

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

HENRY G. SPALLONE, Petitioner V. UNITED STATES, ET AL.;
PETER CHEMA, Petitioner V. UNITED STATES, ET AL.; and
CAPTION: NICHOLAS LONGO AND EDWARD FAGAN, Petitioners V.
UNITED STATES, ET AL.
CASE NO: 88-854; 88-856; 88-870
PLACE: WASHINGTON, D.C.
DATE: October 2, 1989
PAGES: 1 thru 48

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 HENRY G. SPALLONE, :

4 Petitioner :

5 v. : No. 88-854

6 UNITED STATES, ET AL.; :

7 PETER CHEMA, :

8 Petitioner :

9 v. : No. 88-856

10 UNITED STATES, ET AL.; :

11 NICHOLAS LONGO AND EDWARD FAGAN, :

12 Petitioners :

13 v. : No. 88-870

14 UNITED STATES, ET AL. :

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16 Washington, D.C.

17 Monday, October 2, 1989

18 The above-entitled matter came on for oral argument
19 before the Supreme Court of the United States at 2:00 o'clock
20 p.m.

21 APPEARANCES:

22 JAMES D. HARMON, JR., ESQ., New York, New York; on behalf of
23 the Petitioners.

24 KENNETH W. STARR, ESQ., Solicitor General, Department of
25 Justice, Washington, D.C.; on behalf of the Respondent.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
JAMES D. HARMON, JR., ESQ.	3
On behalf of the Petitioners	
KENNETH W. STARR, ESQ.	27
On behalf of the Respondent	

P R O C E E D I N G S

(2:00 p.m.)

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2
3 CHIEF JUSTICE REHNQUIST: We'll hear argument next
4 in Number 88-854, Spallone v. United States; 88-856, Chema
5 against the United States; 88-870, Longo and Fagan against the
6 United States.

7 Mr. Harmon, you may proceed whenever you're ready.

8 ORAL ARGUMENT OF JAMES D. HARMON, JR.

9 ON BEHALF OF THE PETITIONERS

10 MR. HARMON: Mr. Chief Justice, and may it please
11 the Court:

12 There, there is no question but in this case of the
13 federal government has the power to squash the City of
14 Yonkers. When our federal courts act, they act directly, not
15 through fronts and not through proxies. They accept the
16 responsibility in so doing, the exercise of their own power.
17 No federal court, not even in the civil rights movements of
18 the 1960s has ever found the need to ask and direct a
19 legislator to cast his vote in favor of enactment of
20 legislation at the price of his own conscience and the cost of
21 his freedom. That, I submit, is just not the way that we do
22 things.

23 The Solicitor General argues for a government in which
24 the judiciary is supreme, a judiciary which drafts laws,
25 directs their enactments -- enactment, interprets them, and

1 presumably holds people accountable for their violation. It
2 is just this type of concentration of power that the -- that
3 the Constitution avoids in many different ways.

4 QUESTION: You think the -- you're arguing for
5 legislative immunity, local legislative immunity?

6 MR. HARMON: As well as First Amendment, Your Honor,
7 and the discretion inherent in the Court to fashion a
8 constitutional remedy and the limitations on the Court in
9 fashioning such a remedy.

10 QUESTION: Do you think you need all of those?

11 MR. HARMON: We think the Court could --

12 QUESTION: What about just the immunity question?

13 MR. HARMON: We think the Court could decide this on
14 that basis, yes, Your Honor.

15 QUESTION: Well, is that constitutionally based?

16 MR. HARMON: No, it is not, Your Honor.

17 QUESTION: So, it is just a construction of some other
18 federal statute, 1983?

19 MR. HARMON: It's -- it's based upon federal common law
20 as --

21 QUESTION: Which some statute wasn't intended to
22 interfere with?

23 MR. HARMON: That is correct, Your Honor.

24 QUESTION: So, Congress could deprive the legislators
25 of their common-law immunity?

1 MR. HARMON: That is not correct, Your Honor. It is a
2 question of federal common law, and we think that is the whole
3 --

4 QUESTION: Well, if that is all it is, then can
5 Congress change that?

6 MR. HARMON: It, it, it cannot, Your Honor. It would
7 be our position that for Congress to do that would interfere
8 with the rights of the states, guaranteed through the
9 guarantee clause to establish --

10 QUESTION: So, you are relying on a constitutional
11 basis, not merely a common law immunity?

12 MR. HARMON: Yes, Your Honor.

13 QUESTION: You are relying on the guarantee clause?

14 MR. HARMON: Yes, Your Honor, although the cases, both
15 Tenney and Lake Tahoe Estates, do not -- explain in any detail
16 the extent to which Congress could interfere with the
17 operation of legislative immunity. We submit that if the
18 Congress would take action once the state has selected its
19 particular form of republican government, that this would
20 interfere with the federal government's obligation --

21 QUESTION: Well, why do you need to get into that
22 rather difficult question in this case, Mr. Harmon, if, if
23 your argument is basically legislative immunity? Congress has
24 not acted, at least that is your position I take it, to, to
25 remove legislative immunity. Why don't you settle for that

1 rather than trying to raise the hypothetical question of what
2 happens if Congress did try?

3 MR. HARMON: Well, I think I as best I could was
4 answering the question about whether or not Congress could
5 intervene, and in, in answering the question I was giving our
6 position in the event that Congress had -- has intervened.

7 But, but, but we do believe that this issue can be
8 resolved simply by extending the principle in Lake Tahoe
9 Estates to local legislators. The whole purpose behind
10 legislative immunity was to protect our form of representative
11 government. That was the entire idea behind legislative
12 immunity and this Court has -- has accepted the principle as
13 applied to state legislators and, in the Lake Tahoe Estates
14 case, to those regional legislators. And as Justice Marshall
15 said in his dissent in that particular case, there really was
16 no particular argument that could be advanced to deny its
17 application to local legislators in this, in this particular
18 case.

19 However, Your Honor, we also deal in this case not only
20 with the issue of legislative immunity, but with the Court's
21 power and the extent of the Court's power to remedy a
22 constitutional violation, and we would say also the obligation
23 of the Court to remedy a constitutional violation. We'd
24 suggest to the Court that there -- that there is an underlying
25 principle underlying our First Amendment argument, the use of

1 the contempt power, as well as the Court's obligation to
2 remedy a constitutional violation.

3 And it would be, this we would suggest, that it is the
4 obligation of the courts to provide a measured exercise of
5 their power in remedying a constitutional violation, taking
6 into account the rights of those who are not before the court.
7 And we respectfully suggest, Your Honor, that in this
8 particular case, this Court used the most intrusive means when
9 it came to the personal rights of the councilmen and when it
10 came to their legislative immunity.

