

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

CAPTION: JAMES B. HUNT, JR., GOVERNOR OF NORTH  
CAROLINA, ET AL., Appellants v. MARTIN  
CROMARTIE, ET AL.

CASE NO: 98-85 c.2

PLACE: Washington, D.C.

DATE: Wednesday, January 20, 1999

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**Supreme Court U.S.**

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1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   JAMES B. HUNT, JR., GOVERNOR       :

4       OF NORTH CAROLINA, ET AL.,       :

5                   Appellants               :

6               v.                               :   No. 98-85

7   MARTIN CROMARTIE, ET AL.               :

8   - - - - -X

9   Washington, D.C.

10    Wednesday, January 20, 1999

11               The above-entitled matter came on for oral  
12   argument before the Supreme Court of the United States at  
13   11:13 a.m.

14   APPEARANCES:

15   WALTER E. DELLINGER, ESQ., Washington, D.C.; on behalf of  
16       the Appellants.

17   JAMES A. FELDMAN, ESQ., Assistant to the Solicitor  
18       General, Department of Justice, Washington, D.C.; for  
19       the United States, as amicus curiae, supporting the  
20       Appellants.

21   ROBINSON O. EVERETT, ESQ., Durham, North Carolina; on  
22       behalf of the Appellees.

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1 PROCEEDINGS

2 (11:13 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 98-85, James B. Hunt v. Martin Cromartie.

5 Mr. Dellinger.

6 ORAL ARGUMENT OF WALTER E. DELLINGER

7 ON BEHALF OF THE APPELLANTS

8 MR. DELLINGER: Mr. Chief Justice, and may it  
9 please the Court:

10 When the North Carolina General Assembly enacted  
11 its 1997 congressional districting plan, compliance with  
12 this Court's decision in Shaw v. Hunt was its number one  
13 goal. It met that goal. The line-drawing decisions  
14 contested here were not driven predominantly by race  
15 either for its own sake or as a proxy, but they were made  
16 on the basis of actual election data. They were designed  
17 to accomplish the constitutionally legitimate goal of  
18 maintaining partisan balance in the State's congressional  
19 delegation. We had a Republican-led House and a  
20 Democratic Senate who determined not to gridlock and leave  
21 this vital function to Federal courts. They came together  
22 on a bipartisan, bicameral agreement that retained six  
23 districts leaning to each party, a goal that was  
24 accomplished by having a Democratic-leaning district  
25 created in the midst of the Republican sea that is the

1 Piedmont Carolina.

2 Let me put on the table a half dozen ways this  
3 plan differs from those that this Court invalidated in  
4 Miller and Shaw and Bush v. Vera. This plan was not  
5 adopted under Federal pressure for maximization of black  
6 districts. It was not adopted by a process that  
7 manipulated district lines to exploit unprecedentedly  
8 detailed racial data. There was no use of computer  
9 programs more sophisticated with respect to race than to  
10 other Democratic districts' precincts. Existing political  
11 units that are about a hundred times larger than the --  
12 than the racially encoded census blocks used in Texas,  
13 precincts with the building blocks of the districts in  
14 this plan -- they were not adopted for the express purpose  
15 of creating a majority-minority district. They did not,  
16 in fact, create a majority-minority district.

17 QUESTION: Was there any allegation that the --  
18 the precinct numbers were used as a surrogate for race;  
19 that is to say, precinct numbers were used in order to  
20 include people of a certain race in the district? Was  
21 there any allegation of that here?

22 MR. DELLINGER: I take it, Justice Kennedy, that  
23 is the -- the heart of the case, that there is this --  
24 this overlap, and so given the fact that this -- that the  
25 precincts included in district 12 are more Democratic and

1 that there is a correlation -- it's more African-Americans  
2 adhere to the Democratic Party and registration at the  
3 present time -- that one could have done that as a  
4 pretext. But I believe and I think that Mr. Everett would  
5 concur that there's simply no evidence that that was the  
6 case.

7 I mean, I think what you have here is the  
8 precise question that the Court answered in Bush v. Vera.  
9 In the plurality opinion by Justice O'Connor, the Court  
10 said that if a State's goal is the otherwise  
11 constitutional political gerrymandering, it is free to use  
12 precinct general elections, voting patterns, precinct  
13 primary voting patterns to achieve that goal regardless of  
14 its awareness of its racial implication and that if  
15 district lines merely correlate with race, because they're  
16 drawn on the basis of political affiliation which  
17 correlates with race, there is no racial classification to  
18 justify.

19 QUESTION: Mr. Dellinger, you say that there's  
20 no evidence, but I -- some of the districts that -- that  
21 were carved up in order to create this unusually shaped  
22 district or some of the -- some of the counties were  
23 indeed overwhelmingly Democratic, and it would have been  
24 easy to put in more Democrats without putting in more  
25 black Democrats. And -- and part of the allegation is

1 that the -- what was done shows that there was an  
2 intentional effort not only to get in Democrats, but to  
3 get in black Democrats.

4 And that -- and that circumstantial evidence is  
5 -- is affirmed by the -- the affidavits put in by your  
6 side which say that one of the purposes of the legislature  
7 was to -- was to retain the election of incumbents. And  
8 here you had an incumbent who had been elected by a  
9 district that had been unconstitutionally established on a  
10 racial basis, and to simply come in and say, well, we want  
11 to make sure that he'll get reelected is, it seems to me,  
12 more circumstantial evidence. I mean --

13 MR. DELLINGER: Well, you make --

14 QUESTION: -- there may not be enough evidence,  
15 but it seems to me to go too far to say that there's no  
16 evidence that -- that there was any racial gerrymander  
17 here.

18 MR. DELLINGER: Well, to be precise, Justice  
19 Kennedy's question was whether there was any evidence that  
20 they -- that they made a pretextual use of creating a  
21 Democratic district, of using Democratic precincts in  
22 order to create a district that was more African-American.  
23 And one could imagine counter-examples.

24 First of all, the State has direct evidence of  
25 the -- Senator Cooper and Representative McMahan that --



1 that partisan election results were what -- were the  
2 building blocks for the creation of this district. That  
3 was their predominant concern.

4 The examples that are given that there are  
5 Democratic registration precincts adjacent to but outside  
6 district 12, Representative Watt's district, is virtually  
7 a non sequitur because there's a very simple answer. The  
8 precincts that adjoin district 12 that are not included  
9 aren't less Democratic by any measure than the included  
10 precincts. 89 percent of the precincts outside the  
11 boundary but adjacent to, that have a majority Democratic  
12 registration actually voted Republican on election day in  
13 either one or two or all three of the elections that the  
14 legislature has been consulting this decade in doing  
15 districting.

16 You have to understand that North Carolina is  
17 basically Democratic in registration. There's not a  
18 single one of the 12 congressional districts that has a  
19 majority of registered Republicans. So their only  
20 suggestion is, but the State had some districts outside  
21 district 12 that were majority Democratic, to which our  
22 answer is, they were not excluded. We were already at the  
23 equal population limit with this district, and they were  
24 less Democratic either in terms of voting registration.

25 There are in the entire 12th district only 2

1 precincts -- they're both in Guilford County; they're  
2 noted in red on one of the maps -- only 2 precincts that  
3 are inside the district that have a Democratic  
4 registration that is less than one or more of the  
5 neighboring precincts outside the district. And in that  
6 case, if the Court -- the legislature followed the basic  
7 township line, Elm Street, then Lee Street that has  
8 traditionally divided Greensboro.

9           So that I -- I think what the question leads to  
10 in terms of the incumbency, I don't think you can have a  
11 bill of attainder that -- that Congressmen want, the  
12 interest in preserving someone of rising seniority may  
13 never be a -- may never be at interest because of what  
14 this Court held about the original plan. The State gains  
15 a great deal by having from Charlotte a member of each  
16 political party, each of whom is rising in influence  
17 within their respective political districts.

