

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1581
TITLE ANTONE OLIM, ET AL., Petitioners
v.
DELBERT KAAHANUI WAKINEKONA
PLACE Washington, D. C.
DATE January 19, 1983
PAGES 1 thru 54



ALDERSON REPORTING

(202) 628-9300
440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - -x

3 ANTONE OLIM, ET AL., :

4 Petitioners, :

5 v. : No. 81-1581

6 DELBERT KAAHANUI WAKINEKONA :

7 - - - - -x

8 Washington, D.C.

9 Wednesday, January 19, 1983

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 11:47 o'clock a.m.

13 APPEARANCES:

14 MICHAEL A. LILLY, ESQ., First Deputy Attorney General of
15 Hawaii, Honolulu, Hawaii.

16 ROBERT GILBERT JOHNSTON, Chicago, Illinois.

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
MICHAEL A. LILLY, ESQ.	3
ROBERT GILBERT JOHNSTON	25
MICHAEL A. LILLY	50

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next in Olim against Wakinekona.

4 Mr. Lilly, I think you may proceed whenever
5 you are ready.

6 ORAL ARGUMENT OF MICHAEL A. LILLY, ESQ.

7 MR. LILLY: Mr. Chief Justice, and may it
8 please the Court, the question presented by this case is
9 whether state-created pretransfer procedures prior to an
10 interstate transfer of an inmate implicate a liberty
11 interest protected by the Fourteenth Amendment.

12 We believe that the Court should not so
13 broaden the concepts of the due process clause to so
14 extend it to mere procedures prior to interstate
15 transfer where there is no underlying substantive
16 liberty interest at stake.

17 Now, Delbert Kaahanui Wakinekona is a maximum
18 control, maximum security inmate of the Hawaii prison
19 system. He is serving multiple terms for crimes
20 including life without parole for murder in 1970. He
21 was in 1976 an inmate of the maximum control unit of the
22 Hawaii State Prison. The maximum control unit was a
23 prison within the Hawaii State Prison System, a small
24 prison with its own programs, with its own walls within
25 the institution to house maximum security type inmates.

1 On August 2, 1976, there was a series of
2 hearings conducted by what is called the Program
3 Committee, which is not unlike the type of committees
4 you see in almost every prison system throughout the
5 land, to ascertain why the programs within the maximum
6 control unit had failed.

7 Mr. Wakinekona, along with every other inmate
8 of the maximum control unit, were interviewed.
9 Subsequently, the same committee provided notice to Mr.
10 Wakinekona that within five days they would hold a
11 hearing to determine whether his classification within
12 the system should be altered, and whether or not he
13 should be transferred to another part of the prison
14 system, another prison within Hawaii, or transferred
15 interstate.

16 A hearing was held before this committee. He
17 was represented by an attorney. He was provided
18 opportunity to respond to all of the provisions set
19 forth in the notice. He was advised why they were
20 considering certain actions about him.

21 And ultimately, after the hearing was
22 concluded, he received a notice of recommendations on
23 his security classification that it should remain as
24 maximum, that he continued to be a security risk within
25 the Hawaii prison system, and that because of major

1 changes that were going to be undertaken by the system,
2 and that is, to terminate the maximum control unit,
3 pending construction of the State of Hawaii's new master
4 plan, master correctional plan, that because there would
5 be no programs available in Hawaii for maximum control
6 inmates, there would be no institution set up for
7 maximum control type inmates, that they recommended that
8 Mr. Wakinekona be transferred to a mainland facility.

9 That recommendation was followed by the
10 administrator, the final decision-maker under Rule 4 of
11 our rules, Mr. Antone Olim, who made the decision to
12 transfer Mr. Wakinekona to Folsome Prison in
13 California --

14 QUESTION: Mr. Lilly, in reading the Ninth
15 Circuit's opinion, I had some difficulty, because I
16 couldn't find any place where the rules were set out.
17 Can you tell me somewhere in the briefs or appendix
18 where these rules they were talking about are set out?

19 MR. LILLY: The rules are attached in the
20 Joint Appendix. They are attached to the complaint as
21 an exhibit.

22 QUESTION: Thank you.

23 MR. LILLY: And if you will read in the --
24 Those rules provide two basic processes that are
25 addressed. There is an adjustment process in Hawaii for

1 your traditional disciplinary type actions, where the
2 committee makes actual decisions to punish inmates based
3 upon substantial evidence of rule violations.

4 That is to be contrasted with the Program
5 Committee process, which is under the classification
6 process, where they review every inmate within the
7 system on an ongoing basis to determine where that
8 person best fits within the prison system, to determine
9 what kind of classification he should have, and where he
10 should be housed within the system. It is a continuing
11 -- It is described, the classification process is
12 described in its purpose as a dynamic process that
13 provides a continuing evaluation of every inmate based
14 upon a multiplicity of factors, one committed basically
15 to the discretion of the officials.

16 QUESTION: What happens when he goes to
17 Folsome?

18 MR. LILLY: When Mr. Wakinekona goes to
19 Folsome, then he comes under the programs and the
20 operation of the Folsome prison system.

21 QUESTION: Which wouldn't be as present
22 inmates.

23 MR. LILLY: He would be the same as a Folsome
24 inmate if he went to Folsome, as he did.

25 QUESTION: And another thing is, how does his

1 family visit him in Folsome?

2 MR. LILLY: There is no question that when you
3 have an interstate transfer, that it makes it more
4 onerous.

5 QUESTION: This is a little more than a normal
6 interstate transfer. Like for example if you transfer
7 somebody from Newark to New York City, that is crossing
8 a river, and this is crossing a body of water, but it is
9 not a river.

10 MR. LILLY: I agree with you that it presents
11 different situations, except it is not unlike, for
12 example, the Court's consideration in the Howe versus
13 Smith case last session, in which an inmate was
14 transferred from Vermont to the federal prison in
15 Georgia. It is also not unlike --

16 QUESTION: The Pacific Ocean isn't between
17 Vermont and Georgia.

18 MR. LILLY: It's -- if I may say -- I agree
19 with that. We have a much more difficult opportunity
20 for inmates to -- for visitation interstate, but it is
21 also not unlike this Court's reversal, vacation in Howe
22 versus Maderis last session, in light of Howe, in which
23 three of our inmates had been transferred to a federal
24 prison system in Marion, Illinois.

