: He was the plaintiff in the case.

7 MR. SHAPIRO: Yes, but the plan was never  
8 properly before the court.

9 QUESTION: Where was it that he had the  
10 opportunity to cross-examine?

11 MR. SHAPIRO: At the fairness hearing.

12 QUESTION: So there was testimony taken there?

13 MR. SHAPIRO: There was no testimony. It was a  
14 hearing, and it was not an evidentiary hearing, and it's  
15 clear that Judge Merryday stated at the pretrial  
16 conference this will not be an evidentiary hearing.

17 QUESTION: Well then, how would he have had a  
18 chance to cross-examine him?

19 MR. SHAPIRO: That's the point.

20 QUESTION: But I thought you said he did have a  
21 chance.

22 MR. SHAPIRO: Well, he was given a chance by the  
23 judge. Guthrie, the person for the State, he didn't  
24 testify. He put his affidavit in the record and Judge  
25 Tjoflat said, we'll consider that his direct testimony.

1 If you want to cross-examine him, go ahead.

2 QUESTION: And your client declined.

3 MR. SHAPIRO: Declined, but that was not an  
4 evidentiary hearing, so to say --

5 QUESTION: Well, it was certainly the next best  
6 thing.

7 MR. SHAPIRO: The next best thing, but he had no  
8 burden to prove plan 386 was unconstitutional, because  
9 plan 386 was never properly before the court. Because  
10 they did an end run around the legislature, it was never  
11 referred to the legislature. Therefore, to say that he  
12 had a duty or a burden at all at that hearing is  
13 incorrect. He had no burden under Miller or anywhere else  
14 to prove that that district was unconstitutional.

15 QUESTION: Was the judge not told by the  
16 representatives of the legislature that the legislature  
17 just wasn't going to do anything about this?

18 MR. SHAPIRO: Well --

19 QUESTION: That it had done its thing in the  
20 decennial whatever, and that the article of the  
21 Constitution that you cite didn't apply except at the 10-  
22 year redistricting?

23 MR. SHAPIRO: Everybody, including the Attorney  
24 General of the State of Florida, expected, and stated to  
25 the district court, that the State legislature had the

1 right to convene. In fact, the district court was asking  
2 for status reports.

3 But the fact is that the State legislature never  
4 had to -- it was never triggered, a special session,  
5 because there was no adjudication that the original  
6 district was unconstitutional.

7 QUESTION: I took what went on as simply an  
8 indication that at least unless and until the extant  
9 district was declared unconstitutional, the legislature,  
10 simply because of the existence of a lawsuit, had no  
11 intention of creating a new district.

12 MR. SHAPIRO: Exactly. What the court was  
13 saying was, because of Miller v. Johnson for the U.S.  
14 Supreme Court, we note that the Florida legislature has  
15 not spontaneously convened itself to rectify the  
16 situation.

17 QUESTION: But aren't those matters of State  
18 law? I mean, whether or not the State --

19 MR. SHAPIRO: No.

20 QUESTION: Whether or not the State of Florida  
21 has the legal power to agree with the court to change its  
22 district with these representatives present or not would  
23 seem a question of State law. I don't see what's the  
24 question of Federal law.

25 MR. SHAPIRO: Because this Court has made clear

1 repeatedly that this is a matter that is to be reserved  
2 for the States in the first instance.

3 QUESTION: If, in fact, the court introduces a  
4 decree agreed upon by our four plaintiffs and their  
5 defendant, Mr. White, whether Mr. White has the power to  
6 make that agreement to the decree is a matter of Mr.  
7 White, a matter of the State. Why is it Federal?

8 MR. SHAPIRO: It's Federal because the Court has  
9 made clear that this is a matter which is to be resolved  
10 first by the State. It's a U.S. constitutional issue of  
11 Federalism. It's a Federalism issue that Mr. Lawyer had a  
12 right to have his State legislature make that decision in  
13 the first instance as a matter of Federalism, but also --

14 QUESTION: I think you've answered the question,  
15 Mr. Shapiro.

16 MR. SHAPIRO: Thank you.

17 QUESTION: Thank you.

18 Mr. Taranto.

19 ORAL ARGUMENT OF RICHARD G. TARANTO

20 ON BEHALF OF THE STATE APPELLEES

21 MR. TARANTO: Mr. Chief Justice, and may it  
22 please the Court:

23 The equal protection holding of the district  
24 court should be affirmed, we suggest, because there's  
25 ample evidence to find, under this Court's recent