18           This is not -- the chain of causation from the  
19 prior district I think is broken in a number of ways.

20           QUESTION: Mr. Dellinger, may I just interrupt  
21 for a second?

22           MR. DELLINGER: Sure.

23           QUESTION: Let's assume, for the sake of  
24 argument, that there's a -- there's a question whether the  
25 chain of causation is broken or not. Isn't it your

1 position that you still win here? I mean, you're arguing  
2 summary judgment. And the question is whether there is a  
3 genuine issue, not who ultimately wins. Am I right? I  
4 mean, that's -- that's really the structure of your  
5 argument.

6 MR. DELLINGER: Well, we're making two points.  
7 One, we believe that it is obvious that the court below  
8 erred in granting --

9 QUESTION: Okay, but --

10 MR. DELLINGER: -- in granting summary judgment.

11 QUESTION: -- the only thing we've got from --  
12 in -- in front of us is -- is an appeal from a grant of  
13 summary judgment.

14 MR. DELLINGER: Well, we would hope that the  
15 Court, having before it the permanent injunction against  
16 the legislature's '97 plan, would clearly indicate that  
17 the State on facts like these was entitled to prevail,  
18 it's entitled to summary judgment, because what the State  
19 puts on is both direct and supporting evidence  
20 demonstrating that the shape of the district reflected  
21 a --

22 QUESTION: Well, that -- that's true, but --

23 QUESTION: Did you move for summary judgment?  
24 Did you move for summary judgment below?

25 MR. DELLINGER: Yes. The State moved for

1 summary judgment and it was denied.

2 QUESTION: Did you cross-appeal? Did you-cross  
3 appeal?

4 MR. DELLINGER: No.

5 QUESTION: Well, we -- we --

6 MR. DELLINGER: I understand that --

7 QUESTION: -- can't give you a judgment here  
8 that is -- that goes beyond what -- what you've asked for.

9 MR. DELLINGER: In the course -- it would not be  
10 beyond the course of an opinion of the Court holding that  
11 the district court was, of course, wrong in granting  
12 summary judgment against the direct evidence of the -- of  
13 the State that politics was used, to make it clear to the  
14 district court that the State's explanation, both direct  
15 and supported, that it created a Democratic leading  
16 district in a sea of Republicans, and that that is a fully  
17 explanatory answer and which was contradicted --

18 QUESTION: Well, it may be a fully explanatory  
19 answer if we assume there is nothing else in the world  
20 that might come in as an evidentiary matter here. Can we  
21 assume that?

22 MR. DELLINGER: No, you can't assume that, but  
23 -- but -- but I think the State would be -- the State  
24 would feel vindicated if it were known that on this kind  
25 of record where there are really just three things that



1       were said to impeach the State's direct case.

2               One was the shape of the district, to which I  
3       will come.

4               The other is that the -- that there are some  
5       Democrats outside the district in precincts that are less  
6       Democratic that -- that are not included.

7               And the third is basically a racial imbalance  
8       argument, that if you look at the districts, the heavily  
9       Republican -- southeastern Mecklenburg and otherwise  
10      heavily Republican district of Representative Sue Myrick  
11      as more proportionate whites than the heavily Democratic  
12      leading district of -- of -- of Congressman Watt, that is  
13      evidence only that it does not in any way contradict the  
14      State's assertion that it was the desire to -- and the  
15      difficulty of creating a political district.

16              What you have here is the complete absence of  
17      counter-examples.

18              QUESTION: Yes, but it sounds to me very much  
19      like a cross-appeal. I mean, it's -- it's one thing to  
20      say that they have not put in sufficient evidence, given  
21      this total record, upon which one could say there was no  
22      genuine issue and they were entitled to judgment as a  
23      matter of law. But I -- it sounds to me as though what  
24      you're arguing is -- is something that strikes me like --  
25      like a cross-appeal, which you didn't take.

1 MR. DELLINGER: I -- I understand --

2 QUESTION: Or the State didn't take.

3 MR. DELLINGER: -- that the -- the -- what the  
4 State is -- wishes to establish is that the preliminary  
5 injunction -- the permanent injunction was in error. They  
6 clearly did not make their case for summary judgment.

7 But moreover --

8 QUESTION: Well, if the summary judgment case  
9 wasn't right, you could have the injunction vacated, and  
10 then it goes back presumably for further development. And  
11 on that score, I wanted to ask, having had a preview of  
12 what's going on in the summary judgment submissions, what  
13 would the State -- what additional, if anything, would the  
14 State put in were this case to go to trial?

15 MR. DELLINGER: I do not believe that the State  
16 -- I am not aware -- we haven't thought through to that  
17 point, Justice Ginsburg. But I'm not aware that the State  
18 has or indeed would need any other information. The --  
19 the challengers have appropriately a very heavy burden  
20 under this Court's decisions in Miller and others, and  
21 here the State puts on the only evidence it has, that --  
22 that --

23 QUESTION: It's the other side.

24 MR. DELLINGER: -- that it needs to put on.

25 QUESTION: It's the other side that -- the other

1 side, if they're denied summary judgment, that I guess  
2 would have a right to put in some evidence. I mean, if we  
3 deny -- if we said you're wrong to give them summary  
4 judgment, you're wrong --

5 MR. DELLINGER: I think that's right. I  
6 don't --

7 QUESTION: -- wouldn't that automatically say to  
8 you, well, if the law doesn't permit them to win, if this  
9 evidence doesn't permit them as a matter to law -- of law  
10 to win, it must permit somebody to win? So, I guess  
11 they'd have to -- they'd have to put in some more evidence  
12 if they should have that opportunity.

13 MR. DELLINGER: Well, it would be interesting to  
14 me to know what other evidence they could have. You  
15 have --

16 QUESTION: Well, that's their problem.

17 MR. DELLINGER: That's right. You have the  
18 statement, and I think the Court --

19 QUESTION: What evidence -- what evidence do you  
20 have? I mean, I don't think we're about to send it back  
21 and give summary judgment in the other direction when you  
22 haven't asked for it. Let's talk about the summary  
23 judgment that you're seeking to overturn.

24 MR. DELLINGER: Well, anyway, we have both  
25 direct and circumstantial evidence.

1           QUESTION: And now, it -- it has to be evidence  
2 showing that there is a controverted issue of fact.  
3 Suppose the evidence showing the controversion is so weak  
4 in light of the evidence on the other side, that no  
5 rational person would believe it. Is -- is that enough?  
6 Can you bring in a 10-times felon who has perjured himself  
7 in so many cases testifying to a fact that is inherently  
8 incredible, and so long as you get on the record somebody  
9 controverting that fact, is that enough to get you by  
10 summary judgment?

11           MR. DELLINGER: No, I certainly wouldn't think  
12 so.

13           QUESTION: So, despite these statements by the  
14 legislatures -- legislators that, oh, no --

15           MR. DELLINGER: I believe the record doesn't  
16 need --

17           QUESTION: -- this was just politics, it is  
18 conceivable that the district court looked at those  
19 statements, looked at the -- looked at the district that  
20 had been drawn, looked at other statements, and said these  
21 things are inherently incredible. That -- that's at least  
22 up for grabs, that argument.

23           MR. DELLINGER: Yes. Now, unlike the  
24 hypothetical you gave, neither Representative McMahan or  
25 Senator Cooper is a convicted felon, not even --



1 QUESTION: Well, I didn't mean to imply that.

2 MR. DELLINGER: I understand that.

3 (Laughter.)

4 QUESTION: It was what is known as a  
5 hypothetical felon.

6 (Laughter.)

7 MR. DELLINGER: -- someone who is a 10-times  
8 convicted felon. Representative McMahan said under oath  
9 in a sworn statement that in negotiating the eventually  
10 enacted plan, partisan election data, not race, was the  
11 predominant basis. And indeed, that -- there's no reason  
12 to go beyond that.

13 The Court understood in Bush v. Vera that if  
14 you're going to create a Democratic district -- and here  
15 the -- to get a partisan balance, you need a Democratic  
16 district in this part of the Carolinas. And to anticipate  
17 the map show that my colleague will put on, what you will  
18 see is I think a -- a very sensible district, by no means  
19 inexplicably bizarre. It is the third shortest district  
20 of the 12 in North Carolina, and it's thin only because  
21 it's a densely populated area.