25 It is not unusual that inmates will be

1 transferred interstate. It is not unusual that an
2 inmate from Alaska would be transferred anywhere within
3 the United States. It is not unusual for Hawaii inmates
4 to be transferred interstate. It is within the
5 contemplation of the sentence of --

6 QUESTION: Well, it always involves a
7 balancing of all the interests, does it not?

8 MR. LILLY: It is a very delicate balancing.
9 We don't do it so often, because it is very expensive,
10 but when we do it, we do it because there are necessary
11 considerations, and in this case, with Mr. Wakinekona,
12 there would be absolutely no place for him within the
13 Hawaii prison system with the termination of the maximum
14 security unit. He would basically be placed in a cell,
15 and would have no opportunity for any kind of
16 programming. Once his status was remained at maximum,
17 there was simply no place for him.

18 QUESTION: Mr. Lilly, what specific rules were
19 not followed by the state in connection with the process
20 of this transfer? Was it Rule 4-2, on the composition
21 of the program committee?

22 MR. LILLY: Apparently, what is alleged, that
23 it was -- the composition is the -- claiming that Mr.
24 Wakinekona did not have an impartial tribunal.

25 QUESTION: Is that the only alleged failure to

1 follow the rule?

2 MR. LILLY: I think that's probably the
3 basic --

4 QUESTION: As you understand it?

5 MR. LILLY: As I understand it. If you read
6 the complaint, he doesn't even contest the basis for the
7 decision. There is no allegation anywhere in this case
8 about --

9 QUESTION: But as you understand it, the sole
10 defect here, if there is one, would be in the
11 composition of the program committee that --

12 MR. LILLY: Yes, Justice O'Connor.

13 QUESTION: -- provided the hearing. And do
14 you agree that under Hawaii's adopted rules, that the
15 transfer here would fit the definition of a grievous
16 loss?

17 MR. LILLY: For purposes of this argument, we
18 will.

19 QUESTION: May I ask just a question about
20 your prisons? Where was he incarcerated before his
21 transfer to California?

22 MR. LILLY: He was transferred -- He was
23 housed in the Hawaii State Prison.

24 QUESTION: Which is where, just out of
25 curiosity?

1 MR. LILLY: Just outside of Honolulu.

2 QUESTION: It is on Oahu?

3 MR. LILLY: It is on Oahu. It is basically in

4 an industrial area, and within the prison system there

5 is the maximum control unit, which no longer exists

6 today.

7 QUESTION: Do they have similar institutions

8 on other islands in the state?

9 MR. LILLY: Every island has an institution,

10 basically medium security facilities for people who live

11 in that locality.

12 QUESTION: I see. You haven't had this kind

13 of problem with intra-island transfers? Nobody has been

14 contesting your right to move an inmate from one island

15 to another within the state?

16 MR. LILLY: We have had a number of contests.

17 We have had contests about intrastate transfers.

18 QUESTION: I see.

19 MR. LILLY: And a number of state actions

20 contesting interstate transfers. There were a number of

21 transfers in this period of time when we were reducing

22 the -- we were eliminating the maximum control unit at

23 that time, not unlike Vermont in the Howe case, where

24 they eliminated their maximum control facility.

25 The -- By the way, as I understand it, Mr.

1 Wakinekona at this time is in Vaccaville Medical
2 Facility, and is still in California.

3 Mr. Wakinekona filed suit in federal court in
4 Honolulu for money damages and a declaration that his
5 constitutional rights were violated. He does not allege
6 in the complaint that the decision itself to transfer
7 him to the mainland was in any way wrong. He apparently
8 contests actually the composition and the process set up
9 in our procedures prior to interstate transfer before
10 the Program Committee.

11 He alleges in his complaint and in a letter
12 that he was transferred from one hole to another, only a
13 larger one, but he does not allege in any respect that
14 the conditions of his confinement were materially
15 different between the Hawaii system and the mainland
16 system.

17 The Ninth Circuit reversed the District
18 Court's decision that on the face of his complaint he
19 did not allege a liberty interest protected by the
20 Fourteenth Amendment. The Ninth Circuit held in a two
21 to one opinion that the procedures, the detailed
22 procedures here alone created a constitutional right to
23 due process, that it implicated a liberty interest.

24 It did so in the face of an opinion rendered
25 by the Hawaii Supreme Court which interpreted this

1 particular rule, Lono versus Ariyoshi, which is attached
2 to the petition for certiorari. The Hawaii Supreme
3 Court specifically held that Rule 4 contained no
4 standards, contained no limitations on discretion, was a
5 mere procedural rule, and if you read it carefully, you
6 have to come to the conclusion that the Supreme Court is
7 saying that Mr. Wakinekona had absolutely no
8 expectation, reasonable or otherwise, except for a
9 unilateral one, in Hawaii laws, in Hawaii regulations,
10 to remain in the Hawaii prison system, that the prison
11 system has the absolute discretion, consistent only with
12 constitutional standards, to transfer inmates to the
13 mainland.

14 That is, that the administrator can transfer
15 them for any constitutionally permissible reason. Now,
16 the liberty interest --

17 CHIEF JUSTICE BURGER: We will resume there at
18 1:00 o'clock, Mr. Lilly.

19 (Whereupon, at 12:00 p.m., the Court was
20 recessed, to reconvene at 1:00 p.m. of the same day.)

21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Lilly, you may proceed.

ORAL ARGUMENT OF MICHAEL A. LILLY, ESQ. - CONTINUED

MR. LILLY: Thank you, Your Honor.

The due process claim raised by the Respondent in this case is grounded in whether he has a liberty interest to remain in the Hawaii prison system as contemplated by the due process clause of the United States Constitution, and implicit in the notion of due process is the freedom of restraint in any significant way, such as, for example, in this Court's on parole and early release, for example, in Wolff.

And from Roth on, this Court has said that we look to the nature of the interest, and not the weight, and that is where grievousness seems to come into play, as to whether that constitutes a basis for a liberty interest.

Now, in last term, and I think I misspoke earlier, the Howe case, Howe versus Smith, had a companion case. It was Hawaii versus Maderis, in which three Hawaii inmates were transferred to the federal system in Marion, Illinois, and it was -- the same issue was raised in that case as was raised in Howe, and in light of Howe, Hawaii versus Maderis was remanded.

1 There was no suggestion in those cases that an
2 interstate transfer was grievous in a constitutional
3 sense. Indeed, for purposes of arguing the grievous
4 aspect of due process, if it is -- has any vitality at
5 all after the Iago decision, and after the Meachum
6 decision, is that Wakinekona, Mr. Wakinekona would stand
7 in no different position in this case than if he were a
8 federal prisoner in Hawaii, and there being no federal
9 prison in Hawaii, he would have been transferred
10 interstate.