1 decisions, that race did not predominate over, did not  
2 subordinate other districting principles in the design of  
3 plan 386, and the Court should find no Federalism problem  
4 here because the district court, acting only after giving  
5 the legislature an opportunity to convene, then properly  
6 allowed authorized State officials to resolve the serious  
7 Federal claim here by proposing a lawful districting plan,  
8 giving appellant an opportunity to challenge the  
9 lawfulness of that plan --

10 QUESTION: Did the court below ever enter an  
11 order saying, and I hereby give 60 days or 90 days or  
12 something in which the legislature can act, or did he just  
13 accept somebody's statement that the legislature wasn't  
14 going to be called into special session?

15 MR. TARANTO: I think it's a combination of  
16 those.

17 In July of 1995, after this Court decided  
18 Miller, there was a status conference at which everyone  
19 recognized this claim had now become substantially more  
20 risky than it had been before.

21 Part of what the district court did was to enter  
22 an order directing the State parties every 30 days to file  
23 a piece of paper in the court saying whether the State  
24 legislature would be convened to address what was now  
25 recognized to be a serious Federal claim. That --



1 QUESTION: What had not yet been adjudicated to  
2 be an unconstitutional district.

3 MR. TARANTO: That's right.

4 QUESTION: It's uncontested, is it not, that the  
5 legislature had no opportunity, after this Court had  
6 determined that the district was unconstitutional and  
7 therefore could not be used, to adopt on its own a new  
8 district?

9 MR. TARANTO: This Court -- the court did not  
10 determine that plan 330 was unconstitutional.

11 QUESTION: So why should the legislature adopt a  
12 new district --

13 MR. TARANTO: Because --

14 QUESTION: -- unless and until the court does  
15 that?

16 MR. TARANTO: Because I think the legislature,  
17 represented by the Speaker here and the President of the  
18 Senate and the Attorney General, was fully aware that  
19 there was a serious risk of invalidation.

20 QUESTION: But legislatures don't enact new  
21 legislation just because there's a serious risk, and some  
22 of the members of the legislature did not think that these  
23 individuals had the authority to commit the legislature to  
24 a whole new districting plan.

25 MR. TARANTO: Well, I don't think there's any

1 thing in the record --

2 QUESTION: There's a letter in the record from  
3 one Senator, isn't there?

4 MR. TARANTO: That letter was not in the record.  
5 It was rejected because it was improperly filed, and had  
6 that issue ever been joined, which it has never been  
7 joined, there is plenty of evidence that we would have  
8 submitted had the issue ever been raised, to support the  
9 authority.

10 QUESTION: No, I think --

11 MR. TARANTO: That authority has not been  
12 questioned.

13 QUESTION: I think there is a serious burden on  
14 whoever is taking the word of a couple of members of a  
15 State legislature that the State legislature as a body  
16 concedes to redistricting for the State. I think there's  
17 an enormous burden to show that that representation that  
18 they can speak on behalf of the legislature is true, and  
19 even if there is nothing else in the record, I cannot  
20 imagine approving a Federal judge's acceptance of the  
21 Majority Leader's statement just on its face.

22 MR. TARANTO: It was not simply submitted on its  
23 face. Exactly the same statements were made to the  
24 Florida supreme court after preclearance was denied to the  
25 original plan that the legislature would not convene, and

1 therefore judicial action was going to be required.

2 QUESTION: I'm not talking about the statement  
3 that it would not convene. I accept that. I'm not  
4 surprised that it would not convene. Its prior plan was  
5 still constitutional as far as it knew.

6 I'm talking about the assertion that I and one  
7 other person have the authority on behalf of the entire  
8 legislature of Florida to agree to redistricting of the  
9 State. That's an extraordinary assertion.

10 MR. TARANTO: Your Honor, I don't think it's  
11 extraordinary. I think State parties are defendants in  
12 Federal courts all of the time. It is a matter of State  
13 law what authority they have through whoever the party is  
14 to settle litigation.

15 We've cited in our brief a number of authorities  
16 to show that the Florida authorities, including the  
17 Attorney General and the State parties, the State  
18 legislative parties, did have that authority, and that has  
19 never been contested here.