22 QUESTION: You don't contend that the Shaw line  
23 of cases and Miller apply only to majority-minority  
24 districts, do you?

25 MR. DELLINGER: We -- we do not. It is not, as

1 Judge Ervin said below, Justice Kennedy, a dispositive  
2 factor, but it certainly makes the plaintiffs' burden,  
3 which was already quite high, even more onerous to prove,  
4 Justice Kennedy. And --

5 QUESTION: Well, it seems to me that it was  
6 somewhat troubling for some of those who drew the district  
7 to say, good news, this isn't majority-minority. That  
8 seems to me that's a misunderstanding --

9 MR. DELLINGER: Right.

10 QUESTION: -- of Shaw v. Miller.

11 MR. DELLINGER: It -- it --

12 QUESTION: -- in itself circumstantial evidence  
13 that impermissible fact --

14 MR. DELLINGER: It is circumstantial evidence in  
15 the sense that it doesn't communicate the message that  
16 this is a district whose representative is supposed to  
17 only care about the interest of one racial group.

18 I'll reserve my time to discuss Judge Everett's  
19 maps. Thank you.

20 QUESTION: Very well, Mr. Dellinger.

21 Mr. Feldman, we'll hear from you.

22 ORAL ARGUMENT OF JAMES A. FELDMAN

23 FOR THE UNITED STATES, AS AMICUS CURIAE,

24 SUPPORTING THE APPELLANTS

25 MR. FELDMAN: Mr. Chief Justice, and may it

1 please the Court:

2 The summary judgment record in this case was  
3 inefficient to -- was insufficient to establish, as a  
4 matter of undisputed fact, that the State's predominant  
5 motive in drawing district 12 was race.

6 QUESTION: What does a predominant motive mean?  
7 I'm -- I'm a little unclear about that.

8 MR. FELDMAN: I think the --

9 QUESTION: Suppose -- suppose the district would  
10 have been drawn almost this way, but -- but a few curves  
11 in it were put there just for racial reasons. Does that  
12 make it not -- not a predominant motive?

13 MR. FELDMAN: I think that that -- I think the  
14 -- the fact that there were substantial parts of the  
15 district that may have been put there for racial reasons  
16 would be evidentiarily very significant, but I don't think  
17 the fact that there were a few isolated pockets would be  
18 sufficient to establish a predominant motive.

19 In Shaw against Hunt, the Court explained a  
20 predominant motive as being that that couldn't be  
21 compromised in drawing the district. It was really the  
22 basis of the district, the one thing that couldn't be --  
23 couldn't be eliminated. Once -- and I think that that's  
24 what you have to show.

25 Now, the --

1 QUESTION: Why is -- why is that the test? I  
2 don't -- is that the test in any -- any other civil rights  
3 areas that we know of? I mean, do we say if somebody  
4 fires somebody and, you know, well, yes, race was what  
5 finally tipped the scales, but I can't say it was the  
6 predominant factor? This was a person who didn't really  
7 work very well. Race was just the last factor. That --  
8 that was the straw that broke the camel's back, but it  
9 wasn't the predominant factor. We certainly wouldn't say,  
10 well, that's okay, would we?

11 MR. FELDMAN: I agree with you. In that -- that  
12 area, the Court wouldn't and I think it would be correct.

13 QUESTION: So, don't -- don't you think  
14 predominant maybe just -- just means ultimately  
15 determinative?

16 MR. FELDMAN: No, I don't think so. The Court  
17 has --

18 QUESTION: It can be the ultimately  
19 determinative factor in how you drew this -- this  
20 district.

21 MR. FELDMAN: It can be in how you drew a --

22 QUESTION: But if it's not the predominant one,  
23 it's okay.

24 MR. FELDMAN: It can -- it can be a -- it can be  
25 a determinative factor in how some isolated portion of a



1 district was drawn, along with many other factors, like  
2 going to putting a plan together.

3 QUESTION: Well, do you have to look at the  
4 whole district? Are you saying that it's lawful for us to  
5 say we know the basic lines of the district; now we're  
6 going to add 10 percent more just to come up with our --  
7 and we'll put all of one racial minority in that just to  
8 help them out. Is -- is that lawful?

9 MR. FELDMAN: I'm not sure that the hypothetical  
10 -- I'm not sure it's sketched out enough for me to give a  
11 yes or no answer, but I think the main point is --

12 QUESTION: The hypothetical, as I understand it,  
13 can you -- can you ever use race specifically in designing  
14 part of a district?

15 MR. FELDMAN: I -- I take -- first of all, I --

16 QUESTION: If your only motive is to use race  
17 for part of a district, can you do that?

18 MR. FELDMAN: I take the Court's decisions where  
19 it's repeatedly talked about the predominant motive, not  
20 just any motive or not just something that was a factor --

21 QUESTION: But it didn't say as to the whole  
22 district.

23 MR. FELDMAN: I think that in the Miller case  
24 the Court talked about a predominant motive for a  
25 substantial number of people. So, already there, that I

1 think excludes the case where there was some small portion  
2 of the district that -- that may have had race as a factor  
3 in considering a community of interests or what ties  
4 together people in a particular area.

5 QUESTION: Well, what would be the rationale  
6 which would allow you to use -- to use race only as the  
7 sole factor in -- in comprising part of a district? What  
8 -- what conceivable rationale would allow that under the  
9 Equal Protection Clause?

10 MR. FELDMAN: Well, I -- I think the rationale  
11 would be that the Court has -- when it's discussed the  
12 issue, has talked -- has mentioned the fact that race --  
13 legislators commonly are aware of race when they draw a  
14 district, as they are aware of many of the other  
15 demographic factors of the district they're drawing. And  
16 the Court has --

17 QUESTION: I'm not talking about awareness. I'm  
18 talking about specific purpose.

19 MR. FELDMAN: Right, but I think given that  
20 awareness, the Court has also said, or at least the  
21 plurality said, in Bush that the mere desire to draw even  
22 a majority-minority district, which this isn't, that even  
23 that doesn't -- doesn't render it automatically subject to  
24 strict scrutiny.

25 I think you have to look and see what was the --

1 I think you have to go back to the Shaw line of cases and  
2 the kinds of harms that the Court identified as underlying  
3 the Shaw doctrine, and those harms don't necessarily  
4 occur, the kinds of beliefs that one -- people -- a  
5 Congressperson may believe that he or she is only there to  
6 represent one race or the balkanization of the electorate.  
7 I don't think those harms are necessarily there if they're  
8 some small part of a district where a State has taken race  
9 into account in saying that in order to have -- there's a  
10 community of interest here that isn't --

11 QUESTION: So, the position of the Justice  
12 Department is that in drawing districts, race and race  
13 only can be taken into account for some neighborhoods.  
14 That's your position.

15 MR. FELDMAN: For -- for a small -- I believe  
16 that's the position that the Court has taken when it has  
17 talked about the predominant motive of drawing districts.

18 I want to add one other --

19 QUESTION: Aren't you saying, Mr. Feldman, that  
20 the -- that whatever predominant means, it at least does  
21 not include cases in which the governing motive is to  
22 avoid a section 2 or a section 5 violation? You're saying  
23 that at least, aren't you?

24 MR. FELDMAN: You know, I -- I'm not sure I'm  
25 saying that because it may be that the question of

1 avoiding a section 2 or section 5 violation may be  
2 relevant. It may or may not be. It may be relevant at  
3 the later stage of determining whether something is  
4 subject to strict scrutiny.

5 QUESTION: Let me get the Justice Department's  
6 position correct. If -- if you have some legislators who  
7 want to -- want to exclude some blacks from a district  
8 that has been, for many years, represented by a white  
9 Congressman, and they're worried that too many blacks in  
10 that district might make it difficult for him to get  
11 reelected because his policies have generally not been  
12 favored by blacks, it can take those blacks and chop them  
13 out of his district and put them into this new  
14 gerrymandered district so long as that's not a big part of  
15 that district.