11 And Mr. Wakinekona is not irrevocably sent to
12 California. He still remains a Hawaii prisoner, and
13 under the Western Interstate Corrections Compact,
14 attached to our brief in this matter, he remains a
15 Hawaii prisoner, and he remains under the Hawaii
16 statutes and rules and regulations.

17 QUESTION: Mr. Lilly, what is the doctrine you
18 say you think has little vitality after Meachum?

19 MR. LILLY: The notion that grievous loss in
20 any way on its face implicates a liberty interest.

21 QUESTION: I think the decisions from this
22 Court, maybe some have avoided use of the term and some
23 haven't, perhaps just because of its vagueness, but in a
24 sense Hawaii has brought its problems on itself here. I
25 mean, these regulations one might think were perhaps

1 drawn by a social worker, but they do use the term
2 "grievous loss."

3 MR. LILLY: They were -- the rules are -- I
4 think it is probably a poor choice of words. It was in
5 some respects ambiguous, but at the time when these
6 rules and regulations were adopted, there was no
7 definitive ruling in a sense by this Court as to what
8 was or was not a grievous loss. Indeed, it seemed to be
9 going in the direction of grievousness as having some
10 kind of a liberty triggering process, and I think Hawaii
11 had that in mind when that -- those words were
12 utilized.

13 But even in Iago, it was decided that there
14 was no question that he suffered a grievous loss, but
15 that was not of a constitutional dimension. There is no
16 question that Mr. Wakinekona complains about being
17 transferred, but he doesn't complain about the decision
18 to transfer, and that doesn't necessarily implicate a
19 liberty interest.

20 QUESTION: Well, you say he complains about
21 being transferred, but he doesn't complain about the
22 decision to transfer.

23 MR. LILLY: About the actual decision. He
24 does not complain that the decision to transfer him was
25 incorrect in any material respect. He complains about

1 the processes, the procedures and the hearing before our
2 Program Committee, saying that that was incorrect, and
3 therefore his due process rights were violated.

4 QUESTION: How would you know what the result
5 would be before a different kind of a tribunal?

6 MR. LILLY: If -- in this particular case,
7 Hawaii has adopted rules and regulations to provide for
8 procedures, which gives him a modicum of process, but
9 has not said that Mr. Wakinekona has in any respect a
10 right to remain in Hawaii. He has no liberty interest
11 or entitlement to remain within the system, and
12 therefore due process, we contend, does not attach.

13 QUESTION: Is the right to have family visits
14 within liberty, do you consider?

15 MR. LILLY: I don't believe -- I don't believe
16 that that's before the Court, but I don't think that the
17 right to have family per se visit is necessarily a
18 constitutional right.

19 QUESTION: I said a liberty.

20 MR. LILLY: I don't think that the right to
21 have family visit is in itself a liberty, a freedom.

22 QUESTION: I didn't think so.

23 MR. LILLY: And our rules and regulations due
24 use the term "grievousness," but those are the state's
25 rules and regulations. They are not necessarily

1 intended to be of a constitutional dimension. It is
2 merely definitional for purposes of defining in what
3 situations it intends to have a procedure prior to
4 taking certain actions with respect to inmates, whether
5 they be deemed adverse to the inmate or even beneficial,
6 because transfers to the mainland in Hawaii can be made
7 for a variety of reasons that don't necessarily mean
8 that the inmate is a bad person, or violated some rule.

9 Indeed, in this case, if you read the
10 decision, the recommendation of the hearing body, they
11 did it basically for his benefit, because there would be
12 no programs available to this inmate in Hawaii. They
13 transferred him to the California system so that he
14 would have available to him programming that would not
15 be available to him in Hawaii.

16 QUESTION: I thought he was transferred
17 because he was such an unruly prisoner.

18 MR. LILLY: That is -- There are two parts of
19 the decision, the recommendation --

20 QUESTION: Well, give us both. Don't just
21 give us one.

22 MR. LILLY: What happened was that they were
23 evaluating in one respect his classification. They
24 found that because of his security risk, because he was
25 such an assaultive inmate -- he had threatened guards,

1 he was an escape risk, and since his conviction for
2 murder he had committed other crimes -- that his
3 classification within the system remained at maximum.

4 That being the case, they had no choice but to
5 recommend that he be transferred to the mainland,
6 because the programs that were available in the maximum
7 security unit in Hawaii would no longer be available
8 with the impending construction, and they transferred
9 him to Folsome for the purpose of benefitting him with
10 those programs. Now --

11 QUESTION: Benefitting him with those
12 programs?

13 MR. LILLY: That's right.

14 QUESTION: I suppose the alternative would
15 have been to put him in solitary confinement, create a
16 special cell somewhere and put him in solitary
17 confinement permanently.

18 MR. LILLY: That is exactly what we are faced
19 with in Hawaii in this period of construction. There
20 were a number of inmates transferred to the mainland
21 whose security classification remained at maximum.
22 Other inmates --

23 QUESTION: Are there any prisons -- You said
24 there were prisons on a number of the islands in the
25 chain. How many all together, roughly?

1 MR. LILLY: One on Kauai, one on Maui, and one
2 on the big island, Hawaii.

3 QUESTION: The big islands. Yes.

4 MR. LILLY: Now --

5 QUESTION: I have been bothered, and perhaps
6 my colleagues don't share this trouble, by the kind of
7 generality of the discussion in the Ninth Circuit's
8 opinion and a little bit by the character of the -- kind
9 of -- as opposed to focusing down on just what was
10 involved in this particular case.

11 As I understand it, reading the Ninth
12 Circuit's opinion, the prisoner complains that the panel
13 of the board or the board that made the recommendation
14 to transfer was biased, and your answer is that it
15 doesn't make any difference if it was biased?

16 MR. LILLY: We don't believe --

17 QUESTION: It doesn't give him any --

18 MR. LILLY: It doesn't make any difference.
19 It does not implicate due process. It is not bias of a
20 constitutional dimension. There is no hint in this
21 record at any time through even the discovery process or
22 any time that the committee itself was biased of a --
23 for unconstitutional reasons, such as religion or race
24 or anything of that sort.

25 QUESTION: But I thought his claim of bias was

1 just, it was the same tribunal that had had this
2 hearing --

3 MR. LILLY: Yes. Yes.

4 QUESTION: -- and they already knew more about
5 him than maybe he wanted them to know.

6 MR. LILLY: Well, the -- if you understand the
7 process of a classification within a prison system, you
8 will know that they have -- the same bodies will review
9 inmates periodically and on an ongoing basis, and they
10 become familiar with inmates in the system, and how
11 things are done, and this has a utility, because then
12 they can make a more informed decision about placement
13 of inmates.