20 The district court here took great care to  
21 assure itself that it was not allowing itself to be used  
22 to usurp authority.

23 QUESTION: Well, I think it is one thing to  
24 settle litigation. That is, to agree on behalf of the  
25 legislature that the State will not oppose the

1 judicially -- the judicially imposed districting. That's  
2 one thing.

3 But what is being asserted here is that this is  
4 not judicially imposed districting, that this is  
5 districting that was, in fact, expressing the will of the  
6 Florida legislature, which to my mind is an important  
7 thing if the prior district was never declared  
8 unconstitutional.

9 MR. TARANTO: I think what's going on here is  
10 that there is -- by the time the summer of 1995 comes  
11 around there is a very serious Federal challenge.  
12 Authorized State officials I don't think are required or  
13 should be stripped of the authority to resolve that  
14 litigation voluntarily as other defendants can resolve  
15 their Federal claims. That seems to me to turn Federalism  
16 principles upside down.

17 Consent decrees are routinely -- customarily, as  
18 this Court said in Maher v. Gagne, entered without  
19 liability findings against State defendants and it would,  
20 I think, strip them of an important authority --

21 QUESTION: Would the State parties, as you  
22 understand State laws, have had authority to concede that  
23 the Senate-approved plan -- that the legislatively  
24 approved plan was unconstitutional?

25 MR. TARANTO: Would have had authority, yes,

1 as -- litigating authority, absolutely.

2 QUESTION: They did not make that concession,  
3 however.

4 MR. TARANTO: They did not make that concession.  
5 That's right. And the issue --

6 QUESTION: You --

7 MR. TARANTO: The issue in the district court  
8 was never pressed whether, had Judge Tjoflat's view  
9 prevailed that the court had agreed that a liability  
10 judgment had to be entered, whether we would have accepted  
11 that as a condition to the entry of the remedy. That  
12 issue was simply never presented.

13 QUESTION: Well, frankly, looking at the series  
14 of maps, it didn't strike me as terribly important if we  
15 were to say the district judge should have found the plan  
16 330 unconstitutional before deciding which plan to adopt,  
17 and if it went back, the court could probably make that  
18 finding. It is a most unusual-looking district --

19 MR. TARANTO: When I --

20 QUESTION: -- and chances are the court would  
21 say plan 330 was unconstitutional, therefore I have to  
22 adopt a plan, and the plan I'm going to adopt is 386.

23 MR. TARANTO: When I say that the issue was not  
24 joined, the State appellees are prepared to accept and  
25 were prepared to accept back in November 20 -- November

1 20, a judgment entering a finding of liability without  
2 conceding the constitutional issue. It was not pressed at  
3 the point, and not necessary, so we would accept an  
4 affirmance under Judge Tjoflat's route.

5 What we do think is that this district, the 1995  
6 district, is constitutional under this Court's standards,  
7 and all of what I think this Court said last term in the  
8 Bush case and the Shaw case indicates that there is a  
9 variety of evidence that bears on that question.

10 Here, the evidence is partly what there is, and  
11 partly what there isn't. What there isn't is any block-  
12 by-block separation of races. What there isn't --

13 QUESTION: Well, if there were a party, as there  
14 appears to be here, to the proceedings below who didn't  
15 consent, is that party entitled to an evidentiary hearing  
16 before the district court says yes, I'm going to go with  
17 386?

18 MR. TARANTO: Absolutely, and he got it. He was  
19 invited to put on evidence. The reference to --

20 QUESTION: Did the court say this is not an  
21 evidentiary hearing?

22 MR. TARANTO: Absolutely not. He's taking one  
23 quote --

24 QUESTION: That's wrong?

25 MR. TARANTO: That's wrong.

1 QUESTION: That's not in the record?

2 MR. TARANTO: That is not in the record. He's  
3 referring to a statement at the end of the November 2  
4 status conference in which the Justice Department attorney  
5 said, I'm a little confused, Your Honor, about how you  
6 want to handle the hearing that's coming up. Do you want  
7 us to put on oral evidence?

8 And the judge said, I suppose somebody, some  
9 judge here wants to hear oral evidence, and what happened  
10 was of course that all of the affirmative evidence of the  
11 State was put on in writing.