11 QUESTION: Do you think that legislators, if they enjoy
12 immunity, can waive it?

13 MR. HARMON: The government has made no effort to argue
14 that in its, in its brief.

15 QUESTION: Well, I asked you whether you thought it
16 could be waived if there is such a privilege?

17 MR. HARMON: The answer is we do not believe that an
18 individual legislator can waive the privilege. We do not
19 believe that the legislature itself can waive the privilege,
20 because it is designed to protect our form of government. It
21 is designed to protect our representative form of government.
22 And it cannot be waived by an individual and it cannot be
23 waived by the institution of the legislature, because in the
24 final analysis, it is there to protect the right of the people
25 to select those who they would have to represent them.

1 QUESTION: What is the effect, then, of the city
2 council approving the consent decree?

3 MR. HARMON: It has no effect whatsoever on the rights
4 and immunities of any of the individual councilmen. It is our
5 position, however, that the city is bound by whatever
6 commitments it made in the, in the consent decree. That the
7 individual legislators, nonetheless, still retain their First
8 Amendment rights and their vote, and they continue to be
9 protected by legislative immunity.

10 QUESTION: Does the city yet have the 800 housing units
11 and a zoning plan to accommodate them? Has it ever been done?

12 MR. HARMON: No, there have been no developers even
13 selected yet for the 800 affordable housing units, Your Honor.

14 QUESTION: And how's the Court to go about this? I
15 mean, this has been a long time brewing.

16 MR. HARMON: Well, I, I, I'd suggest to you that we are
17 -- I am not standing up here as any kind of a Monday morning
18 quarterback. These councilmen were held accountable through
19 the use of the contempt power for refusing to enact an
20 ordinance which had been drafted by experts and adopted, and,
21 and adopted by the district court. And it was a zoning
22 ordinance, it was an overlay, a zoning overlay which affected
23 all of the zoning in, in the City of Yonkers. It was a major
24 piece of legislation.

25 QUESTION: Well, can the district court just impose

1 that on the city?

2 MR. HARMON: In, in, in fact, and I --

3 QUESTION: Yes or no?

4 MR. HARMON: Yes.

5 QUESTION: And that is not more intrusive?

6 MR. HARMON: It can do it to this extent, Your Honor.
7 It can do what it did already once in this case, which I just
8 became aware of Friday and which I advised Mr. Starr a short
9 while ago. It can enter an order to the effect that the
10 zoning in Yonkers is deemed to permit a certain type of
11 housing in a, in a certain part of Yonkers.

12 Although the briefs don't reflect this, and this is
13 again not a question of second guessing the district court, on
14 March 20, 1987 with respect to public housing, the district
15 court in fact did enter an order deeming that Yonkers zoning
16 permitted the construction of this public housing. And just
17 last Thursday, the government attorneys appeared before Judge
18 Sand and asked him to do the very same thing with respect to
19 five additional sites.

20 Now, in doing that, Your Honor, it does not implicate
21 the First Amendment rights of, of the councilmen to vote. It
22 does not affect --

23 QUESTION: (Inaudible) immunity?

24 MR. HARMON: Nor immunity, Your Honor. Nor immunity.
25 There is no -- the court in this case lost sight of what

1 really was important here, and what really was important, as
2 Your Honor has, has pointed out, is to figure out a way and to
3 get moving with respect to building housing in some fashion.

4 Turning toward the councilmen, using means that only
5 left them as targets at the end of, of the line, we submit
6 missed the point and, and, and, and was a case of using
7 intrusive means that did not point towards the accomplishment
8 of the objective.

9 QUESTION: What about raising the money? Do you think
10 the court could say I deem that the council has passed a tax
11 measure, or a bond issue, has approved a bond issue for this
12 purpose --

13 MR. HARMON: Well, in, in this particular case --

14 QUESTION: -- and then order the executive branch to
15 carry it out?

16 MR. HARMON: In, in this particular case, Your Honor,
17 the, the question of cost has not yet arisen. It hasn't
18 gotten to that particular point.

19 QUESTION: But it will. How's the court going to do
20 it?

21 MR. HARMON: It is -- there is a difference between
22 directing an executive act, in our opinion, and, and directing
23 an act which is purely legislative. It is one thing to levy,
24 to levy a tax, which we believe would be a legislative act and
25 something that a court simply could not do. That -- that --

1 that's not to say that in this case, or even -- or even in
2 this one, Your Honor, that a court would be powerless to act.

3 We think that, that courts do not have only the
4 authority which is not barred to them, but there are limits on
5 the court's authority, and the courts must act within those
6 particular limits.

7 QUESTION: How is the court going to effectively
8 produce the money to get the houses built, the housing built?

9 MR. HARMON: In, in this particular case there is a
10 combination of market incentives encouraging developers to
11 come in and granting tax abatements. That is the method that
12 has been chosen in, in this particular case.

13 QUESTION: Well, I suppose there is some -- there are
14 some things that maybe a court just cannot bring about.

15 MR. HARMON: We think that the court's power is limited
16 by the constitutional grant of its power, and it is the
17 responsibility of courts to, to say what the law is, and to
18 levy a tax is not an exercise of, of the judicial power.
19 There may be other ways, though.

20 QUESTION: Well, if, if, if you stipulate that the city
21 has violated the Constitution, would you say that the court
22 can use all appropriate means to require the city to remedy
23 that violation?

24 MR. HARMON: All appropriate means within its power,
25 taking into account the rights of persons who are not before

1 the court.

2 QUESTION: All right. And if all of the expertise and
3 the ability to raise funds and so forth resides within the
4 city council, I take it an ultimate and permitted and
5 appropriate sanction would be a monetary fine against the City
6 of New York for failure to act -- or against the -- the City
7 of Yonkers for failure to act?

8 MR. HARMON: We, we, we would suggest that the contempt
9 power be a, a matter of last resort, and that there would be
10 some --

11 QUESTION: But that that would be appropriate, monetary
12 fine, as was imposed in this case against the city?

13 MR. HARMON: Yes, Your Honor.

14 QUESTION: Then, if you --

15 QUESTION: But not against the individual?

16 MR. HARMON: But not against the individual, right.

17 QUESTION: Then what you are really arguing, if you
18 have recalcitrant councilmen who, let us assume, it may not be
19 this case, for their own political advantage, refuse to comply
20 with the court order, you are saying that there is a right in
21 the city councilmen to force the city to go bankrupt?

22 MR. HARMON: There is a, a right in councilmen to
23 exercise their judgment, to take into account the wishes of
24 their constituents, to take into account their own -- their
25 own conscience --

1 QUESTION: And to force the city to go bankrupt if that
2 is what they conclude?

3 MR. HARMON: Yes, and to be held accountable for that
4 at the ballot box, Your Honor.

5 QUESTION: I have some trouble with looking to the
6 wishes of the constituents, because it seems to me the basic
7 issue in the case is whether the court can order something the
8 constituents don't want. I think you assume that if it
9 followed the appropriate procedure it could order this housing
10 to be built, notwithstanding the fact that constituents really
11 don't want it.