16 MR. FELDMAN: No, I don't --

17 QUESTION: So long as it's only a -- less than  
18 half?

19 MR. FELDMAN: I think that what you're  
20 describing is a case where someone is trying to dilute  
21 either the white, black, or the black vote. I don't  
22 really -- I'm not sure which, but I don't think that would  
23 be okay.

24 But I do think when the Court has recognized  
25 repeatedly that -- that a legislature can take race into



1 consideration and even can determine that it wants to draw  
2 a majority-minority district --

3 QUESTION: But they're not going to say we did  
4 it for dilution. They're -- we're protecting incumbents,  
5 the same argument that's being made here. We're  
6 protecting incumbents. That's why we drew the district.

7 MR. FELDMAN: But -- but --

8 QUESTION: To protect the incumbents, we took  
9 race into account for a little -- for a little bit of the  
10 district.

11 MR. FELDMAN: And I -- I think that -- as I said  
12 before, where that would be -- it may be very powerful  
13 evidence that the predominant motive in drawing the  
14 district is race, but I don't think that it's -- as the  
15 case --

16 QUESTION: So, it can be the predominant motive  
17 for just a little part of the district. That will be  
18 enough.

19 MR. FELDMAN: When the Court has said that a  
20 motive for drawing a district can be race, I think it  
21 necessarily means that there can be some portion of a  
22 district where that is a motive in drawing one part of a  
23 district line.

24 QUESTION: When you say a motive, I thought this  
25 was a case in which, in respect to all groups of minority

1 voters, the State was saying, look, we put all of them in  
2 there because they're Democrats. So, our predominant  
3 motive is to every significant group was that they were  
4 Democrats.

5 MR. FELDMAN: That -- that's correct.

6 QUESTION: We may have also thought, well, fine.  
7 They're minorities too. We like that idea in this case.  
8 But I mean, that's not the only motive for even those  
9 people.

10 MR. FELDMAN: That -- that's correct. I was  
11 going to get to that point.

12 QUESTION: All right. Then I don't know why  
13 we're going into this.

14 MR. FELDMAN: But I don't think on this point,  
15 on a summary judgment record, you can conclude that any  
16 line in this district was drawn in order -- was drawn  
17 predominantly or even motivated by race. All you have in  
18 the record --

19 QUESTION: Dominantly it was never only  
20 motivated by race.

21 MR. FELDMAN: Right. I don't think you could  
22 even -- yes, I don't think you could conclude that on the  
23 summary judgment motion in this case. All you have is the  
24 legislators admitting that they took racial fairness into  
25 account, which means -- may well mean that they drew the

1 districts as they said, in accordance with partisan  
2 political considerations, looking at the actual voting of  
3 the people on -- of various precincts on election day --

4 QUESTION: What in the world does that mean?

5 MR. FELDMAN: -- and the after that --

6 QUESTION: What does -- they took racial  
7 fairness into account. What in the world does that mean?

8 MR. FELDMAN: I -- I take that to mean, if you  
9 read the affidavit, to mean they were conscious of their  
10 obligations under sections 2 and 5 --

11 QUESTION: To use race in drawing the districts.

12 MR. FELDMAN: And -- no, I don't think so. And  
13 under this Court's decision in Shaw, that they drew the  
14 districts, as they said, in order to achieve certain  
15 partisan goals to get those election-day Democrats in the  
16 district.

17 Having done that, they looked at their results  
18 as Federal -- as Federal law requires and to see whether  
19 it complies with sections 2 and 5. It's completely  
20 consistent with this record that every line in this  
21 district was drawn for partisan political reasons, and  
22 there was no line that was motivated for race.

23 QUESTION: You had a statistician who said that  
24 it was -- if you had to pick between the two, was more  
25 likely political.

1 MR. FELDMAN: That's right, and -- and yes,  
2 that's correct.

3 QUESTION: The district court didn't seem to do  
4 anything but say, well, we're talking about registered  
5 Democrats here.

6 MR. FELDMAN: That's correct, and I -- I think  
7 that was where the district court went wrong, because it  
8 was completely consistent with the State's evidence to  
9 say, well, there are some registered Democrats who are  
10 left out, to say what the legislature claimed it did was  
11 not trying to draw districts that had a lot of registered  
12 Democrats, it was trying to draw a district that had  
13 precincts that include those who would reliably vote  
14 Democratic on election day.

15 And I think the experts' evidence and the maps  
16 and, indeed, even the maps that the plaintiffs put in make  
17 quite clear that at least that explanation is very  
18 consistent with all of the facts. Therefore, summary  
19 judgment couldn't have been granted on this record.

20 QUESTION: Mr. Feldman, don't you think it's  
21 appropriate for the district court to take into account  
22 that this is not some brand-new legislature that's walked  
23 up here creating a brand-new district, but it's a  
24 legislature that has been told to redistrict precisely  
25 this district because the last time they clearly did it on



1 -- on a racial basis, which was invalidated by the courts  
2 and upheld up here?

3 MR. FELDMAN: I --

4 QUESTION: Do -- do they have to pretend that  
5 this is not a legislature that has been pulled kicking and  
6 dragging into -- into drawing a fair district?

7 MR. FELDMAN: No.

8 QUESTION: And then when they're given another  
9 district that looks pretty much like the -- like the old  
10 one, they cannot take that into account?

11 MR. FELDMAN: No. I don't -- I don't think the  
12 district court has to -- has to -- has to do that, but  
13 there's no reason to think that the district court in this  
14 case did do that. And once the legislature draws a new  
15 district that is substantially different, as this one was,  
16 from the old district, I think any causal connection  
17 between the old one and the new one is broken and --

18 QUESTION: Thank you, Mr. Feldman.

19 MR. FELDMAN: Thank you.

20 QUESTION: Mr. Everett, we'll hear from you.

21 ORAL ARGUMENT OF ROBINSON O. EVERETT

22 ON BEHALF OF THE APPELLEES

23 MR. EVERETT: Mr. Chief Justice, and may it  
24 please the Court:

25 I am back again with a map show and that's

1 because the maps are a very important part of the history.  
2 There are two maps that we're going to show --

3 QUESTION: Well, certainly they are, but I  
4 think, at least speaking for myself, my concern is that  
5 there may well have been sufficient evidence here to  
6 preclude the court from granting summary judgment on this  
7 question. So, I would be most interested in how you  
8 justify that.

9 MR. EVERETT: Your Honor, we -- I think the maps  
10 are a key to that. Starting first with the 1992 map,  
11 which is over here, which is part of the history and which  
12 was part of the Court's opinion in Shaw v. Reno --

13 QUESTION: Do we have it in front of us? It's  
14 not the one at 61a?

15 MR. EVERETT: They -- this is the one I believe  
16 on 61a, the 1992 --

17 QUESTION: This is 61a of the petition -- or the  
18 jurisdictional statement.

19 MR. EVERETT: Jurisdictional statement.

20 And the other one, the '97 plan, is I believe on  
21 59a. In any event, they are juxtaposed. They are in the  
22 jurisdictional statement.

23 And I think the -- the reason why there's -- why  
24 there's a basis for summary judgment is this. This  
25 particular map was used in three elections. This is the

1 '92 map. It gave a result in 1996 which was six  
2 Democratic Congressmen and six Republicans, six Democratic  
3 members, of whom two were African-Americans, one elected  
4 from the 12th district, the other from the 1st district,  
5 the other four were -- were white. Then, on the other  
6 hand, there were six Republicans. Now, at that point,  
7 there was a balance.

8 It was perfectly proper, according to the  
9 State's logic, to simply say, we are now going to reenact  
10 this for political purposes. We like the result. It is a  
11 perfect balance. We have a legislature in which the House  
12 is Republican, the Senate is Democratic, and we'll just  
13 balance it off. Therefore, we will reenact exactly what  
14 we had before.