12 What happened then was that Mr. Lawyer was  
13 invited several times, put him on the stand and cross-  
14 examine him. Ask him what his instructions were. Ask --

15 QUESTION: And the court never said this will  
16 not be an evidentiary hearing?

17 MR. TARANTO: Never said this will not be an  
18 evidentiary hearing, and at the hearing --

19 QUESTION: Counsel here has just misrepresented  
20 flatly that the statement --

21 MR. TARANTO: He's taking one quote that was  
22 addressed to the Justice Department lawyer --

23 QUESTION: Did the quote say this will not be an  
24 evidentiary hearing?

25 MR. TARANTO: No, and I don't even think that

1 the quote as he quotes it says it.

2 QUESTION: Well, in any event his client was  
3 offered a chance to cross-examine. You know, most people  
4 would think of that as an evidentiary hearing, I gather.

5 MR. TARANTO: Absolutely. He said that -- the  
6 man who sat down with the computer, he has said in writing  
7 what he did.

8 Put him on the stand. Ask him what his  
9 instructions were, what your data were, did you use race  
10 as a proxy for, or disproportionately -- do you have more  
11 racial data than nonracial data, as in the Texas case?  
12 Did you try to draw things block-by-block? What's your  
13 information about what's inside the district and what's  
14 outside the district? Do the people who live along the  
15 coast own boats? Are they the same socioeconomically as  
16 the people who live between the freeways here?

17 QUESTION: Did the court indicate --

18 MR. TARANTO: None of that was done.

19 QUESTION: Did the court indicate in this  
20 hearing that there would be any restrictions on the  
21 matters as to which Mr. -- the appellant could inquire?

22 MR. TARANTO: Yes. The one restriction that was  
23 pressed by Judge -- Chief Judge Tjoflat was a restriction  
24 about asking -- about putting the Justice Department  
25 attorney on the stand and that, I think, is actually a



1 perfectly proper discretionary evidentiary ruling.

2           There is a general rule that says you don't make  
3 a lawyer a witness in the case absent compelling need.  
4 Before you've examined the man who drew the district,  
5 before you've examined the State officials who actually  
6 negotiated, you couldn't possibly show a compelling need,  
7 and there was no showing of that sort by appellant.

8           Appellant was allowed to submit statistics,  
9 allowed to submit a different plan, allowed to submit his  
10 own maps, some of these maps -- he was invited to put on  
11 any evidence he had and under, I think, this Court's  
12 decision in Local 93, it is very clear that once the other  
13 parties to the case agreed on a decree, that couldn't --  
14 that by itself couldn't adjudicate his rights, but he had  
15 an opportunity to adjudicate his claim that this district  
16 was unlawful.

17           And I think this district cannot be found  
18 unlawful. It is not a safe minority district. It is --  
19 geographically and economically shares a real community of  
20 interest. There's plenty of evidence to that effect.

21           There -- this is not a district that had the  
22 kind of process flaws of either being dictated by the  
23 Justice Department -- this was negotiated in a wide-  
24 ranging discussion, including appellant's coplaintiffs who  
25 after the fact came in and said, this is not a district

1 that is race-based.

2 QUESTION: Mr. Taranto, I'm prepared to accept  
3 your analysis as far as whether the district, had it been  
4 adopted by the legislature, would be unconstitutional.

5 My problem with this case is, I think it's a  
6 serious matter to say that when the Florida legislature as  
7 a whole has not been put on notice that its existing  
8 districting is unconstitutional, and has not been given an  
9 opportunity after that notice to itself draw a district --  
10 which might have been like this, but then again it might  
11 not have -- it isn't enough for me that this district be  
12 constitutional.

13 I also would like it to be the district that the  
14 voters of Florida wanted to the extent that the Federal  
15 court could have given them an opportunity to select it.

16 MR. TARANTO: Your Honor, I don't agree with  
17 that rule, because I think that the proper Federalism rule  
18 in this context is one that leaves it to State law what  
19 officials have the authority to engage in what kind of  
20 settlement of litigation, and that's what is undisputed  
21 here. These State officials --

22 QUESTION: Mr. Taranto, is there anything in the  
23 decree that would prevent the Florida legislature today  
24 from redefining the district?