12 MR. HARMON: That is --

13 QUESTION: How can we use the constituents as the test
14 of what can be permitted?

15 MR. HARMON: Well, we don't suggest for, for a minute
16 that there is a question of majoritarianism here, that the
17 majority -- that the majority should rule, Your Honor. We do
18 suggest, however, that the wishes of constituents is simply
19 one of the things that our representative form of government
20 permits elected officials and legislators to take into account
21 --

22 QUESTION: Even when it violates a, a superior federal
23 law. If there is a federal statute or a federal requirement
24 that these houses be built, how does -- how do the local
25 majority of the constituents' views come into the play at all?

1 MR. HARMON: Well, we respectfully suggest that that is
2 precisely the problem that has been posed here by the district
3 court, that this Court is being put in the position of
4 deciding which, which rights should be superior.

5 QUESTION: But aren't you -- don't you start here from
6 the premise that there is a federal violation that the court
7 has the power by appropriate means to correct?

8 MR. HARMON: Yes, Your Honor.

9 QUESTION: Notwithstanding the fact that the
10 constituents are very much opposed to it.

11 MR. HARMON: Yes, Your Honor.

12 QUESTION: So don't -- aren't the views of the
13 constituents necessarily subordinate to the court's power to
14 fashion an appropriate remedy? And the only question is
15 whether this is an appropriate remedy.

16 MR. HARMON: Well, they may -- they may be subordinate,
17 Your Honor, but we, as we pointed out in our brief, we -- we'd
18 suggest that the views of the constituents, since this was a
19 class action, were views that should have been brought to the
20 attention of the district court. There was no notice here,
21 there was no hearing, there was no fairness hearing before the
22 court accepted this particular form of consent decree.

23 Yes, in the final analysis the court could have
24 disregarded, and had every right to, to disregard the wishes
25 of anybody that might have appeared before it or, or, or any

1 of the people that lived in Yonkers.

2 QUESTION: Mr. Harmon, I have some, some misgivings
3 about -- extending the speech or debate clause in the federal
4 Constitution, not only to state legislatures but even to
5 state, city councils. What if the state itself doesn't think
6 that, that city councils by and large are responsible enough
7 that they should be given the full protection of the speech or
8 debate clause, which, after all, prevents even a libel action
9 against, you know, the most terrible libels uttered in, in the
10 course of the debates. You have a state who says you know, we
11 know our city councilmen and by and large they are not a
12 responsible enough lot that we are going to -- we, we are
13 going to immunize them to go about slandering the whole world
14 like that. You say they can't do that, the federal
15 Constitution protects these city councils against libel
16 action, is that what you are saying?

17 MR. HARMON: It protects the state government's choice
18 of -- choice of form of government. And in the case of New
19 York, there is a provision similar in the New York State
20 Constitution to the -- to the speech or debate clause. In
21 fact --

22 QUESTION: No, but you are arguing on the base of
23 federal Constitution here. Let's assume New York State
24 doesn't have that, in fact let's assume the state legislature
25 enacts a statute allowing members of city councils to be sued

1 for libel. You would say that is an unconstitutional statute,
2 that the majesty of the federal Constitution prevents city
3 councilmen from libel actions.

4 MR. HARMON: No, Your Honor, we would --

5 QUESTION: Well, then you are not arguing the speech or
6 debate clause. Now, maybe there is some other principle in
7 the Constitution that says that courts can enact legislation
8 that isn't the speech or debate clause.

9 MR. HARMON: It's -- it's -- it's Article 3, which says
10 that the courts have judicial power. And that is the source
11 of the, of the court's power.

12 QUESTION: Yes. I think what you are talking is
13 separation of powers, but not necessarily the speech or debate
14 clause. The implications of extending the whole speech or
15 debate clause to a city council --

16 MR. HARMON: We do not argue that immunity under the
17 speech or debate clause should be extended to local
18 legislators. We think that the principle of legislative
19 immunity already accepted by this Court would be an
20 appropriate vehicle for extending that particular immunity.

21 QUESTION: Well, well, put it this way. Suppose a
22 state court had issued this very order, to enforce a federal
23 constitutional violation. Could you have come here? Suppose
24 a New York State court ordered the Yonkers councilmen to enact
25 this ordinance. Would you have had a constitutional claim

1 here?

2 MR. HARMON: We would have had a constitutional claim
3 based upon the New York State Constitution, and the arguments
4 would have been --

5 QUESTION: Of course you wouldn't. Would you have a
6 federal Constitutional claim in the case that I've put?

7 MR. HARMON: Under the -- under the First Amendment,
8 yes.

9 QUESTION: Only the First Amendment?

10 MR. HARMON: Yes, but not under the -- not under the
11 principle of legislative immunity.

12 QUESTION: But if you rely only on the First Amendment,
13 supposing it were not a governmental agency but a private
14 corporation that had been ordered to merge or divest itself of
15 certain investments or something like that. Would a member of
16 the board of directors have a First Amendment right not to
17 vote against that proposal being ordered by a court?

18 MR. HARMON: Yes, we, we, we think he would have.
19 However, Your Honor, we are talking here in, in the vote of a
20 councilman, we're talking about political speech, the most
21 highly protected form of speech, --

22 QUESTION: You're talking about a vote. He just has to
23 say yes or no on the vote. He can say anything he wants to
24 about how he feels about the vote. But the only speech
25 involved, as I understand, is either the word yes or the word

1 no when they call role.

2 MR. HARMON: Yes, Your Honor.

3 QUESTION: And I don't know why that speech is any
4 different than the director of a private corporation who
5 doesn't want to divest itself of its holdings in South African
6 companies or something like that. Why couldn't that person
7 also have a First Amendment right to say I will vote against
8 it even if the judge tells me to?

9 MR. HARMON: Well, there is a question of balancing,
10 and there is a question of a compelling governmental interest
11 in that particular, in that particular instance. And whether
12 or not that intrusion upon a First Amendment right is
13 warranted in this particular instance that, that Your Honor
14 has posed.

15 QUESTION: Well, where do we get the First Amendment
16 right from, Mr. Harmon? The Constitution, obviously, in the
17 First Amendment protects freedom of speech. In other
18 sections, it talks about the right to vote. It doesn't give
19 the impression or any overlaps. Why is the right to vote in
20 the city council meeting a form of freedom of speech?

21 MR. HARMON: It is a form of political expression. It
22 is a form of putting out ideas on, on, on public issues out to
23 the -- out to the public. It is the basis of, of self-
24 government. The act of voting is the fundamental act of
25 democracy, no matter how it's done.

1 QUESTION: Well, it may be a fundamental act of
2 democracy, but that does not by itself demonstrate that it's -
3 -it's speech.

4 QUESTION: Why, if a legislator, he takes an oath I
5 suppose to live up to the constitution of the laws and I
6 suppose he's -- doesn't he have some obligation to the city if
7 the city has undertaken to do something? How did the city
8 undertake to consent to this decree, consent decree?