15 Now, that would be perfectly consistent with  
16 their logic because they could say this is for partisan  
17 reasons. There's not a predominant racial motive. We  
18 like the results. We think on its face that seems  
19 ridiculous.

20 QUESTION: Well, is it because they're taking  
21 the wrong point in time to determine the incumbency to  
22 protect? In other words, are you saying they had to go  
23 back, say, to 1989 -- and I don't know what the situation  
24 was in '89 -- and -- and they might consider trying to  
25 preserve something close to the incumbency at that time,

1 but they can't look at it at the -- at the most recent  
2 period?

3 MR. EVERETT: Your Honor, I'm saying they're  
4 perfectly free to say, yes, we like this balance, but  
5 they're not -- they're not free to say we like this  
6 balance and we're going to replicate it by having six  
7 Democratic districts of whom two will be racially  
8 constructed, and particularly --

9 QUESTION: But they are entitled to say, we're  
10 going to have six Democratic districts, all six of which  
11 are democratically constructed.

12 MR. EVERETT: They -- that would be --

13 QUESTION: The problem that I have and I think  
14 the problem that Justice O'Connor tried to raise is -- is  
15 this. I -- I see the maps and I -- I don't -- I don't  
16 mean by my question to discount the evidentiary value of  
17 the map for you --

18 MR. EVERETT: Sure.

19 QUESTION: -- because I can see that it has  
20 some. But the summary judgment record upon which you rely  
21 is a record, in fact, in which the -- the district is no  
22 longer majority-minority, the building blocks of it are no  
23 longer the -- the tiny little census blocks. They're -- I  
24 forget whether they're precincts or census tracts, but  
25 they're -- they're larger units. The district, as I



1 understand it, is at least consistent with the goal of  
2 incumbency protection, and you've got at least a couple of  
3 affidavits on the record against you to the effect that  
4 that was the motive.

5 And the problem that I have, even giving --  
6 giving the sort of evidentiary consideration to your map,  
7 is I don't see how on that record it could be found that  
8 you were entitled to judgment as a matter of law because  
9 there was no dispute as to a genuine fact, the genuine  
10 fact being the predominant motive. That's my problem.

11 MR. EVERETT: Your Honor, we -- we would  
12 maintain this, that their statements as to predominant  
13 motive are purely legally -- legal conclusions in the  
14 present context, that as far as the material issues of  
15 fact, there are none that are in dispute.

16 QUESTION: But let's take one thing about --

17 QUESTION: May I ask you a question please? May  
18 I just ask this?

19 Justice Souter didn't mention the thing I find  
20 most troubling about the whole case. As I understand it,  
21 your affirmative case relied entirely on registration  
22 rather than on actual voting results. And if I -- if I  
23 understand the situation in North Carolina correctly,  
24 there are many, many more registered Democrats who vote  
25 Republican. There are a lot of registered Democrats who

1 regularly vote Republican.

2 And how -- if that is the truth -- and I assume  
3 you don't deny that that's true -- how can evidence about  
4 registration possibly prove that -- how the elections will  
5 turn out?

6 MR. EVERETT: Well, Your Honor, there a couple  
7 of things that seem very important in that context. One  
8 is to recall that, according to undisputed evidence, 95 to  
9 97 percent of the African-Americans in North Carolina  
10 register as Democrat and they tend to vote Democrat. So,  
11 therefore, you start with that premise.

12 If you want a partisan core --

13 QUESTION: But -- but explain why the  
14 registration of white Democrats is probative of how  
15 they'll vote.

16 MR. EVERETT: Well, certainly a registration  
17 indicates a preference. And one of the problems --

18 QUESTION: Is it not true that there -- that  
19 maybe a third of the registered Democrats vote Republican  
20 in Federal elections?

21 MR. EVERETT: Certainly, that is quite true,  
22 Your Honor. On the other hand --

23 QUESTION: And is it also true -- just I want to  
24 ask you -- that your case relied entirely on registration  
25 rather than voting results?

1 MR. EVERETT: No, Your Honor, that is not the  
2 fact. It relies on other things as well. It relies in  
3 part on voting results, as for example, there were three  
4 different races that they relied on that they had in the  
5 computer base. There were two 1998 -- two 1988 elections,  
6 one for the court of appeals, one for Lieutenant Governor,  
7 and there was a Senate race in which an African-American,  
8 Harvey Gantt, ran against an incumbent, Jesse Helms. If  
9 you will note the margin of victory with respect to Gantt  
10 over Helms in this particular district, it's significantly  
11 above that --

12 QUESTION: It was 66.49 percent and the other  
13 two were 62.8 percent and 61.5 percent.

14 MR. EVERETT: It was -- it was about a --

15 QUESTION: That's right?

16 MR. EVERETT: -- 4 and a half percent in one  
17 instance and a --

18 QUESTION: But each of the three you described  
19 won by over 60 percent.

20 MR. EVERETT: Each -- that's correct, Your  
21 Honor. But on the other hand, there was a spread.

22 QUESTION: But regardless of what might have  
23 been in the evidence, as I read the district court's  
24 decision, they are relying exclusively on registered  
25 voters. It comes up again and again and again. And in

1 fact, the Peterson affidavit is written off with one  
2 sentence, and we are given a whole page with the  
3 registration.

4 If we think that's wrong, if we think that the  
5 legislature could legitimately use actual results -- I  
6 mean, that's what the affidavits of the legislators said.  
7 We didn't use registration. We thought actual results  
8 were reliable. Was that wrong to use actual results?

9 MR. EVERETT: It certainly was permissible to  
10 look at the actual results. The actual results we think  
11 corroborate the point that we make, that it were racially  
12 -- it was racially based.

13 But the significant thing, Your Honor, is the  
14 way in which this is constructed. It winds up with two  
15 large concentrations of African-Americans in the Triad  
16 area -- that's Greensboro, High Point, Winston-Salem,  
17 approximately 110,000 -- and another concentration in  
18 Mecklenburg County, 110,000. This is the partisan core.  
19 90 percent of the African-Americans who are in the  
20 district, as it was reconstituted, had been in the old  
21 12th district. The -- the manner of structure was such as  
22 to keep a partisan core.

23 QUESTION: But the question of the districts  
24 that were excluded and what their composition was -- for  
25 that you used, and the district court accepted,



1 registration figures to determine how Democratic they were  
2 and whether they were excluded because they had white  
3 voters but who were Democratic. And that's what was  
4 criticized by the legislators who said, no, you can't tell  
5 that those white voters are, in fact, going to vote  
6 Democratic.

7 MR. EVERETT: Well, the thing that was  
8 significant was that they wanted to put the African-  
9 American voters there because they could tell that would  
10 be a firm partisan core.

11 They also in the -- the section 5 submission  
12 pointed out the possible effect on Congressman Watt of  
13 removing African-Americans from the district. They made  
14 it perfectly clear there they were concerned with him not  
15 only as an incumbent Democrat, but as an incumbent  
16 African-American Democrat. So, all of that goes into the  
17 -- into the --

18 QUESTION: So, are you telling us essentially it  
19 doesn't matter, that maybe the district court was wrong to  
20 use the registration instead of the actual results, but it  
21 doesn't matter, we should win anyway?

22 MR. EVERETT: I would say in this particular  
23 instance it doesn't matter, that you --

24 QUESTION: But the district judge relied -- the  
25 district -- two of the district judges relied on -- on the

1 registration figures.

2 MR. EVERETT: But in addition, the actual result  
3 figures point out the same thing. For example, if you  
4 look at Guilford County, you'll find districts which were  
5 excluded which gave victories to the Democrats, but they  
6 were predominantly white. Mr. Dellinger -- General  
7 Dellinger points to Elm Street --

8 QUESTION: Yes, but we're not going to  
9 reconstruct the record and we're not -- another question  
10 was about looking at only 32 precincts when there are 120  
11 surrounding that might have given a different picture.  
12 You're not asking us to say, well, if the district -- the  
13 district court could have found that and therefore summary  
14 judgment is appropriate even though they didn't find it.