14 It is not -- as our rules are defined,
15 impartiality means a person should not sit on the board
16 who is a witness to events or who is a charging person,
17 or somebody that is bringing this action before the
18 board. It is not impartial in any -- it doesn't mean
19 impartiality in any other sense. I mean, we would not
20 have --

21 QUESTION: In a juror sense.

22 MR. LILLY: In a juror sense or even in a
23 judge sense, because you are still going to have, in a
24 small prison setting, you are going to have the same
25 people come from time to time onto a committee, and we

1 would certainly not say in the rule that the board
2 should be a biased one.

3 QUESTION: Would you think there are any
4 senior staff members eligible to sit on this process who
5 would not generally know about this fellow's record as
6 an assaultive person?

7 MR. LILLY: It is impossible, and quite the
8 contrary, that it is important that they do know about
9 it. What we don't have -- All we had here was the same
10 board saw the same inmate twice, and this is the same
11 board that saw many inmates probably more than once, two
12 or three times, maybe even longer over a period of time,
13 and that in itself is not partiality as defined by our
14 rules. They did not initiate him coming before it.
15 They are not a charging body or anything of that sort.

16 Now, the right to due process appears to arise
17 pursuant to this Court's previous opinions either from
18 the Constitution itself or from state law. Now, we
19 submit for the reasons previously stated in our briefs
20 that there is no constitutional right not to be
21 transferred interstate.

22 QUESTION: But I still think that there is
23 some problem with the way you state the thing, and maybe
24 the fault isn't yours, but somewhere else down there.
25 Maybe the fault is mine. But I presume that even though

1 there is not any right to be free of an interstate
2 transfer, that is, the fact you are being transferred by
3 itself doesn't give rise to any constitutional claim, if
4 Hawaii regulations provide that you shall have a hearing
5 before you are transferred, and the -- it doesn't say
6 anything more than, you will just have a hearing.

7 MR. LILLY: That's right.

8 QUESTION: It doesn't require any finding of
9 fact or anything like that.

10 MR. LILLY: No.

11 QUESTION: But nonetheless, a hearing is
12 required, and you have a right to appear before them.
13 And if you could show that the board was in fact biased,
14 that is -- take an extreme case -- that the prison
15 administrator had paid one of the members of the board
16 \$100 to decide -- to vote to transfer this person, would
17 you say that didn't raise any constitutional claim?

18 MR. LILLY: That presents an entirely
19 different situation, but -- and it may have some
20 constitutional implications where you have that kind of
21 activity.

22 QUESTION: Well, I think what you are really
23 arguing is that there wasn't bias here.

24 MR. LILLY: Oh, I don't believe there is bias
25 at all, but I don't believe that every single violation

1 of a state regulation implicates some constitutional
2 right.

3 QUESTION: No. I think the decisions of this
4 Court support you in that, but I think if you have a --
5 you can have a constitutionally biased finder of fact
6 that passes on non-constitutional questions, and you
7 nonetheless might have a constitutional issue.

8 MR. LILLY: They may. There is no --

9 QUESTION: That wouldn't involve any --
10 wouldn't be based on any liberty interest created by
11 state law.

12 MR. LILLY: It would not.

13 QUESTION: That would be a -- you were denied
14 due process within the meaning of the federal
15 Constitution, I suppose.

16 MR. LILLY: It would not at all, in that
17 sense. It would not implicate a liberty interest, which
18 is the issue before the Court.

19 QUESTION: If it doesn't implicate a liberty
20 interest, why can't you be as biased as you want to be?
21 I mean, if you are not depriving the man of liberty, he
22 is not entitled to due process, is he?

23 QUESTION: It is a liberty interest under
24 state law, I said, but it might implicate a liberty
25 interest under the federal Constitution if you deprived

1 a person of -- or he imposed grievous loss through a
2 biased agency. But that isn't the claim in this case.

3 MR. LILLY: That isn't the claim here.

4 QUESTION: I guess the claim in this case is
5 that they failed to follow state law.

6 MR. LILLY: They violated the state law that
7 was provided, and I might say before I reserve the rest
8 of my time that this rule and regulation was not adopted
9 pursuant to the Hawaii Administrative Procedures Act, as
10 claimed in the brief for the Respondent. The Hawaii
11 Administrative Procedures Act under *Tai v. Chang*, which
12 is cited in the *Lono* versus *Ariyoshi* opinion, is
13 specifically exempted because the rules and regulations
14 of our Corrections Division involve mere internal
15 management of our prison institutions, and has under
16 that ground been held to be exempted from the APA. It
17 does not implicate the APA.

18 QUESTION: May I ask one other question?
19 Because I may have missed it before -- before we broke
20 for lunch. Did you agree that this transfer does
21 involve grievous loss within the meaning of your
22 regulation?

23 MR. LILLY: Well, let me see if I can make
24 that clear. I do not agree that this implicates
25 grievous loss as this Court may see it in the

1 constitutional sense.

2 QUESTION: My question is whether it involves
3 grievous loss within the meaning of your regulation.

4 MR. LILLY: Within this regulation, for
5 purposes of the argument, yes.

6 QUESTION: That is what I thought.

7 MR. LILLY: That this is a grievous loss as
8 the rule and regulation defines it.

9 QUESTION: Contemplates.

10 CHIEF JUSTICE BURGER: Very well.

11 Mr. Johnston.

12 Mr. Johnston, before you start, let me ask you
13 this. Suppose there were no regulations at all. He is
14 just in prison under a valid sentence, and then all the
15 other events took place. Is there any kind of -- is
16 there any constitutional right to any particular process
17 before he is transferred?

18 ORAL ARGUMENT OF ROBERT GILBERT JOHNSTON, ESQ.

19 MR. JOHNSTON: Your Honor, I believe under
20 Vitek we could establish a liberty interest under the
21 change in conditions. There are very substantial change
22 in conditions in a transfer from Hawaii to the
23 mainland.

24 QUESTION: Were there any regulations or any
25 controlling state law in Vitek?

1 MR. JOHNSTON: In Vitek, you have a two-prong
2 approach, as I understand it. The first prong addresses
3 the question of the statutes. The second prong
4 addresses the question of the residuum of liberty that a
5 person retains which would preclude a transfer from the
6 -- from the prison, the mental hospital without some due
7 process.

8 QUESTION: Would you not think there is some
9 difference between being transferred from an institution
10 of pure confinement, that is, a prison, and to a mental
11 institution, different from being transferred from one
12 classification of prison to another?

13 MR. JOHNSTON: There would be a difference on
14 that, Your Honor. There is no doubt about that. But I
15 would submit that it is officially analogous.