9 MR. HARMON: Well, that is not clear in the record,
10 those, those particular events, Your Honor.

11 QUESTION: Well, I know, but everybody seems to agree
12 that the city was bound, and you agree it was bound.

13 MR. HARMON: Yes, Your Honor.

14 QUESTION: And, so it was -- how, how was it supposed
15 to act?

16 MR. HARMON: Well, it was -- it was bound to this
17 extent, concerning the legislative action that was called for
18 in the, in the consent decree. We submit that that type of a
19 provision in a consent decree is unenforceable, an agreement
20 to enact legislation sometime in the future, especially in a
21 situation like this where there are no particulars at all
22 outlined in the particular consent decree.

23 QUESTION: Well, you say -- you say the city could be
24 fined for not living up to its consent, don't you?

25 MR. HARMON: Our position here is in representing the -

1 - individual councilmen, Your Honor. The city was bound by
2 anything that was enforceable in that particular consent
3 decree.

4 QUESTION: You don't think the members of the council
5 owed any duty at all to -- to do what the city had promised to
6 do?

7 MR. HARMON: I think perhaps the, the, the city was ill
8 advised here in entering into a --

9 QUESTION: I know, but that isn't answering my
10 question. You must say, though, no, the individual council
11 members had no obligation whatsoever to implement the promise
12 of the city.

13 MR. HARMON: There was no legal obligation to do that,
14 insofar as the enactment of legislation was, was called for.

15 QUESTION: Had there been any change in the membership
16 of the council between the time of the city's agreement to the
17 consent decree and the time of these particular votes?

18 MR. HARMON: No, Your Honor.

19 QUESTION: And these councilmen were the ones who voted
20 for the consent decree, were they not?

21 QUESTION: Two of them were.

22 MR. HARMON: Two of them were. Yes, Your Honor.

23 QUESTION: Two of them.

24 QUESTION: And two of them voted against it.

25 MR. HARMON: Two of them voted against it, Your Honor.

1 QUESTION: And are you representing them, too, or do
2 they have different counsel here?

3 MR. HARMON: I represent -- I am counsel of record for
4 all councilmen for purposes of oral argument. I represent
5 Councilman Chema. The other three councilmen have their
6 individual counsel. But with, with respect to those
7 councilmen who voted against the, the consent decree in the
8 first instance, we respectfully submit that neither one of
9 those councilmen undertook any obligation either publicly or
10 privately at that time or at any, at any time subsequent to
11 that --

12 QUESTION: What do your words "in the first instance"
13 mean?

14 MR. HARMON: That means at the time that they voted
15 against the consent decree, Your Honor.

16 QUESTION: Well, what did they do in the second
17 instance? Was there one?

18 MR. HARMON: Well, there was one later, later on after
19 this court denied the stay to the city and granted the stay to
20 the individual councilmen. In fact, one of the councilmen did
21 -- did change his vote as the city's fines mounted, and did
22 make a judgment on his own that it was in the interest of his
23 constituents and the interest of the city at that point to
24 vote in favor of the legislation that the district court had
25 directed be enacted earlier that year.

1 QUESTION: So he did feel an obligation to carry out
2 what the city had promised to do.

3 MR. HARMON: Well, I think he --

4 QUESTION: Well, anyway, he did it.

5 MR. HARMON: Yes, sir.

6 QUESTION: Was that your client or someone else's?

7 MR. HARMON: That was my client, Justice, yes.

8 QUESTION: Of course, to the extent it is a First
9 Amendment right you are relying on, you, you are not asserting
10 that that is not waivable, are you?

11 MR. HARMON: Again, that is not an issue that has been
12 presented by the, by the government, but it would be our
13 position that, in this particular instance, the First
14 Amendment act of voting by an elected legislature in favor of
15 legislation is not waivable. There's a public interest
16 inherent and important in the act of that particular vote.

17 QUESTION: Is -- is this like the court ordering
18 somebody to say something he didn't, doesn't want to say?
19 Courts are always doing that. Courts are always ordering
20 employers to post notices that they -- which they never wanted
21 to post.

22 MR. HARMON: Well, that we submit is an executive type
23 of function and it does not --

24 QUESTION: Well, it is because the -- the -- the
25 employer has been found to have violated a law and they want

1 to -- and, and the agency wants to provide a remedy, and they
2 say post this notice.

3 MR. HARMON: Well, it, It also does not require, and we
4 question whether anything in the Constitution permits a court
5 to compel someone to publicly --

6 QUESTION: The employer, it won't do the employer any
7 good these days to say the First Amendment protects me, I have
8 freedom of speech, why should they be able to order me to say
9 something I don't want to say?

10 MR. HARMON: Well, there is a question of the competing
11 governmental interest on one side as opposed -- as opposed to
12 the other.

13 QUESTION: Are you willing to apply that here in the
14 First Amendment, on your First Amendment argument, weighing,
15 weighing the governmental interests against the private
16 interests?

17 MR. HARMON: Yes, we are willing, we are willing to do
18 that, Your Honor. And we suggest that that particular balance
19 is struck in this way, that the court's order was totally
20 unnecessary. Since the court's order was unnecessary, since
21 the court could simply have deemed Yonkers zoning to permit
22 the particular housing at stake here, there was no interest at
23 all to be served, no governmental interest at all to be served
24 by directing the councilmen to vote in favor of the zoning.

25 QUESTION: (Inaudible) said, well, just to make it

1 clear I am going to draft -- redraft the ordinance. Here is
2 the ordinance as it is now deemed to have been enacted.

3 MR. HARMON: Excuse me, Your Honor, I didn't understand
4 that.

5 QUESTION: Well, wouldn't, wouldn't the court have,
6 have had to redraft the zoning -- the existing zoning
7 ordinance so everybody would know what the law is?

8 MR. HARMON: That is not what the district court did in
9 this case.

10 QUESTION: I know, but you say that was an alternative,
11 a less intrusive alternative.

12 MR. HARMON: Yes, Your Honor.

13 QUESTION: But it would have involved redrafting the
14 zoning ordinance.

15 MR. HARMON: It, it would not have required a
16 redrafting of the zoning ordinance. It was permissible, in
17 our view, for the district court to do simply what it had
18 already done, namely which was to simply enter an order
19 deeming that Yonkers zoning permitted the construction of a
20 certain type of housing in certain parts of Yonkers.

21 As we have argued here, Your Honor, this, this is, as
22 we see it, a case of ends and means, and we believe that the
23 district court lost sight of the end here, lost sight of the
24 goal, which was housing in this particular case, and resorted
25 to a means which the Constitution did not permit.

1 Our position does not rest on the principle that local
2 government may disobey lawful federal court orders, as the
3 Solicitor General will argue. Rather, in the words of this
4 Court in the Catholic Conference case, it rests on the central
5 principle of a free society that courts have finite bounds of
6 authority, some of constitutional origin which exist to
7 protect citizens from the very wrong asserted here: the
8 excessive use of judicial power.