25 MR. TARANTO: No, not at all. Appellant is free

1 to contact any Senator or --

2 QUESTION: Is there anything in the record  
3 indicating objections on the part of legislators to this  
4 action?

5 MR. TARANTO: The following is either in or was  
6 attempted to be gotten in the record. There was this one  
7 letter that Justice Scalia referred to from one Senator  
8 who sent a letter ex parte to each of the three judges,  
9 one of which was returned under the order of the court,  
10 and he said I don't think the Senate can represent -- can  
11 speak this way in litigation. Otherwise, there is nothing  
12 on that issue.

13 There is a public comment from the former  
14 Senator at this hearing, the former Senator of this  
15 district, objecting to the plan.

16 QUESTION: Was there an inquiry by the court?  
17 Did the court -- on what did the court base its assurance  
18 that it had the authority to accept this as the will of  
19 the Florida legislature?

20 MR. TARANTO: Well, several things. The  
21 briefing that was submitted in support of the plan, the  
22 particular -- I think the fullest brief was by the United  
23 States -- cited the State statutory authority as  
24 interpreted in various decisions giving the Attorney  
25 General the authority to resolve litigation.

1           There's an affidavit in the joint appendix from  
2 the Speaker of the House citing the House rule that  
3 specific --

4           QUESTION: So you didn't even need the Senators.  
5 It would have been enough to have the Attorney General?  
6 The Attorney General could redistrict the State, or could  
7 agree to it?

8           MR. TARANTO: I think as a matter of Florida law  
9 that is probably correct. I think as a district court is  
10 being asked to enter a decree that resolves a serious  
11 claim, and puts in place a new plan subject to any change  
12 that the legislature wants to make, it needs to inquire  
13 into all the circumstances.

14           It's a harder case if the House and the Senate  
15 both came in and said, we disagree about what should be  
16 done. That's not this case.

17           Here, all relevant State authorities are  
18 speaking with the same --

19           QUESTION: No -- there was that statute. Now,  
20 what else was there besides the statute that gave the  
21 Attorney General authority?

22           MR. TARANTO: Florida -- a Florida decision, in  
23 particular the Abramson decision, which we cited in our  
24 brief, that says State agencies can violate their State  
25 statutes when necessary to settle a serious claim against

1 them.

2 There is the --

3 QUESTION: I don't see the relevance of that.

4 There was no State agency here, was there?

5 MR. TARANTO: Well, the State as a party itself  
6 is -- I think the form of the question is, could it change  
7 its State statute by voluntarily settling through the  
8 Attorney General a serious piece of Federal litigation? I  
9 think the Abramson decision under Florida law is  
10 supportive of that.

11 There is the affidavit of the Speaker citing and  
12 attesting to the authority under the House rule, and then  
13 there was a series of representations I think two or three  
14 times in which the attorney for the Senate was asked by  
15 the court, are you sure that you really have authority to  
16 be representing the Senate here and he said, yes, I'm  
17 absolutely sure. I'm absolutely sure.

18 And had there been a contest about that, there  
19 would have been still more evidence in the form of  
20 petitions.

21 QUESTION: Well, is this a matter, though,  
22 perhaps of Federal law? This Court seems to have  
23 indicated its position that a district court, before  
24 drawing its own plan to replace one that appears to be  
25 invalid, or has been found to be invalid, should give the

1 State legislature an opportunity to address it.

2 Now, could we mean, as a matter of Federal law,  
3 that the full legislature should have an opportunity to  
4 draw up a plan --

5 MR. TARANTO: I --

6 QUESTION: -- and that we don't accept the  
7 notion that, pursuant to settlement authority, the  
8 Attorney General can come in and say, speaking on behalf  
9 of the State, we accept this?