16 QUESTION: Vitek didn't rest just on the
17 substantiality of the change of conditions, did it?

18 MR. JOHNSTON: Not entirely, Your Honor, but I
19 believe the precise language is that there was a
20 qualitative change in the conditions of confinement not
21 substantiated by the terms of the sentence.

22 QUESTION: But those words, that language must
23 be read in the context of the facts of the case.

24 MR. JOHNSTON: Yes, Your Honor, it must, but I
25 think that this case is sufficiently analogous, because

1 I would submit that a transfer of a person such as
2 Wakinekona from Hawaii under the circumstances he was
3 transferred to the mainland indeed raises the same kind
4 of liberty interest that is raised in Vitek on the
5 transfer from the penal institution to the mental
6 hospital.

7 QUESTION: Suppose Hawaii had another -- I
8 don't know how -- what's the sweep of the islands. How
9 many miles is it, 500, or 300, or what?

10 MR. JOHNSTON: I would say about 350
11 diagonally.

12 QUESTION: Well, let's assume that the only
13 maximum prison was 300 miles away from Honolulu, and he
14 was -- Would you say that the same constitutional
15 factors were raised if he was transferred to the only
16 maximum security institution available 350 miles away?

17 MR. JOHNSTON: That would raise a very
18 difficult question, Your Honor, and I am not sure that I
19 could justify a change of that distance.

20 QUESTION: It would be not as difficult, but
21 it would be certainly difficult for family to make
22 visits, would it not, 350 miles?

23 MR. JOHNSTON: Yes, it would, if he were to be
24 transferred to a different island entirely, because he
25 would still have the problem of interisland or

1 intercounty transport for the family to visit him,
2 unless he had family on the island that it was on.

3 However, I would just say, if I may, Your
4 Honor, that my recollection of the time was that there
5 was another facility called Halava, which was
6 approximately 15 minutes from the Hawaii State Prison
7 located in Kalihi, just outside of Honolulu. Now, I do
8 believe that there were people in that place, and I do
9 believe that we can find references to Halava in the
10 record.

11 But I would like to clear up one thing right
12 away, if I may, because there have been several
13 questions on this point, and that is the question of the
14 record on the impartiality of this particular tribunal.
15 Contrary to Mr. Lilly's position, I believe that the
16 complaint that was filed with the supporting TRO to stop
17 the transfer of Wakinekona raised questions that went
18 beyond the mere violation of the regulations, and
19 indeed, though I didn't believe in view of the court's
20 ruling below that that question was really before the
21 Court, I can refer the Court to the record at Pages 394
22 and also at Page 443 and 444, in which there are
23 definitely questions of personal animosity raised
24 regarding this particular tribunal as to Wakinekona.

25 QUESTION: But that isn't the basis on which

1 the court of appeals proceeded --

2 MR. JOHNSTON: No, it's --

3 QUESTION: -- and the issue here is violation
4 of state procedures, is a withholding of state
5 procedures.

6 MR. JOHNSTON: Yes, based upon whether or not
7 there is indeed a liberty interest created.

8 QUESTION: Under state law. Created by state
9 law.

10 MR. JOHNSTON: And also, Your Honor, whether
11 or not there is a residual of liberty that would be
12 protected regardless of the existence of state law.

13 QUESTION: Well, that isn't what the court of
14 appeals said.

15 MR. JOHNSTON: No, the court of appeals,
16 though it cited Vitek, went on the rules alone.

17 QUESTION: It went strictly on the liberty
18 interest created by state law.

19 MR. JOHNSTON: That is correct. That is
20 what --

21 QUESTION: Do you think the opinion of the
22 court of appeals is internally consistent? Because in
23 places it talks about this bias question.

24 MR. JOHNSTON: I don't know why they did that,
25 Your Honor. I just don't. There is definitely in the

1 discovery supporting the complaints, the first complaint
2 and then the first amended complaint, allegations of
3 personal bias as to at least two of the members of the
4 tribunal.

5 QUESTION: But you would agree that the
6 questions presented to us on review of the Ninth Circuit
7 simply don't involve that issue?

8 MR. JOHNSTON: They don't involve the issue of
9 bias. They involve the issue of whether there is a
10 liberty interest, because that was the only ruling
11 presented by the lower court.

12 QUESTION: So we should assume that the
13 tribunal which did pass on this thing was totally
14 unprejudiced?

15 MR. JOHNSTON: No, just to the contrary,
16 because we have alleged that it was biased.

17 QUESTION: Well, but we have to somewhat
18 segregate the issue that is before us for decision. We
19 can't take into consideration in deciding the issue you
20 say is here your other allegation that the tribunal was
21 biased.

22 MR. JOHNSTON: Mr. Justice Rehnquist, I would
23 believe that we should, regarding the question of
24 personal animosity, the bias, that should be determined
25 in the first instance by the district court.

1 QUESTION: We would certainly leave that open
2 in any decision we rendered, I think.

3 MR. JOHNSTON: Yes, and I would think that it
4 would be appropriate, if there is a liberty interest
5 here, to remand for that specific issue, because there
6 is indeed a jury asked for in this action as to the
7 facts, and we definitely, I believe, on the record, have
8 a question of fact as to that point.

9 QUESTION: The court of appeals hasn't decided
10 a question which he raised. Is that your basis?

11 MR. JOHNSTON: It was raised in the trial
12 court, and the trial court didn't address it, and
13 therefore the court of appeals didn't address it.

14 And if I may take another step back along the
15 line, Justice O'Connor, the question of the rules goes
16 beyond merely Rule 4. We claim there is a statutory
17 scheme involving Rules 3, 4, and 5, in this action, and
18 it is the statutory scheme that we should be addressing
19 in this matter. Now --

20 QUESTION: Well, to that extent, and to the
21 extent of a statutory scheme or, you know, things
22 peculiar to the Hawaii system that courts not in Hawaii
23 might not be familiar with, I should think the best
24 authority on that is the Supreme Court of Hawaii, and
25 they have spoken on the question, haven't they?

1 MR. JOHNSTON: Your Honor, in that regard, the
2 Lono case addressed only Rule 4, because that apparently
3 was all that was presented to it, rather than
4 considering the other rules that should be read in
5 conjunction.

6 QUESTION: Well, you say should be read in
7 conjunction. If the Supreme Court of Hawaii was willing
8 to read Rule 4 by itself, I presume it thought that the
9 other rules didn't have to be read in conjunction with
10 it.

11 MR. JOHNSTON: I would submit that perhaps
12 counsel didn't present the other rules to the court, and
13 that could well explain what happened.