9 QUESTION: Your argument sounds as though it is, it's -
10 - it's -- you could make just as strong an argument of saying
11 this is just a matter of equity; this is just a matter of
12 equitable principles applying to what remedy a court could,
13 could issue, without even raising any constitutional issue.

14 MR. HARMON: The constitutional issue is, is raised by
15 the fact that there is a, a proven constitutional violation,
16 that the court is exercising its authority to remedy that
17 violation. And the sole question we would suggest before this
18 Court is what the court can do within the limits of its power
19 and taking into account the rights of --

20 QUESTION: Well, that is a matter of equity, certainly.

21 QUESTION: You could just say that remedy was
22 improvident without --

23 MR. HARMON: And that, in general, is our position.
24 That it is improvident for these various reasons: that the
25 rights of the legislatures, the First Amendment rights were

1 needlessly intruded upon and that their legislative immunity
2 was, was likewise intruded upon.

3 QUESTION: But it would be okay if they were needfully
4 intruded upon? That, that wouldn't -- right then, that
5 argument would assume that they could needfully be intruded
6 upon.

7 MR. HARMON: In this, in this particular case the court
8 had an alternative, a specific alternative which, which it
9 could have used and which it did use in the past. Therefore,
10 we'd submit that in this particular case, the court did have a
11 less intrusive option which it had used in the past and, for
12 whatever reason, which maybe the Solicitor General will
13 explain, chose not to do that again but chose rather to focus
14 on the councilmen and the contempt power.

15 QUESTION: (Inaudible) in your argument you could say
16 normally you don't impose contempt except to the -- as a last
17 resort.

18 MR. HARMON: We agree with that, Your Honor.

19 QUESTION: And that is not a constitutional argument.
20 That is just an argument about what is the proper remedy.

21 MR. HARMON: We agree that the court could resolve the
22 case on the basis of the contempt power and the court's
23 supervisory authority over the, over the exercise of the
24 contempt power. That the principle is the least --

25 QUESTION: Thank you, Mr. Harmon, your time is expired.

1 Thank you.

2 General Starr.

3 ORAL ARGUMENT OF KENNETH W. STARR

4 ON BEHALF OF THE RESPONDENT

5 MR. STARR: Mr. Chief Justice, and may it please the
6 Court:

7 Not long before this lawsuit in Yonkers was filed,
8 Justice Lewis Powell, writing in dissent in the Columbus, Ohio
9 School Desegregation case, issued a warning to federal judges
10 across the country. He warned that in cases involving the
11 elimination of racial discrimination, of eradicating racial
12 discrimination roots and branch, that federal judges would
13 confront situations in which local elected authorities would
14 seek to abdicate their responsibilities. They would welcome
15 judicial activism, Justice Powell's words, rather than face up
16 to the politically difficult and sensitive task of remedying
17 discrimination, of upholding the Constitution of the United
18 States.

19 In this case, Judge Sand, affirmed by an able and
20 unanimous court of appeals, presided over the liability phase
21 of these proceedings and then the equitable remedial
22 proceedings with great patience, as the court of appeals
23 expressly stated, with great courage. In the face of the most
24 difficult and daunting and at times threatening circumstances,
25 the judge never flinched from doing his duty.

1 But he also refused to permit the elected authorities
2 of Yonkers from doing their duty. He refused specifically,
3 even though he considered it, he refused to establish himself
4 as the housing czar of Yonkers by creating an affordable
5 housing commission, which he considered, but which the city
6 objected to, the city council members objected to. He thought
7 the better of it. He also declined to deem legislation
8 passed. He had indeed in the past taken certain steps with
9 respect to deeming certain acts to be done, the Rule 70
10 approach, which --

11 QUESTION: Has the judge now done that, though, to a
12 degree?

13 MR. STARR: He has done it with respect, Justice
14 O'Connor, to specific sites in the public housing arena.
15 There are two aspects of the remedy, it is important for the
16 Court, as I am sure it appreciates, to bear that in mind. The
17 first part of the remedy, public housing, is not involved in
18 this case. With respect to that, the judge has, indeed, from
19 time to time deemed specific steps to have been taken. But he
20 said in this instance, involving affordable housing, this is
21 different. This is such an important and pivotal piece of
22 legislation that I am not going to deem the legislation
23 passed.

24 I invite the Court's attention to the colloquy that is
25 set forth at page 357 of the Joint Appendix, where Judge Sand

1 said I have a sense of what my powers are, but also what is
2 appropriate. If I knew I never had to come back to the city
3 council for any further action, then I might very well be
4 willing to deem the legislation passed. I believe I do have
5 that in my power. But I know, given the political structure
6 of Yonkers, that I will have to come back to them, and thus I
7 want to consider stripping them entirely of their authority by
8 creating the Affordable Housing Commission, reporting to the
9 court.

10 It was that that the United States objected to, that
11 the city council members objected to and that the city
12 objected to. On what grounds? The grounds was, do not strip
13 us of the power that we enjoy under state law. And he
14 declined to do that. He thought the better of it, and he said
15 I am, therefore, going to simply hold the city to its
16 obligations.

17 And what were its obligations? The obligations were
18 set forth --

19 QUESTION: This was after the, after the consent decree
20 had been entered?

21 MR. STARR: Yes, Your Honor. The consent decree was
22 entered in January of 1988. The colloquy of which I am now
23 speaking took place in June of 1988. These contempt
24 proceedings occurred the following month.

25 QUESTION: Were the city councilmen represented

1 personally in that colloquy?

2 MR. STARR: They were not in that colloquy, but the
3 attorney for the city, Justice Kennedy, represented that he
4 was, in fact, conveying to the court the strongly felt views
5 of the city council. He didn't enumerate or identify specific
6 members, but he was speaking for the city council in that
7 particular colloquy.

8 QUESTION: Are, are you saying that that colloquy and
9 the rest of the proceedings in the district court are
10 tantamount to a finding that all other remedies were
11 inadequate?

12 MR. STARR: Well, I think this judge reached the stage
13 where he determined that there had to be obedience to law, and
14 that any other remedy was, in fact, unduly intrusive with
15 respect to principles of federalism and comity that this Court
16 has mentioned and emphasized time and again -- Rizzo against
17 Goode, Milliken v. Bradley One -- concerns about unnecessarily
18 stripping the elected authorities of their power. And he
19 chose instead to do what judges have done from time
20 immemorial, which is to hold them to their obligation, to
21 their duty under the consent decree and under the housing
22 remedy order.