10 MR. TARANTO: I think that the legislative  
11 opportunity was given over the course of several months.  
12 I don't think there was any doubt about --

13 QUESTION: But it was not given within the  
14 context of a finding that plan 330 was invalid.

15 MR. TARANTO: That's right, but the price of  
16 that rule would be to be -- to insist that States in  
17 voting rights cases may never voluntarily resolve their  
18 claims. In fact, they do on a number of occasions.  
19 There's a consent decree in the Johnson v. DeGrandy case  
20 in --

21 QUESTION: Well, I can certainly understand that  
22 a State and this Court might be willing to accept the  
23 notion that the attorneys on behalf of the State could  
24 agree that the former plan was unconstitutional. Now  
25 let's go from there. Is it nevertheless a matter of

1 Federal law that the full legislature be given an  
2 opportunity, following that, to adopt a plan?

3 MR. TARANTO: Well, I think it is a matter of  
4 Federal law that an -- a proper opportunity to be given.

5 I think it's also a matter of Federal law  
6 whether there should be a rigid rule saying, you have to  
7 have, in this one class of cases, an adjudicated  
8 violation. I think that that, in fact, strips States of  
9 an important authority that all other litigants have and  
10 doesn't --

11 QUESTION: Well, of course, the concern  
12 expressed by this Court in saying there should be such was  
13 a concern on behalf of the States that the Federal court  
14 shouldn't intrude and take upon itself the job of drawing  
15 a legislative district without finding a good reason for  
16 it, to wit, invalidity of what the legislature had put its  
17 task --

18 MR. TARANTO: But I think --

19 QUESTION: -- its hand to.

20 MR. TARANTO: I think it is also a good reason  
21 that the Federal claim is very serious, that there is a  
22 real -- a real risk of the litigation. It's the same good  
23 reason that supports consent decrees without liability in  
24 all kinds of other cases against States, including --

25 QUESTION: Well, this wasn't a consent decree,

1 of course, because we have a petitioner here who didn't  
2 consent.

3 MR. TARANTO: Insofar --

4 QUESTION: I mean, it wasn't a consent decree.

5 MR. TARANTO: Insofar as the State is concerned,  
6 though, it is a consent decree. It's a consent decree  
7 between the four other plaintiffs and the State appellees  
8 and the other defendants, and by the way, the reason that  
9 is plain in this record for why the legislature was not  
10 going to convene has nothing to do with whether there had  
11 been an adjudicated violation.

12 It has to do with a series of political problems  
13 in the State that I think Judge Merryday referred to in  
14 the October 26 hearing that a whole series of important,  
15 contentious vetoes are triggered for override the minute  
16 the legislature convenes, and that was not going to  
17 happen.

18 I don't think there was any -- that it would  
19 have made any difference had there been an adjudication.  
20 The same thing would have happened: thank you for the  
21 opportunity; we're not going to do it; we think that this  
22 ought to be resolved here.

23 The only difference, therefore, that we're  
24 talking about in this regard is whether this declaratory  
25 judgment that plan 330, the predecessor, is invalid, a



1 different -- a declaratory judgment that can't possibly  
2 make a difference to appellant, who's already had that  
3 plan eliminated by court order.

4 QUESTION: So your position is that, as far as  
5 the State legislature and the State itself is concerned,  
6 that counsel had a right to waive any finding of  
7 unconstitutionality, and they did so, and the State had a  
8 right to waive any opportunity to redraw a district, and  
9 they did so. Is that your position, in essence?

10 MR. TARANTO: Yes, Your Honor. Yes.

11 Thank you.

12 CHIEF JUSTICE REHNQUIST: Thank you,  
13 Mr. Taranto.

14 Mr. Gornstein, we'll hear from you.

15 ORAL ARGUMENT OF IRVING L. GORNSTEIN  
16 ON BEHALF OF THE FEDERAL APPELLEE

17 MR. GORNSTEIN: Mr. Chief Justice, and may it  
18 please the Court:

19 Our position is that the settlement plan is  
20 constitutional, and that the district court did not  
21 violate any principles of Federalism in approving it.

22 On the constitutional question, I wanted to make  
23 three points. The first is that the district court  
24 applied the correct legal standard in judging the  
25 constitutionality of the proposed plan, that it correctly

1 drew from Miller the principle that a plan is subject to  
2 strict scrutiny only when a challenger can show that race  
3 predominated in the design of the district.

4 The second point I wanted to make is that  
5 district court findings of predominant motive are governed  
6 by the clearly erroneous standard of review, so that the  
7 district court's finding in this case that District 21 was  
8 not predominantly motivated by racial considerations is  
9 subject to review in this Court only for clear error.