15 MR. EVERETT: What I'm asking you to find, Your  
16 Honor, is this, that these judges, who were very familiar  
17 with the situation, particularly Judge Voorhees who had  
18 been on the Shaw panel, looked at this evidence,  
19 considered it in the context, and realized there was  
20 nothing in the post hoc affidavits of the legislators --  
21 of Cooper and McMahan. They were not felons, but they  
22 were giving ex post facto rationalizations, designed  
23 cleverly to -- to cover the -- the true motive, the  
24 predominant motive.

25 Now --

1 QUESTION: Mr. Everett, can -- can one say that  
2 on summary judgment, that it's a post hoc rationalization?  
3 You know, if you're -- if you're sitting as a finder of  
4 fact, you could decide that about an affidavit, but on a  
5 summary judgment motion, I question whether you can  
6 characterize it that way.

7 MR. EVERETT: Well, Your Honor, we -- we would  
8 -- we point out in our brief that there are some decisions  
9 of this Court which would certainly suggest that post hoc  
10 affidavits by legislators are not competent to show what  
11 the intent was at the time.

12 We think in this instance they actually confirm  
13 that which we have suggested, as for example, there's a  
14 portion of Senator Cooper's affidavit which makes it clear  
15 they were concerned about -- and this is specifically in  
16 there -- concerned about whether the removal of some of  
17 the African-American voters, particularly those in Durham  
18 and that area, and Gastonia, from the district would place  
19 him at a disadvantage because of race. And therefore,  
20 they make it clear that they have concentrations of voters  
21 in Charlotte, Winston-Salem, and Greensboro. Now, those  
22 concentrations of voters, if you look at the statistics,  
23 are overwhelmingly African-American.

24 So, the -- they use code in that situation.  
25 They say Democratic. Democratic. But these are

1 particular Democrats. They are Democrats who are  
2 Democrats who are African-Americans.

3 QUESTION: What do you do with the conclusion of  
4 the State statistician? I mean, I presume he was not --

5 MR. EVERETT: I'm sorry, Your Honor.

6 QUESTION: What -- what do you do with the  
7 evidence of the State statistician that says that the --  
8 the facts statistically analyzed are just as consistent  
9 with the incumbency protection as with the predominant  
10 racial motive?

11 MR. EVERETT: Well, it's a little hard for me,  
12 Your Honor, to see how incumbent protection of someone who  
13 has been elected pursuant to a race-skewed, race-based  
14 plan is permissible in this particular context. I  
15 recall --

16 QUESTION: So, do you think as a matter of law  
17 then -- I take -- is it your position that as a matter of  
18 law, his conclusion should be discounted to -- to nothing  
19 for summary judgment purposes?

20 MR. EVERETT: I think -- I think basically that  
21 it could be discounted. I think in a situation where  
22 there's a reliance --

23 QUESTION: But isn't -- isn't that what we -- I  
24 mean, isn't that what we do at trials, if we do it at all,  
25 is -- is -- I -- I'm -- I'm just having difficulty in



1 seeing what the theory is on -- on which you discount it  
2 to nothing as a matter of law for summary judgment  
3 purposes.

4 MR. EVERETT: Well, Your Honor, my impression is  
5 that when affidavits are conclusory and do not bear on --

6 QUESTION: Well, but this is not conclusory.  
7 This is -- this is an affidavit that says either of two  
8 conclusions is possible, and it's very relevant at the  
9 summary judgment stage because the question is, as a  
10 matter of law, is -- is only one conclusion possible? So  
11 -- so, sure, it's conclusory but it's a conclusion about a  
12 conclusion, and I assume that the expert is competent to  
13 offer it.

14 MR. EVERETT: Well, the -- what you have here is  
15 a situation where the legislators are saying that, yes, we  
16 had this desire to create six and six. That doesn't bear  
17 on whether in this particular --

18 QUESTION: Yes, but how about the statistician's  
19 conclusion? Why isn't that a good reason for saying --  
20 not the only reason, but a good reason for saying that  
21 there certainly may indeed be a genuine issue here?

22 MR. EVERETT: Well, the -- the use of that which  
23 was impermissible, used as a base -- as a benchmark of a  
24 plan which was determined to be unconstitutional, creates  
25 a situation where reliance on that -- on that plan, even

1 an indirect reliance as here --

2 QUESTION: So -- so, you're saying his  
3 conclusion is really beside the point, and the reason it's  
4 beside the point is you can -- if I understand you  
5 correctly, that you cannot justify by incumbency  
6 protection the preservation of an incumbency which itself  
7 resulted from -- from the scheme which has been knocked  
8 out on constitutional grounds.

9 MR. EVERETT: I -- I am saying that you can't  
10 justify by use, continuing use, of a plan that's -- which  
11 is race-based. Now, 19 --

12 QUESTION: Well --

13 QUESTION: Mr. Everett, before you get -- I had  
14 thought that the statistician was not testifying as to any  
15 facts to establish facts that are controverted. I thought  
16 that he was just drawing different conclusions from the  
17 agreed-upon facts than other people. Now, is -- is that  
18 enough to establish the existence of controverted facts?

19 MR. EVERETT: No, Your Honor.

20 QUESTION: There's no doubt that there's  
21 controversion as to what the conclusions might be here.

22 MR. EVERETT: No, Your Honor. We --

23 QUESTION: What fact did the -- did the  
24 statistician controvert that hadn't been controverted  
25 before? I don't --

1                   MR. EVERETT: We are unaware of any, Your Honor.  
2       As a matter, all of the data was furnished by the State.  
3                   QUESTION: Is racial motivation a fact? Is  
4       racial motivation a fact?  
5                   MR. EVERETT: Racial motivation was a fact  
6       originally. It's -- it's very apparent in this  
7       particular --  
8                   QUESTION: Well, it's -- isn't it the nub of  
9       what we're -- we're litigating now?  
10                  MR. EVERETT: Well --  
11                  QUESTION: And doesn't the statistician's  
12       conclusion bear on that?  
13                  MR. EVERETT: Well, the racial motivation is  
14       apparent from all the circumstances here. There's nothing  
15       that undercuts that.  
16                  QUESTION: Mr. Everett, the original plan that  
17       this Court looked at in Shaw v. Reno is reflected in your  
18       1992 base plan map. Is that correct?  
19                  MR. EVERETT: Yes, Your Honor.  
20                  QUESTION: And the plan with which we are now  
21       concerned is represented by the '97 plan?  
22                  MR. EVERETT: Yes, Your Honor. That -- this --  
23                  QUESTION: And -- and how long are the terms of  
24       legislators in North Carolina?  
25                  MR. EVERETT: Well, the legislative term is a 2-

1 year term.

2 QUESTION: So, we are not dealing with the same  
3 legislature in --

4 MR. EVERETT: You're dealing with a different  
5 legislature, but they're --

6 QUESTION: -- 1997 plan. It's a different  
7 legislature.

8 MR. EVERETT: They're acting with the same  
9 advice from the Attorney General's office.

10 QUESTION: But different people.

11 MR. EVERETT: There are some --

12 QUESTION: Different legislature.

13 MR. EVERETT: -- some different people. That's  
14 correct, Your Honor.

15 QUESTION: That gets back to the -- your  
16 original statement. I think you were establishing a  
17 hypothetical something like this. A plan is invalidated  
18 by the courts as being based on a racial gerrymander.  
19 Race was the predominant motive in drawing the whole  
20 district, let's say.

21 MR. EVERETT: Correct.

22 QUESTION: Then legislators get together and  
23 say, you know, that plan was really a pretty good plan  
24 because it had a partisan balance. We don't care about  
25 race, but we want to keep it for a partisan balance. And



1 you said something to the effect, oh, that's ridiculous or  
2 absurd or wrong.

3 Why is that so? If -- if it is ridiculous or  
4 absurd or wrong, does that just show that the predominant  
5 motive test is -- is not adequate?

6 MR. EVERETT: Well, we would say that where  
7 you're dealing with something which is remedial, there's a  
8 special consideration of showing that the original  
9 predominant motive has been eliminated.