23 QUESTION: General Starr, your opponent made the
24 statement in his argument that no federal court has ever
25 before required legislators to -- cast their votes in a

1 particular way. Now, what you just said makes me think
2 perhaps you disagree with him. Do you know of cases where
3 legislators have been required to vote in a particular --

4 MR. STARR: Oh, yes, Your Honor, Mr. Chief Justice, at
5 pages 30 to 32 of our brief we enumerate a number of cases
6 arising under the contract clause that go back to the mid-19th
7 century, where federal courts, affirmed by this Court,
8 directed local legislative bodies to take specific action to
9 levy a tax increase. This Court, in an opinion by Justice
10 Black, who was a friend of federalism, said in the Griffin v.
11 County School Board case --

12 QUESTION: That is dicta though, in the Griffin case.

13 MR. STARR: My brethren would agree with you, Mr. Chief
14 Justice. I, I must respectfully suggest that, in that case,
15 the court was speaking to the federal judge and telling the
16 federal judge what was permissible or impermissible. And what
17 the court said in language which is quite clear is that the
18 federal judge, if it is necessary, can direct them, them being
19 the elected board of supervisors of Prince Edward County,
20 Virginia, to exercise the power that is theirs. That's what
21 is --

22 QUESTION: That would convert a great deal of dicta
23 into holding, if everything a court says that might be done in
24 a case be -- becomes a holding. I thought a holding was
25 something that the facts of the case required the court to

1 decide it.

2 MR. STARR: I do not quarrel that it was not the
3 holding in the, in the case, Mr. Chief Justice, but --

4 QUESTION: (Inaudible) do you mean holding in dicta
5 now?

6 (Laughter)

7 MR. STARR: I would -- I, I would certainly say that if
8 the court has given guidance to a district judge as to what
9 can be done, that that guidance should be taken very
10 respectfully and very seriously.

11 QUESTION: Well, that may be, but of course, in that
12 case the -- it didn't really say that legislators could be
13 required to vote for any specific piece of legislation. They
14 just had to -- they just had to get with it and provide for
15 the reopening of public schools.

16 MR. STARR: That is true.

17 QUESTION: So they could have done that in all sorts of
18 ways, I suppose.

19 MR. STARR: Well, it was a bit more -- I don't dwell on
20 that one sentence, but it was rather specific, Justice White,
21 with respect to directing them to levy a tax increase. That
22 is fairly specific. It doesn't tell them how much, but it
23 does say you can direct them to levy a tax increase. But
24 there are other instances in which federal courts have, with
25 this Court's approbation, ordered the enactment of a

1 particular kind of statute or plan, particularly in the Voting
2 Rights Act area and with respect to reapportionment. This
3 Court's decision in Wise against Lipscomb, which is cited in
4 the briefs, is quite clear that at least as a temporary
5 remedy, the courts can in fact impose a specific
6 reapportionment plan on a state or local jurisdiction.

7 In the fair housing area --

8 QUESTION: But now does -- does that plan -- when a
9 court says that under their -- Voting Rights Act this plan is
10 going to obtain at least temporary -- does that require
11 enactment by the legislative body?

12 MR. STARR: In that instance it does not. That would
13 be an imposition by, by --

14 QUESTION: Well, then that isn't a very good example,
15 is it?

16 MR. STARR: -- by, by the court. But it is, in fact --

17 QUESTION: That isn't a very good example, is it?

18 MR. STARR: It is not a particularly good. However, it
19 is a, it is a temporary expedient prior to the legislative
20 body enacting its own plan.

21 QUESTION: That's -- that's more like -- if the court
22 here had said I deem this legislation to be in effect. That,
23 that is closer to this Voting Rights example.

24 MR. STARR: I, I would respectfully disagree with that.
25 If one looks at the precise terms of the order, the order of

1 July 26, 1988. That order did not say here is an ordinance
2 which you must enact, very specifically. You cannot change
3 anything; you just must vote to enact it. It, rather, used --
4 the language of that order was tied to the language of the
5 consent decree itself. Section 17 of the consent decree put
6 an obligation on the city to enact a legislative package that
7 would accomplish a variety of things in order to make
8 affordable, assisted housing available for lower-income and
9 middle-income residents of Yonkers.

10 It was a broad mandate that was vested in the city
11 council, directed to the city council, which they could have
12 complied with. As the court of appeals specifically said,
13 they would have been in compliance with this order if in the
14 city council meeting they had come forward in good faith to
15 the judge and said we now have alternative B. It accomplishes
16 what we agreed to accomplish. Here is the alternative. But
17 they did not.

18 A message I would like very much to leave for the Court
19 is they simply chose not to obey. And furthermore, they said
20 we don't have to obey. And what this case is ultimately about
21 is the power of a court to direct compliance with its orders,
22 consistent with principles of federalism and comity.

23 QUESTION: Well, General Starr, I guess no one here is
24 disputing that the court can do something to compel
25 compliance. I didn't hear the attorney for the Petitioners

1 argue to the contrary. I think it is more a question of
2 whether the something can include a direct order to the
3 legislators to vote a certain way. What is the closest case
4 authority you would cite to us for that proposition over a
5 claim of legislative immunity?

6 MR. STARR: Well, if I may, the authorities I would
7 principally rely upon are the authorities from the 19th
8 century and the early 20th century, which in case --

9 QUESTION: Was there a claim there, to your knowledge,
10 of legislative immunity that was asserted?

11 MR. STARR: There was none. I would respectfully urge
12 the Court to reject the applicability of that doctrine here.
13 Immunity, which is their principle, not their sole claim,
14 immunity has to do with being sued: being sued for money
15 damages, being sued for injunctive relief. It does not have
16 to do with one's obligation under law to comply with law --
17 lawful orders of the district court.

18 QUESTION: Can we order Congress to enact a statute,
19 General Starr?

20 MR. STARR: We could not by -- the courts could not by
21 virtue of the speech or debate clause.

22 QUESTION: Do you think the court --

23 QUESTION: But you just said -- you just said no. You
24 said the speech only has to do with money damages, or -- oh,
25 the immunity only has to do with -- I see. I'm sorry, I

1 thought you were talking about speech or debate.

2 MR. STARR: All right. They are relying on common law
3 immunity. They want this Court to create doctrine that will
4 protect them as a shield against lawful orders of a federal
5 court.

6 QUESTION: Suppose the speech or debate clause didn't
7 exist. Do you think that's the only obstacle? You think a
8 court could direct the Congress to enact a particular statute,
9 it is only the speech or debate clause?

10 MR. STARR: Absolutely not.

11 QUESTION: You think the separation of powers --

12 MR. STARR: The separation of powers concerns would be
13 grave by the judiciary directing a coordinate branch to take a
14 specific action. It, it -- I would not rule it out, but it
15 would raise the gravest separation of powers question, whereas
16 --

17 QUESTION: One, one last step, it, it -- you know, they
18 refer to the unification of two powers within one branch is
19 the definition of tyranny, you think it would be okay for the
20 court to unite within itself judicial and legislative powers
21 where those legislative powers are federal, but it would be
22 okay for a court to unite within itself judicial and
23 legislative powers, so long as those legislative powers are
24 only state legislative powers --

25 MR. STARR: I think to --

1 QUESTION: -- which are probably more extensive than
2 federal powers.

3 MR. STARR: -- to the contrary, again.

4 QUESTION: Doesn't that scare you a little bit, too?

5 MR. STARR: It gives me great pause because of
6 principles of federalism. I would be gravely concerned with a
7 federal court order to a state legislature. It is not unheard
8 of, and it is done, but that raises more profound questions of
9 federalism and comity than it does to a local council which
10 does not even enjoy the state constitutional immunity that
11 exists by virtue of the New York State Constitution.