14 I would also submit that in view of this
15 Court's recent ruling in Logan versus Zimmerman Brush,
16 that this Court indeed does have the power, if not the
17 duty, to address this particular issue, regardless of
18 the Lono decision.

19 QUESTION: How are Rules 3 and 5 involved in
20 this case? I thought Rule 3 had to do with the
21 adjustment process to punish a prisoner for some
22 violation while incarcerated, and that Rule 5 had to do
23 with legal counsel, and I did not understand that either
24 of those rules was implicated in the allegations of the
25 complaint.

1 MR. JOHNSTON: If I may, the -- looking at the
2 rules in total, particularly Rule 5, there are four
3 circumstances in which an inmate is entitled to have a
4 lawyer present at a hearing, two of which are in essence
5 the disciplinary hearings. The other is the
6 classification hearing.

7 And part of the argument is, if you read these
8 rules as a whole, it seems somewhat inconceivable to us
9 that prison authorities who promulgated these rules
10 approved by the Attorney General and by the Lieutenant
11 Governor at that time would give a person such as
12 Wakinekona a right to counsel in these four situations,
13 one of which, and these are the only four situations you
14 are entitled to lawyers in these hearings, one of which
15 involves an interstate transfer.

16 QUESTION: Didn't he have a lawyer? I thought
17 the Attorney General said he did. Did I misunderstand
18 him?

19 MR. JOHNSTON: Yes. Yes, indeed, Mr.
20 Wakinekona was represented at the classification hearing
21 by a lawyer. I am not suggesting that that is the
22 defect in the hearing process. I am just suggesting
23 that one wouldn't expect correction authorities to give
24 an inmate a lawyer at that particular kind of hearing
25 unless they considered it a very important type of

1 hearing. And that is the thrust of Rule 5.

2 QUESTION: Well, I suppose even conceding that
3 the consequences of an interstate transfer are
4 significant and important, that doesn't answer the
5 question, does it? That alone won't resolve the issue,
6 will it?

7 MR. JOHNSTON: No, I think we have to look to
8 the rules and see what has occurred in the context of
9 this case, in view of the particular concerns that we
10 would have for transferring somebody interstate, and in
11 addition the rules and practices of giving a hearing in
12 this. I would simply --

13 QUESTION: Now, there are no substantive
14 standards set forth in Hawaii procedure, are there, to
15 govern when an interstate transfer will be --

16 MR. JOHNSTON: I would refer you to the Joint
17 Appendix and the Rule 4, the general considerations. In
18 that rule, they are worried about what is --

19 QUESTION: What page?

20 MR. JOHNSTON: I am sorry, Mr. Justice
21 Rehnquist. Page 20 of the Joint Appendix. It starts
22 with the Rule 4 classification hearing.

23 Now, it is our position the requirements of
24 determining what is in the best interests of the
25 community, of the prisoner, of the penal system, of the

1 state, would indicate that there should be some reason
2 in the minds of the drafters of the rules as to why they
3 would hold these hearings to determine that they meet
4 these standards set out in that particular provision.

5 QUESTION: Well, it could be just kind of a
6 joint right of allocation, kind of a best interest
7 hearing, where everybody -- anybody affected is entitled
8 to be heard, but it is totally discretionary with the
9 deciding authority.

10 MR. JOHNSTON: Well, no, I don't think we can
11 -- well, I guess we could disagree on that and make such
12 a conclusion. It is our position that it is really not,
13 because you do have that provision. You do have them
14 holding hearings for Wakinekona, Lono, and other people
15 that are being transferred interstate, and you do have
16 the requirements in this particular situation that the
17 tribunal make specific findings of facts based only on
18 the evidence presented, which then becomes the
19 recommendations that restrict the prison director --

20 QUESTION: But then as determined by the
21 Hawaii Supreme Court, the final decision is made by the
22 facility administrator, and he is free to disregard
23 those findings, apparently, without any substantive
24 standard, and make the determination. Now, that is what
25 I understand the Hawaii Supreme Court has determined.

1 MR. JOHNSTON: Yes, Your Honor. I would say
2 that that is a correct reading of the court, that --
3 what they had before them. And I would not try to
4 represent differently. And I would submit in response
5 to that that again the court did not read, for whatever
6 reason they didn't, the rules as a whole. And they did
7 not address specifically the same concerns that the
8 Ninth Circuit did that there is a requirement of
9 specific findings of facts which temper the discretion
10 or the power of the prison administrator, because if we
11 refer to Page --

12 QUESTION: Well, so what you want us to do is
13 say the Hawaii Supreme Court was wrong, and we aren't
14 bound by its determination.

15 MR. JOHNSTON: On one point, yes, Your Honor.
16 I am afraid that that is exactly what I am asking you to
17 do, and I am suggesting that you do have such power,
18 because that is exactly what this Court did in Logan
19 versus Zimmerman Brush on the question of the Fair
20 Employment Practices Act in Illinois. And so that we do
21 believe this Court has that power. It has had that
22 power in the past, and it has exercised that power. And
23 so that I think that this Court should in this case look
24 to that Zimmerman case and read the Lono case in light
25 of your power under Zimmerman.

1 I would also say, if I may, that we still
2 contend absent the rules that Wakinekona retained a
3 liberty interest because of the particular circumstances
4 in this case. He is transferred across the Pacific
5 Ocean to California, isolated from other Hawaiians
6 entirely, isolated from his family, his friends,
7 effective assistance of counsel, the Hawaii corrections
8 agencies.

9 He is also put in a position where he can't
10 reach social workers who are trained to dealing with
11 persons such as Wakinekona.

12 QUESTION: Well, doesn't Folsome have a prison
13 advocacy group and social workers surrounding it? I
14 mean, isn't he transferred to Folsome?

15 MR. JOHNSTON: As a matter of fact, when he
16 was transferred to Folsome, he was kept in maximum
17 security there without any programs.

18 QUESTION: Well, but I mean, you say, no
19 access to counsel. I mean, don't most prisons have a
20 legal advocacy group --

21 MR. JOHNSTON: I am suggesting that in
22 Wakinekona's case, a factor which is unique to this
23 situation among the questions of distance is also the
24 consideration that Wakinekona, if in Hawaii, would have
25 access to workers who are trained to deal with a person

1 such as Wakinekona who is a native Hawaiian.

2 QUESTION: Well, but you can say the same
3 thing in southern California. A prisoner might have
4 access to workers trained to deal with Spanish-speaking
5 people, because there are so many in southern
6 California. If he is transferred to a correctional
7 center in Springfield, Missouri, he probably won't, but
8 I don't think the distinction turns on that.