10 QUESTION: No, no. This is a -- we're -- we're  
11 assuming that the legislators say their new motive -- and  
12 they're in good faith about this -- is to keep partisan  
13 balance, so they just keep the old district. Is that  
14 permissible?

15 MR. EVERETT: We think that is not permissible.

16 QUESTION: Why?

17 MR. EVERETT: We believe that in that situation  
18 it is tainted by the past, that it still carries forward  
19 the message. If you say --

20 QUESTION: But if what were driving at is -- is  
21 preventing districting based on an impermissible motive,  
22 how is that furthered by your -- by your conclusion here?

23 MR. EVERETT: Well, in a situation where the  
24 boundaries are so similar to those of a clearly  
25 unconstitutional plan, even though it's no longer

1 majority-minority, we would submit to the Court that the  
2 same message is being conveyed that was found  
3 impermissible in Shaw v. Reno. Indeed, it is almost a  
4 reinforcement of that message to say, well, they've done  
5 virtually the same thing, or even in your hypothetical,  
6 Your Honor, done the same thing.

7 QUESTION: But isn't that just a show of perhaps  
8 a flaw in -- in the reasoning of our cases, that you can't  
9 use race at all is -- I guess is what you're saying.

10 MR. EVERETT: We're saying that you cannot use  
11 race to the extent where it is clearly determinative,  
12 where as, for example, in Shaw v. Reno there is a  
13 reference to -- to persons in disparate areas who are  
14 placed in the same district because of the stereotype of  
15 race. Clearly that stereotype governed in the composition  
16 of these -- of this particular --

17 QUESTION: What in your basic view, to go back  
18 to basics for a second, in your own mind -- what is it in  
19 the Fourteenth Amendment? Why do you think it's somehow  
20 basically fair to gerrymander a district to have more  
21 Democratic faces in the legislature, but you couldn't  
22 Democrat a district -- gerrymander a district because in  
23 part you were pleased if there were more elections of,  
24 say, African-Americans who haven't been overly represented  
25 in the legislature? Why, in other words, is the one

1     somehow basically fair and the other is somehow  
2     fundamentally unfair in your opinion?

3             MR. EVERETT: Well, we think, again, it's a  
4     matter of the purpose, that if it is done to -- if it's  
5     targeted to elect an African-American as such, whether  
6     Democrat or Republican, that is a violation of the  
7     Fourteenth Amendment --

8             QUESTION: Suppose race is just a surrogate for  
9     something else, Mr. Everett. Suppose, given the facts  
10    that nationwide blacks vote -- I don't know -- 90 -- 90-  
11    some percent Democratic, suppose the legislature just  
12    says, ah, we're not going to look at all these statistics.  
13    We're -- we're going to put all these blacks into this one  
14    district because we think they're going to vote  
15    Democratic. Is that okay?

16            MR. EVERETT: We would say no, Your Honor. We'd  
17    say that is the use of race as a proxy. We'd say that --

18            QUESTION: And -- and I suppose it's also use of  
19    race as a proxy if you say, well, there are Democrats and  
20    there are Democrats, but black Democrats are really strong  
21    Democrats. So, since we want really strong Democrats in  
22    this district, we're going to put more black Democrats in  
23    this district. That's also a proxy, I assume.

24            MR. EVERETT: That would be a proxy and that is  
25    again a use of racial statistics.

1 QUESTION: Would it be a proxy if you looked at  
2 those who had regularly voted Democratic without knowing  
3 their race but just look at what happened in the ballots  
4 and use that as a proxy?

5 MR. EVERETT: If that were a starting point,  
6 Your Honor, without any prior history, where it was not a  
7 treatment of race as a proxy, where a voter was not just a  
8 statistic because of race.

9 QUESTION: Then let me ask you this question.  
10 If you were in the legislature and had to start out fresh  
11 without trying to be bothered by what happened in the  
12 past, would you think it more appropriate to look at  
13 election results or registration as the best basis for  
14 deciding how people will vote?

15 MR. EVERETT: Well, I think it would be --  
16 either would be very helpful.

17 QUESTION: Which do you think would be the --  
18 which do you think would be the more reliable?

19 MR. EVERETT: I think in a situation where it  
20 was -- in North Carolina I think the -- the registration  
21 insofar as it revealed race would be the more important.  
22 The voting results would be more important in other  
23 contexts. But --

24 QUESTION: Why would their registration be -- be  
25 the better choice?



1           MR. EVERETT: The -- why would the -- in that  
2 particular instance, where it is identified and you're  
3 knowing whom you are targeting on the grounds of race,  
4 that would be a better choice if you were trying to get a  
5 particular result predicated on race, which in --

6           QUESTION: But if you're trying to avoid a  
7 choice. That's what I was trying to suggest. If you're  
8 trying to avoid a choice predicated on race, would it not  
9 be better to look at election results rather than  
10 registration?

11          MR. EVERETT: If you were trying -- if you were  
12 totally trying to avoid any -- any use of race, certainly  
13 you could say I will forget all about it. You will do as  
14 was --

15          QUESTION: Well, if you were trying to district  
16 on a basis of race, I guess registration -- I guess voting  
17 patterns would be better then too.

18          MR. EVERETT: Well, what they -- what they did  
19 here --

20          QUESTION: In some -- in some instances and  
21 under some hypotheses.

22          MR. EVERETT: Right. What they did here in some  
23 of these instances, they took the racial hypothesis and  
24 verified it from the results where the districts were  
25 voting in a certain way. But on the other hand, in some

1 of the instances, even though the results would have been  
2 favorable, they did not include them, so that you have a  
3 -- you have a clear use of race as such in this particular  
4 district.

5 And it is a carryover. It's a pretty clear  
6 carryover. It's a carryover that was predicated on a  
7 misunderstanding that's reflected in one of the comments  
8 by Senator Cooper on the floor to the effect, guess what,  
9 this is no longer a majority-minority district.

10 Therefore, it's our opinion -- we've been  
11 informed -- that shape is not important. In effect, we've  
12 got a Magna Carta to do whatever we want to so long as it  
13 is not a majority-minority district.

14 And I think the -- neither the State appellants  
15 nor the -- the Solicitor General at this point have argued  
16 for any position of that sort. We think it's clearly  
17 wrong.

18 QUESTION: Mr. Everett, in terms of summary  
19 judgment, one procedural feature of this case is -- is  
20 disconcerting. That is, you keep talking about they  
21 haven't remedied the wrong or -- as though this were the  
22 original Shaw v. Reno case, but it's not. That case, for  
23 whatever reason, was dismissed.

24 One of the things that was said was that the  
25 plaintiffs are no longer in the district, but now it turns

1 up two of those very same people start a brand-new  
2 lawsuit. And in a brand-new lawsuit, usually the  
3 plaintiff carries the burden, and it is extraordinary to  
4 give summary judgment to the party who has the proof  
5 burden.

6 MR. EVERETT: Well, in a situation like this,  
7 Your Honor, where the statistics are forthcoming from the  
8 State itself -- there's no controversy about it -- we  
9 would say that the granting of a summary judgment was  
10 entirely appropriate. There's no new evidence --

11 QUESTION: Well, on burden -- on burden of  
12 proof, after a district has been invalidated as a racial  
13 gerrymander, perhaps the burden of proof should shift to  
14 the State to show that the district was not dominated by  
15 race.

16 MR. EVERETT: We have argued that. We've argued  
17 that the -- that the burden of proof should be on the  
18 State to show that. We've argued also that a sort of  
19 litmus test would be the adoption of some of the  
20 traditional districting principles to show there had been  
21 a -- a departure from -- from that which preceded it.

22 So, we think a remedial district like this,  
23 regardless of who the parties are, is still subject to  
24 some special responsibility on the State's part with  
25 respect to showing the -- the vestiges of the past no

1 longer exist. So, we think there is a continuation of  
2 motive --

3 QUESTION: Was there a reason for starting over  
4 when you had two plaintiffs who qualified so that you  
5 could have carried on the old? Was there reason for  
6 bringing a -- a whole new lawsuit?