12 QUESTION: I am not worried about federalism. I am
13 worried about, about what a court is and what a court can do.
14 Can a court act as a legislature, state or federal, it doesn't
15 matter to me.

16 MR. STARR: It is more troubling and it is, indeed, in
17 this case, one of the reasons that the district court said
18 instead of my acting as a legislature as they now suggest he
19 should have done, he said instead I am going to use a
20 traditional power, the contempt power, to enforce an
21 obligation and which will, in fact, result in no restructuring
22 whatsoever of the local governmental apparatus in Yonkers.

23 That, in my judgment, was a very restrained remedy and,
24 indeed, this Court, Justice O'Connor in her dissent, in the
25 Paradise case joined by the Chief Justice and Justice Scalia,

1 suggested that contempt was a less-intrusive or less-heroic
2 remedy if you will than imposing a regime of racial
3 preferences. Civil contempt, that is important; this is not a
4 criminal contempt case. But civil contempt is a time honored,
5 as this Court well knows, traditional and indeed everyday way
6 that courts go about enforcing their orders.

7 QUESTION: Well, if we concede, General Starr, that the
8 Constitution of the United States, because of its separation
9 of powers scheme would prevent our ordering Congress from
10 voting for a certain act, that is not because it is just a
11 quirk of the constitutional structure. It is because there
12 are some very basic concerns we have about demarcation of the
13 lines of political responsibility. And I am not sure why
14 those same concerns are not abundantly present here, and why
15 just as a matter of controlling the court's discretion as
16 being a wise or an unwise use of discretion, all of those
17 considerations aren't applicable to the city council.

18 MR. STARR: Justice Kennedy, those concerns are in fact
19 raised by Mr. Harmon's suggestion as to what the court should
20 have done. He would now suggest that the court should have in
21 fact enacted that legislation itself, as opposed to --

22 QUESTION: But if, if that had happened the record at
23 least would have been clear as to how the legislation was
24 created, what its authority was, what its source was.

25 But what you are suggesting completely blurs the line

1 of political responsibility as we commonly understand it. It
2 would not be at all clear to the people of Yonkers that their
3 legislators voted for the action because the legislators
4 approved of it or because they were compelled to do so.

5 MR. STARR: Justice Kennedy, I think the court of
6 appeals responded to that concern, although not in those
7 terms. But it made it quite clear that this avenue of using
8 the contempt power to require them to fulfill their
9 obligations permitted the political process to run its course,
10 for them to have a city council meeting, to have a hearing, to
11 have thoughtful suggestions, to have alternatives advanced
12 that --the council --

13 QUESTION: But it is a charade because the outcome is
14 foreclosed.

15 MR. STARR: The outcome in a broad sense is foreclosed
16 with respect to the requirement to enact an ordinance that
17 accomplishes what Part 6 of the Housing Remedy Order and
18 Section 17 of the consent decree -- remember, the consent
19 decree was final, they sought to vacate it, that motion was
20 denied. That is final, that is a final judgment of the court.

21 QUESTION: I just can't understand how it's giving
22 greater latitude to the council to send it back to them,
23 telling them how to vote than it is to go ahead and put it
24 into effect. I mean, that is just hard for me to grasp.

25 MR. STARR: It means by virtue of what the court did

1 that it did not raise those profound questions of the nature
2 of the power that is being exercised. That's point one, which
3 isn't responsive, but this I hope will be responsive. What
4 the court of appeals said was that the very purpose of the
5 state notice and hearing requirement was to give the city
6 council an opportunity to meet in the city hall of Yonkers,
7 not for Judge Sand in chambers to say here is the ordinance
8 that I want to be in place and I hereby enact it myself or I
9 nominate an individual or entity to enact this ordinance. He
10 said rather, let the political process run its course, but
11 their discretion. I, I --

12 QUESTION: So long as it reaches a foreordained
13 outcome.

14 MR. STARR: Foreordained in the sense, I must agree
15 with that, with respect to enacting an ordinance that fulfills
16 the purposes of the consent decree. But there would be an
17 enormous amount of running room for the -- for the council to
18 come back to the judge and to say judge, who was indeed the
19 soul of patience throughout this, we have not been obedient in
20 the past. Indeed we have been flagrantly contumacious, as the
21 city itself in its brief admits, but we have decided to do our
22 duty. Here is our alternative --

23 QUESTION: Well, I suppose that option is always open
24 to them.

25 MR. STARR: That option is, indeed, always open to

1 them, but they have not sought to avail themselves of that
2 option.

3 QUESTION: I take it the liability of the city and the
4 contempt against the city is a fore -- foregone conclusion,
5 that the city's liability is settled, is that it?

6 MR. STARR: That is true.

7 QUESTION: And of course, the running fine against the
8 city put unbearable pressure on the city council, I suppose.
9 And one of them finally reacted to it.

10 MR. STARR: That is true.

11 QUESTION: And I suppose that, that -- that, is
12 arguably in your favor, I suppose.

13 MR. STARR: Well, I would think it is in my favor. It
14 is used against me by my colleagues on the other side to say
15 look, the contempt citation against the city itself was
16 efficacious. On September 9, 1988, once this Court denied the
17 stay, the ordinance was indeed passed, but only at an expense
18 to the city, the people of Yonkers, ultimately the victims of
19 discrimination themselves. And this Court has made clear that
20 in the equitable remedial setting the qualities of mercy and
21 practicality are pivotally important.

22 This judge knew that in order for housing, this is
23 different than just admitting James Meredith to the University
24 of Mississippi. As important as that was and as difficult as
25 that was, this is getting housing built that is market rate

1 development housing that requires a panoply of changes in
2 zoning laws, tax laws --

3 QUESTION: Doesn't a court have to say once in a great
4 while, Mr. Starr, this is just -- we can't bite off that much?
5 Just because there is so much, as you say, getting one
6 individual admitted to a university is quite a different
7 universe than the sort of thing the district court was -- was
8 going to undertake here. Now, aren't there -- does the law
9 say that he must be careful about what he does, but come what
10 may, he must -- he may accomplish this result whatever
11 happens?

12 MR. STARR: Well, in this instance --

13 QUESTION: Or does it not say that there are some cases
14 he is going to stop short and say the powers of the -- the
15 equitable powers of this Court just do not encompass going
16 that far, even though we cannot fully remedy the, the
17 violation?

18 MR. STARR: I think the principles of equity constantly
19 must guide the judge. I do not think, however, that the judge
20 should in fact say, absent the most extraordinary
21 circumstances, that even though there is a violation of the
22 Constitution, a proven violation of the Constitution, and I
23 know that there is a remedy that would be effective, that it
24 is too difficult, it's too divisive, it's too sensitive, and
25 therefore, I will not as a matter of discretion remedy

1 discrimination.