10 The final point I wanted to make on the  
11 constitutional question is that the district court's  
12 subsidiary findings show that its ultimate finding on  
13 predominant motive is not clearly erroneous, and those  
14 findings are that the district is sufficiently regular by  
15 Florida standards to avoid any suggestion that race  
16 predominated, that the district includes a genuine  
17 community of interest, and that the district affords to  
18 any candidate, without regard to race, the opportunity to  
19 be elected.

20 Now, those findings are all supported by the  
21 record and are together sufficient to support the district  
22 court's ultimate finding that race did not predominate.

23 On the Federalism question, we think it was  
24 entirely appropriate for the district court to resolve the  
25 litigation without making a formal adjudication based on

1 the State's consent. It would -- it is one of the  
2 principle reasons that parties enter into settlements, is  
3 to avoid a formal adjudication, to avoid findings of  
4 liability.

5 QUESTION: Well, but how can it do so as against  
6 somebody who didn't consent, to wit, the petitioner here?  
7 How can it avoid some opportunity to have evidence put on  
8 and conduct a full inquiry into the validity of plan 386?

9 MR. GORNSTEIN: It certainly can have -- is  
10 required for there to be an inquiry into the validity of  
11 386. What there was not required was an inquiry into the  
12 validity of 330.

13 QUESTION: Well, but the appellant is in the  
14 position of suggesting that there be redistricting, or  
15 that the old district be approved, and faces, as the court  
16 faces, a difficult task in determining what are legitimate  
17 criteria for districting? What are community interests?  
18 What are legislative preferences?

19 And it seems to me that the court must exercise  
20 its discretion to have before it and to have available to  
21 the parties the legislative policies, the legislative  
22 determinations as to what legitimate district criteria  
23 are, and by not referring this to the legislature and  
24 accepting too quickly, perhaps, the representations of  
25 State officials, the court and the appellant were deprived

1 of that data, that body of guidelines that are necessary  
2 to make appropriate and legitimate districting  
3 determinations.

4 MR. GORNSTEIN: Well, I think that the  
5 legislature did -- had ample opportunity to convene, and  
6 to legislate a plan if it had wanted to.

7 It was faced with more than a very serious claim  
8 under Miller, and I think everybody in the legislature  
9 must have been aware that the Florida supreme court's plan  
10 was extremely vulnerable, and still it did not convene in  
11 legislative session, and instead what it did is, its  
12 authorized representatives, the Speaker of the House and  
13 the President of the Senate, are authorized to conduct  
14 litigation, and they negotiated a settlement.

15 Now, the -- that settlement says that it shall  
16 only --

17 QUESTION: Your basis for that is? You can give  
18 me no citation of Florida law, at least as far as the  
19 Senate is concerned.

20 MR. GORNSTEIN: That's correct. That was  
21 strictly on the basis of a representation made. That was  
22 the determination made.

23 QUESTION: And on the basis of a representation  
24 of one person, the --

25 MR. GORNSTEIN: Well, it was --

1 QUESTION: The ability of the Senate to  
2 participate in redistricting of the State is disregarded  
3 by the court. I'm -- I'm worried about that. I --

4 MR. GORNSTEIN: I -- to go on to what the  
5 legislative opportunity was here, there were then  
6 negotiations. Nothing prevented the legislature during  
7 that entire time that negotiations were ongoing to  
8 intervene, convene, and submit a plan.

9 Then there was a settlement agreement presented  
10 to the district court, and that settlement agreement says  
11 that this shall only remain into -- in effect unless and  
12 until the legislature formally enacts a different plan in  
13 compliance with Federal and State law, still.

14 Now, there was remedial hearing held in  
15 November. The district court did not approve this until  
16 March. There was a long period of time in which the  
17 legislature knew that if it did nothing there -- the  
18 district court had before it a proposal that it could  
19 resolve at any time to resolve this litigation.

20 Still the district court did nothing, and it has  
21 done nothing since to change the plan even though the  
22 settlement itself says that it only remains in effect  
23 unless and until the legislature formally adopts a  
24 different plan in compliance with State and Federal law.

25 QUESTION: Do you agree that Mr. Shapiro erred

1 in stating that the court below at its hearing on 386 said  
2 it would not be an evidentiary hearing?

3 MR. GORNSTEIN: Let me break that down into two  
4 parts. There is the prehearing before the remedial  
5 hearing, and then there is the remedial hearing. Let me  
6 address the prehearing first.