9 MR. JOHNSTON: I am not saying it turns solely
10 on that.

11 QUESTION: Do you suggest that is a
12 constitutional factor?

13 MR. JOHNSTON: I am suggesting the total
14 impact of all these factors I am addressing raises a
15 liberty interest which gives Wakinekona an entitlement
16 to a due process hearing which would basically in any
17 prison situation include an impartial or a fair
18 tribunal, because we don't have many of the other
19 accoutrements of due process in prison hearings.
20 Understandably so, but -- so that that becomes the core
21 question of due process in any prison hearing, a fair
22 tribunal, because you really are not allowed to address
23 the questions of cross examination, confrontation of
24 witnesses, and those. Those due process rights are cut
25 back on you in prison hearings usually.

1 QUESTION: Mr. Johnston, you don't need to
2 show the deprivation of a constitutionally protected
3 liberty interest in order to show that you may be
4 entitled to an unbiased tribunal, do you?

5 MR. JOHNSTON: I would think that you are
6 entitled as a matter of course to an unbiased tribunal.
7 However, the way the lower court ruled on it, as I
8 understand it, they felt that there had to be a liberty
9 interest to entitle you to any due process hearing
10 whatsoever.

11 QUESTION: I think the Ninth Circuit's opinion
12 has really balled up this whole thing, if you will
13 pardon me for saying so, because I think that it is very
14 indistinct just what the parties are arguing about. Do
15 you concede that you would have to show a protected
16 liberty interest is at stake in the hearing before the
17 tribunal before you can complain of a constitutionally
18 biased tribunal?

19 MR. JOHNSTON: No, Your Honor, and that is the
20 position we took in the lower court, in the trial court,
21 but we didn't win on that point.

22 QUESTION: So you changed your strategy.

23 MR. JOHNSTON: No, I didn't change the
24 strategy, if I may. I think I have to address what the
25 lower court left me with.

1 Mr. Justice Rehnquist, I would be delighted to
2 take this case back and try it in front of the federal
3 district court in Hawaii.

4 QUESTION: You were entitled to ask for
5 affirmance on another ground, even if you lost on it
6 below and didn't cross appeal or anything. You could
7 ask for affirmance on another ground, as long as it is
8 supported by the record.

9 MR. JOHNSTON: Well, yes, Your Honor. We do
10 believe that the record does reveal that, and we did, by
11 the way, raise that issue of a bias and personal
12 animosity in the lower court.

13 QUESTION: That claim, that is not on the --
14 on a claim that the due process clause of the federal
15 constitution has been violated because you have been
16 deprived of your life, your liberty, or your property,
17 and probably your liberty, without due process of law.

18 MR. JOHNSTON: That is the only thing I think
19 Mr. Wakinekona can claim here, and that he has indeed
20 been deprived of his liberty because there was an
21 interest where he should be entitled to somebody that
22 made this decision.

23 QUESTION: The Ninth Circuit said you win
24 based on liberty interest created by the procedural
25 protections of state law.

1 MR. JOHNSTON: Yes, they went on that point,
2 Your Honor, but that was not the only point we had been
3 arguing.

4 QUESTION: Is there any evidence in this
5 record on which any court at this stage could pass on
6 the claims of bias?

7 MR. JOHNSTON: Your Honor, again, I would
8 refer you to the various pages I did, but the answer is
9 yes. I think looking first at the original complaint
10 that was filed -- it is probably around Page --
11 somewhere about Page 12.

12 QUESTION: That is the complaint. I am
13 talking about evidence. What evidence was presented in
14 the district court?

15 MR. JOHNSTON: There was an affidavit attached
16 to that. There are answers to interrogatories and
17 requests to admit that raised the question of the
18 personal bias of Petitioner Wilhelm and Smythe.

19 QUESTION: Did the district court make any
20 findings on that issue?

21 MR. JOHNSTON: No, the district court did not
22 address any of the discovery. Indeed, the district
23 court took the particular position that the -- it was a
24 motion to dismiss in essence rather than a summary
25 judgment.

1 QUESTION: Then you could not rely on that
2 issue in this court or in the court of appeals, absent
3 some evidence, could you?

4 MR. JOHNSTON: Well, Your Honor, I don't think
5 we should be thrown out on that point. I think we
6 should be allowed to have a hearing on that.

7 QUESTION: Yes. But it can't be resolved here
8 or in the court of appeals with finality --

9 MR. JOHNSTON: No, Your Honor.

10 QUESTION: -- because there is a limited
11 amount of evidence.

12 MR.. JOHNSTON: I would agree that -- if the
13 Court agrees that Wakinekona has an interest that
14 entitles him to a due process hearing, that that matter
15 should be remanded back down to the federal district
16 court of Hawaii to resolve that matter, and then perhaps
17 we could ignore the Ninth Circuit opinion, if it is
18 going to cause the grief that it seems to be causing.

19 QUESTION: I may have spoken too hastily.
20 Assume that you have the kind of situation in Meachum
21 against Fano, where the court says that although you may
22 have -- there may have been a process for some sort of a
23 hearing, nonetheless there was no substantive standard,
24 no deprivation of any liberty interest, just in the
25 transfer from one prison within a state to the other.

1 Now, supposing you end up coupling that -- the
2 allegation that would lose under Meachum against Fano
3 with an allegation that the prison administrator had to
4 make some sort of a finding was constitutionally biased
5 against you. Now, does that get you into the
6 constitutional ball park, so to speak? It is not life.
7 It is not liberty. It is not property. I may have been
8 too hasty in suggesting before that I thought there was
9 a difference.

10 MR. JOHNSTON: As I understand it, really, the
11 question is, Fano would insist that there be a liberty
12 interest created in order to have procedural
13 protections.

14 QUESTION: Well, in order to guarantee an
15 unbiased tribunal it would be a constitutional
16 dimension.

17 MR. JOHNSTON: I would believe that Fano would
18 take that position, but, Your Honor, I think that Fano
19 has been rather severely cut back by the case of Vitek,
20 and I would suggest that our case is almost on all fours
21 with Vitek on both of the points that we are addressing.

22 QUESTION: Well, it isn't --

23 QUESTION: The same author wrote both of them,
24 didn't he?

25 MR. JOHNSTON: Yes, I am aware of that, Your

1 Honor.

2 QUESTION: Yes, you are about to be asked
3 about it, too.

4 (General laughter.)