2 The underlying duty of the court is to remedy the
3 discrimination. The Court cannot do the impossible --

4 QUESTION: Fiat justitia, ruat coelum. Is that what
5 you stand for, that no matter what --

6 MR. STARR: I beg your pardon?

7 (Laughter)

8 QUESTION: Let there be justice, though the heavens
9 fall.

10 MR. STARR: Not at all. We never reached, my reading
11 of this record suggests that we never reached the point of
12 impossibility, and, indeed, the remedy is moving forward with
13 the political structure of Yonkers intact.

14 QUESTION: I take it you would say that if this -- if
15 the remedy that the judge employed is beyond the power of a
16 court, or it shouldn't be -- he shouldn't have issued that
17 kind of remedy, that then the enacting of an ordinance should
18 also be beyond the power.

19 MR. STARR: Quite right. The judge may not, this Court
20 has stated most recently in the Pangilliman case, authored by
21 Justice Scalia, that the powers of equity are broad, but they
22 are not so broad that one can run afoul of a --of a statute,
23 much less a constitution, but --

24 QUESTION: He didn't have to enact an ordinance. Isn't
25 the only thing he had to do was what courts always do, what,

1 what John Marshall did in Marbury versus Madison: ignore a
2 law that is not constitutional. He could have simply ignored
3 the existing ordinance and said any housing that goes forward
4 in the face of this ordinance, which is obstructing what is
5 constitutionally required and, therefore, is unconstitutional,
6 can simply ignore the ordinance. He doesn't have to write a
7 new one.

8 MR. STARR: Mr. Harmon would have you believe that the
9 only ordinance of concern was the zoning ordinance; that --
10 that's, with all respect, completely wrong. The housing
11 remedy order, and I invite the Court's attention to Part 6 of
12 the original Housing Remedy Order, and then Section 17 of the
13 consent decree. This is new law. It is not just let's
14 override the zoning statutes or another ordinance of Yonkers.
15 This is new law to create something that does not exist.

16 QUESTION: What -- what was the -- what was Yonkers
17 doing that was unconstitutional and which this was remedying?
18 What, what was the unconstitutional act that this was
19 remedying?

20 MR. STARR: The forbidding, or the intentional
21 discrimination against individuals on grounds of race with
22 respect to housing, housing, both public housing and market-
23 rate assisted housing. This -- the issue that has come before
24 us, is not public housing. This is market-rate assisted
25 housing, which is eventually going to be built by private

1 developers who will have a certain percentage of those
2 apartments or townhouses devoted to, to lower-income and
3 middle-income housing. That is complicated stuff.

4 QUESTION: It is complicated stuff, but, but the only,
5 the only whip that the city had over the whole thing was the
6 zoning. And if the court just said you are using that -- you
7 are using that tool in an unconstitutional fashion, we will
8 simply disregard the zoning law. Builders can go ahead in, in
9 disregard of the zoning law. That is classic. That is the
10 classic way in which courts handle things of this sort.

11 MR. STARR: I have to disagree. That was not all that
12 the affordable housing ordinance did. It created and
13 facilitated a complex set of what were called mandated
14 incentives: here are some attractions for private developers
15 to go out and do something that they may not otherwise do.
16 That is different --

17 QUESTION: Tax incentives -- tax incentives included?

18 MR. STARR: There were tax incentives, tax abatements,
19 and the like, but there were a series of, the term used in
20 Section 17 is mandated incentives. A very complicated package
21 was going to have to put together.

22 QUESTION: Well, that may well be, but that was not
23 unconstitutional. I mean, it seems to me if, if you ask what
24 is the minimal unconstitutional action that had to be
25 eliminated by the court, it was simply preventing the

1 buildings from going ahead through the, through the zoning
2 law, wasn't it?

3 MR. STARR: I think we have moved beyond that, Justice
4 Scalia.

5 QUESTION: Oh, I am sure you have, but that is the
6 problem.

7 MR. STARR: No, the point that I have moved to is the
8 capacity of the court to enforce an obligation, a decree.
9 They had agreed to the decree. This was an obligation. The
10 obligation was not we will do that which is minimally
11 necessary in order to eliminate unconstitutional
12 discrimination. That was not the obligation. The obligation
13 was set forth in the terms of a consent decree, Section 17 put
14 this affirmative obligation on them to enact a very
15 comprehensive --

16 QUESTION: All right, but at this stage we are no
17 longer talking about the glorious enforcement of the
18 Constitution by a district court, but we are simply talking
19 about how far a district court can go in order to enforce,
20 enforce an agreement that isn't required by the Constitution.

21 MR. STARR: To enforce its own judgment, which is
22 designed to eliminate racial discrimination by remedy --

23 QUESTION: It may be, but if you don't enforce it to
24 the hilt, and if you say gee, our powers just don't enable us
25 to enforce it to the hilt, the conclusion you come to is not,

1 and therefore the constitutional violation must endure, which
2 is a scary conclusion ever to have to come to.

3 But you, you acknowledge that you can eliminate the
4 constitutional violation at least, although perhaps you cannot
5 achieve complete compliance with the -- with the agreement
6 that the city entered into. You could -- you could achieve --
7 eliminate the constitutional violation simply by ignoring,
8 saying we will take no account of this unconstitutional zoning
9 ordinance. That would be enough.

10 MR. STARR: The zoning ordinance, I, I, I hate to be
11 stubborn on the point, but it wasn't the zoning ordinance that
12 was unconstitutional. It was we must build in the other three
13 quadrants of Yonkers, at least as the goal, 800 assisted
14 housing units, and we are going to have to take a lot of steps
15 in order to do that; zoning changes are only part of it. The
16 zoning didn't say thou shalt have no assisted housing here.
17 That wasn't the problem.

18 The problem was, and everyone agreed that this was the
19 problem: there had to be a complicated set of incentives
20 developed so that private developers would want to come
21 forward and build housing that lower-income people to -- could
22 go into. I think, with all respect, it fails to appreciate
23 the complexity of this record by saying there is simply one,
24 or even two, ordinances that could have been overridden. I
25 quite agree --

1 QUESTION: I think you've answered the question,
2 General Starr.

3 MR. STARR: I thank the Court.

4 CHIEF JUSTICE REHNQUIST: The case is submitted.

5 (Whereupon, at 3:00 o'clock p.m., the case in the
6 above-entitled matter was submitted.)

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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:

No. 88-854 - HENRY G. SPALLONE, Petitioner V. UNITED STATES, ET AL.;

No. 88-856 - PETER CHEMA, Petitioner V. UNITED STATES, ET AL.; and

No. 88-870 - NICHOLAS LONGO AND EDWARD FAGAN, Petitioners V. UNITED STATES, ET AL.

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

BY Lena M. May

(REPORTER)

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