7 MR. EVERETT: Well, Your Honor, there was a suit  
8 that they had filed. They were added as additional  
9 plaintiffs. They were from the 1st district. None of the  
10 parties in the 12th district, which had been declared  
11 unconstitutional, had any standing at that point. So,  
12 there had to be some additional action, and that was  
13 handled by an amendment which added some additional 1st  
14 district plaintiffs and also brought in persons from the  
15 reconstituted 12th district.

16 QUESTION: So, there are none -- none of the  
17 people who are now in the -- in the plaintiffs' lineup  
18 from the 12th district were plaintiffs in Shaw v. Reno.

19 MR. EVERETT: There are two that were amended  
20 plaintiffs. They were in at the time of the -- after  
21 the --

22 QUESTION: But not in the original.

23 MR. EVERETT: Not in the original. Those were  
24 five people from Durham, and none of them had any standing  
25 after the -- after the redrafting of the districts.



1 QUESTION: What is the status of the 1st  
2 district? That one didn't go up on summary judgment.

3 MR. EVERETT: That one didn't go up. We would  
4 maintain the defendants were fortunate in that regard  
5 because it seemed it was pretty clearly a racial purpose.  
6 But in that one, there would have been issues, to be sure,  
7 of strict scrutiny which we would maintain are not  
8 involved --

9 QUESTION: No, but where -- what is the posture  
10 of that litigation right now?

11 MR. EVERETT: The posture of that litigation is  
12 that it's in a holding pattern awaiting the disposition of  
13 this case.

14 Interestingly enough, if in this case the  
15 decision of the Court is to overturn the lower court, this  
16 plan will then supersede the plan that was used for the  
17 elections in 1998. There's a plan under which Members of  
18 Congress have been elected and which is, incidentally,  
19 substantially less race-based than this. We would still  
20 contend not free of the taint, but it's about 35 percent  
21 instead of 45 percent or 47 percent.

22 And there again, the partisan results of  
23 maintaining incumbency and so forth were maintained, which  
24 is a pretty good indication that there were alternatives  
25 available to the State which they didn't use, that

1     instead, as exhibited by their own -- the submission under  
2     section 5, by portions of the affidavits when strictly --  
3     when properly construed, they had a racial motive.

4             They were concerned that because of the removal  
5     of the African-Americans in Durham and Gastonia from  
6     Congressman Watt's district, there would be a problem.  
7     And so they tried to assure that this would be racially of  
8     a sort that would assure his reelection, which of course  
9     occurred under the 1998 plan, but -- even a less race-  
10    based plan. But there was a specific purpose which is  
11    revealed even in the affidavit of -- of Senator Cooper

12            So, they had a purpose and they had a purpose  
13    which is reflected in their own documents and it's  
14    reflected throughout. And it's reflected in results.  
15    It's reflected in the circumstances that the experienced  
16    judges sitting there in Charlotte, or sitting in North  
17    Carolina, that they found and looked at. They understood  
18    quite well that even though there was a recital of a -- of  
19    maintaining a partisan balance, a recital of racial  
20    fairness, that as far as the 12th district was concerned,  
21    there was a target, and that was to assure that there  
22    would be an African-American reelected and stated in terms  
23    of reelecting an incumbent. But in this particular  
24    instance, we would say that it was significant that that  
25    incumbent was an African-American.

1 Now, it's perfectly fine to have him reelected,  
2 but our contention is that it should be done from  
3 districts which are not predicated primarily on race,  
4 where race is not the predominant motive.

5 And we would suggest, Your Honors, that if you  
6 look at these two maps together, you come only to the  
7 conclusion that there is such a violation of the ordinary  
8 precepts of traditional districting that this has to be  
9 viewed as based on race. And that is unconstitutional.

10 QUESTION: Thank you, Mr. Everett.

11 Mr. Dellinger, you have about 4 minutes.

12 REBUTTAL ARGUMENT OF WALTER E. DELLINGER

13 ON BEHALF OF THE APPELLANTS

14 MR. DELLINGER: Justice Scalia said in the first  
15 argument this morning that the Court has a responsibility  
16 not just to look at the particular case but to look to the  
17 future, and what we're most concerned with when you do  
18 that is to think how important it is to make clear that  
19 there's a heavy burden on those who would challenge a  
20 State legislature in the exercise of one of its most  
21 sovereign functions of -- of State self-definition as a  
22 political entity.

23 Here --

24 QUESTION: In -- in the hypothetical that we  
25 were working with where they keep exactly the same

1 districts, would the voters still have that same heavy  
2 burden after a district had been previously declared  
3 invalid?

4 MR. DELLINGER: I think that the -- that the  
5 same district would mean that you had not, nearly to this  
6 extent, eradicated the message harms of the -- of the 1st  
7 district, Justice Kennedy. The changed process might make  
8 a difference.

9 But here, if you look at this map, what is clear  
10 is that three-fifths of the district is different. The  
11 lint is reduced in half. The whole hundred-mile corridor  
12 to pick up Durham is gone. There's only one split  
13 precinct, no use of crossovers, double crossovers,  
14 continuity. It is a Democratic district that -- that  
15 makes sense, and its stated purpose was to do so. This  
16 is --

17 QUESTION: Mr. -- Mr. Dellinger --

18 MR. DELLINGER: Yes.

19 QUESTION: -- I'm not sure from your -- from  
20 your prior presentation what your answer to these  
21 questions are. Would -- would you think it is okay to use  
22 race as a determinant of what voters are likely to vote  
23 for the incumbent representative?

24 MR. DELLINGER: No. We do not believe that  
25 race --



1 QUESTION: Could you race as a determinant of  
2 who are yellow-dog Democrats, so-called?

3 MR. DELLINGER: No.

4 QUESTION: Those who will vote for a yellow dog  
5 that's a Democrat.

6 MR. DELLINGER: No.

7 QUESTION: Right?

8 MR. DELLINGER: Race can not only be used not  
9 only for its own sake, but as this Court has taught, it  
10 shouldn't be used as a proxy or a surrogate for other  
11 things. I'm quite clear on that.

12 This is a case where we used the thing itself,  
13 and it's really turning Washington against Davis upside  
14 down to say that because the thing itself, political  
15 affiliation, happens to correlate, that now we have to  
16 treat it as if it were suspect.

17 It was stated most precisely I think in -- in an  
18 opinion by Justice O'Connor that you joined in -- in  
19 Hernandez where two Hispanics were struck from a jury  
20 because of their difficulty relying on the translation.  
21 And the Court said that was appropriate. And -- and the  
22 strongest statement was in the concurring opinion that  
23 said, no matter how closely tied or significantly  
24 correlated to race the explanation may be, the strike does  
25 not implicate the Equal Protection Clause unless it is

1 based on race. That is the distinction between  
2 disproportionate effect and intentional discrimination.  
3 That is the heart of our jurisprudence which we turned  
4 upside down.

5 I don't think the State can be forever barred  
6 from putting a Democratic district in the Piedmont  
7 Crescent that makes as much sense as this one does as if  
8 it were some convicted felon or -- or bungling constable  
9 that had to be held under scrutiny. The '98 plan may look  
10 better, but I would just close by saying it's  
11 significantly less desirable from legitimate political  
12 purposes. It includes an entire rural county and takes  
13 out Greensboro, which has much more in common with the  
14 banking and commercial and urban centers.

15 Thank you.

16 JUSTICE STEVENS: The case is submitted.

17 Thank you.

18 (Whereupon, at 12:14 p.m., the case in the  
19 above-entitled matter was submitted.)  
20  
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## CERTIFICATION

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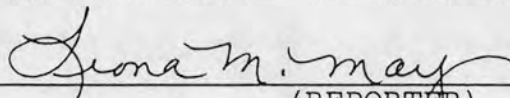
The United States in the Matter of:

JAMES B. HUNT, JR., GOVERNOR OF NORTH CAROLINA, ET AL., Appellants v.  
MARTIN CROMARTIE, ET AL.

CASE NO: 98-85

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