7 An inquiry was made by the Department of  
8 Justice, do we have to submit live evidence or can we  
9 introduce it in other ways, and I will quote from that.

10 QUESTION: This is all people sitting around in  
11 the judge's chambers, perhaps, or in open court?

12 MR. GORNSTEIN: It's a pretrial conference, and  
13 I'm not sure whether it was held in court or not, but I  
14 think it probably was.

15 QUESTION: Are you going to read from the  
16 record?

17 MR. GORNSTEIN: I am reading, and this is page  
18 31 of the hearing from November 2, 1995, and I don't have  
19 the record cite to that. I apologize for that.

20 But the presentation that the proponents of the  
21 settlement agreement are to lead off with:

22 Is it the court's contemplation that it be  
23 evidentiary in nature? Should we be prepared to put  
24 witnesses under oath? I think Mr. Hill might have  
25 mentioned that he thought it might suffice simply to have

1 lawyers present the plan, but if a full evidentiary  
2 presentation is preferred, we would be prepared to do  
3 that. It is a matter of figuring out what the court's  
4 preference is so that we can prepare accordingly.

5 The answer comes, I assume there are some judges  
6 somewhere who simply enjoy hearing evidence. No.

7 Now, I take that to be a response that the  
8 proponents did not have to put on live evidence, that they  
9 could rely on the attachments. I don't take that to be a  
10 preclusion of the appellant or anyone else who would have  
11 wanted an opportunity to present evidence at that hearing  
12 to do that, and I think when we get to the evidence --  
13 now, this is in the joint appendix at page 185, at the  
14 remedial hearing.

15 The bottom of the page, Judge Tjoflat says, at  
16 the very bottom, Mr. Hill has summarized in effect what is  
17 in the record. There are affidavits in the record. If  
18 you want to examine Mr. Guthrie you're free to do so, or  
19 call any witness you want.

20 I think it was quite clear at the remedial  
21 hearing that there was a full chance to put on evidence  
22 for the appellant.

23 Now, if the appellant didn't think -- had  
24 misunderstood that he was -- and thought he didn't have  
25 that chance before, he could have said something about

1 that. He could have said, look, I didn't think that I was  
2 going to get that chance. I need more time. He didn't  
3 say anything like that.

4 QUESTION: Mr. Gornstein, maybe you can explain  
5 something to me about this record, because it does seem  
6 that in the beginning the plaintiffs, everybody was trying  
7 to settle this. Everybody agreed that the plan was  
8 vulnerable under -- the old plan under Miller, and there  
9 was the stipulation that I read, and then there seemed at  
10 some point there was -- this harmony that prevailed about,  
11 let's stipulate, let's mediate, broke down, but it's not  
12 clear to me how that happened.

13 MR. GORNSTEIN: Well, I think Mr. -- the  
14 appellant in this case was not satisfied with the results  
15 of mediation, and --

16 QUESTION: But going into mediation, everybody  
17 was on board.

18 MR. GORNSTEIN: Yes, with the idea that it would  
19 be a good idea to mediate. Yes.

20 I think that the rule that there should be no  
21 precondition, that there -- it will always have to be a  
22 liability finding is extremely important in facilitating  
23 settlements, and it would disserve the principles of  
24 Federalism, we would suggest, to make the States the only  
25 parties who could not settle cases without either a formal



1 adjudication or an admission of liability, because when an  
2 admission of liability is required, that is going to  
3 discourage in many cases voluntary compliance in -- with  
4 the law. It is going to discourage States from entering  
5 into settlements, because there are consequences to  
6 admissions of liability, so that the value of voluntary --

7 QUESTION: Attorney's fees, I suppose, for one.

8 MR. GORNSTEIN: I think that that would  
9 certainly dictate the result of attorney's fees, Mr. Chief  
10 Justice.

11 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
12 Gornstein. The case is submitted.

13 (Whereupon, at 12:30 p.m., the case in the  
14 above-entitled matter was submitted.)

## CERTIFICATION

*Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:*

*C. MARTIN LAWYER, III, Appellant v. DEPARTMENT OF JUSTICE, ET AL.  
CASE NO. 95-2024*

*and that these attached pages constitutes the original transcript of the proceedings for the records of the court.*

BY *Donna Maria Federico*-----

(REPORTER)