5 QUESTION: You really can't sustain that
6 unless you answer the Chief Justice's question a while
7 ago a certain way. Suppose there weren't any
8 regulations, and there was just a transfer to a mainland
9 prison from Hawaii, and you come in and say, well,
10 transferring interstate when it has these consequences
11 is such -- is just not within the contemplation of a
12 sentence. It is just not the kind of a thing that a
13 person in prison should have to contemplate. That is
14 the basis Vitek proceeded on.

15 Now, are you suggesting that an interstate
16 transfer is just out of bounds, without a hearing?

17 MR. JOHNSTON: I am suggesting this particular
18 interstate transfer is out of bounds, because it in
19 essence, as we have argued --

20 QUESTION: So you do agree, you have to say
21 that it is just out of bounds in the sense that no
22 prison administrator should contemplate making this kind
23 of a transfer without a hearing, whether there are
24 regulations or not.

25 MR. JOHNSTON: Yes, that is one point, Your

1 Honor, and as I said --

2 QUESTION: You have to make that point to rely
3 on Vitek.

4 MR. JOHNSTON: Correct, Your Honor.

5 QUESTION: Which is not the basis the court of
6 appeals went on.

7 MR. JOHNSTON: That is correct, Your Honor.

8 QUESTION: Then what would be your position,
9 again, on an interisland transfer if it were 350 miles
10 apart?

11 MR. JOHNSTON: Your Honor, as in any case
12 where we begin to move the distances back and forth a
13 little bit, the distance should be a factor to be taken
14 into account. I think the distance is rather
15 misleading, because it is the impact or the effect of
16 the distance upon the prisoner on an intrastate transfer
17 that I think is important. The isolation. In this
18 case, Wakinekona is indeed in for life without
19 possibility of parole as a young man. In essence, he
20 could be left up in California, isolated from Hawaii for
21 the rest of his life, in their prison system.

22 So that I would submit that under those
23 circumstances, this comes to the closest thing I have
24 seen in modern jurisprudence to banishment.

25 QUESTION: What if he had been assigned to

1 that prison by the State of Hawaii in the first instance
2 on the ground that they had no facilities adequate to
3 take care of him?

4 MR. JOHNSTON: Mr. Chief Justice, that raises
5 the issue that we have made a finding that they have no
6 facilities adequate, which presupposes, I take it, a
7 hearing. I would think that under those circumstances,
8 that would be appropriate. I don't think I can argue
9 that the state could never transfer him. I am not
10 suggesting that to the Court.

11 I am suggesting that if they wish to transfer
12 a person such as Wakinekona from Hawaii, that that
13 should require under the second point in Vitek a due
14 process hearing, because it is so far out of bounds to
15 send somebody like Wakinekona away forever that it just
16 strikes me -- it is outrageous to banish somebody from
17 their homeland.

18 QUESTION: A hearing even if there are no
19 standards to determine whether the transfer should be
20 ordered or not? Just the hearing?

21 MR. JOHNSTON: In this case, yes. If we were
22 to take that position, Justice O'Connor, I then think we
23 would be faced with what process is then due. However,
24 here we do have standards of what process is due.

25 QUESTION: Well, that is debatable, I guess,

1 isn't it, if you read the Hawaii court decision?

2 MR. JOHNSTON: I am afraid that I can't
3 dispute that point, but I do think that this Court can
4 look past the Hawaii decision in this instance, because
5 of the underlying due process concerns of an impartial
6 tribunal, and I do think that this Court can even ignore
7 the question of the regulations and look to the question
8 of whether or not a transfer of this nature for
9 Wakinekona is so outrageous that there should be a
10 hearing to decide if there is justifiable reason to send
11 him across the sea.

12 QUESTION: Well, you are bound to have to mix
13 your procedural argument with a substantive argument,
14 aren't you? You might -- You could have -- give you all
15 the process you wanted, and then just transfer you, but
16 then you are bound to then have to say, well, the
17 reasons weren't good enough.

18 MR. JOHNSTON: Well, I don't -- I --

19 QUESTION: Which isn't really a procedural --

20 MR. JOHNSTON: I would think that we could
21 contrive as an advocate for somebody almost any argument
22 we wished, but I would hope that we wouldn't go that
23 far, Justice White. I would think that --

24 QUESTION: You think you could shame them into
25 not transferring if you had some procedures?

1 MR. JOHNSTON: I would think --

2 QUESTION: Or talk them into --

3 MR. JOHNSTON: I would think that we would
4 have perhaps had a very good chance of prevailing at
5 that time if indeed we had a neutral or an impartial
6 hearing board rather than the one that was personally
7 biased against Wakinekona, and I do think we should be
8 entitled to give that at least a chance, because
9 otherwise, as I say, Mr. Wakinekona is gone forever, as
10 far as we can tell at this point.

11 So that I would -- I would submit, then, that
12 we have both those points. I think those procedural
13 rules, if they don't -- if we call them procedural
14 rules, the character of procedure in substance sliding
15 in this set of rules --

16 QUESTION: The kind of procedural rules, was
17 this "lawyer" a fellow inmate?

18 MR. JOHNSTON: No.

19 QUESTION: It was a regular lawyer?

20 MR. JOHNSTON: It was a regular lawyer who
21 asked for an extension of time in order to prepare the
22 case, and then the whole problem --

23 QUESTION: Right.

24 MR. JOHNSTON: -- began to develop when we
25 complained about the character of the particular

1 tribunal as being a tribunal that was biased, and the
2 bias goes to personal animosity and violation of the
3 rules, both, not just violation of the rules, and I
4 think that that makes it an important difference.

5 But I do think that the procedural rules, if I
6 may, do infer some sort of substantive right, usually.
7 It is -- I find it difficult as a lawyer to believe that
8 we create procedural rules without --

9 QUESTION: How about the right of allocution,
10 which is strictly a procedural rule? I don't think it
11 imparts any substantive right at all. A prisoner can
12 appear before the sentencing authority, the judge, and
13 you know, talk for 30 minutes, and there is no
14 substantive contact that needs come out of that from the
15 judge at all. He can still give exactly the same
16 sentence as he would have before.

17 MR. JOHNSTON: Well, I think that under these
18 rules that we do have a hearing, that they are entitled
19 to find these points because of the introductory
20 paragraphs to Rule 3.

21 Thank you.

22 CHIEF JUSTICE BURGER: Do you have anything
23 further, Mr. Lilly?

24 MR. LILLY: Very briefly.

25 CHIEF JUSTICE BURGER: You have four minutes

1 remaining.

2 ORAL ARGUMENT OF MICHAEL A. LILLY, ESQ. - REBUTTAL

3 MR. LILLY: I don't believe that it is
4 inconceivable that a procedural rule cannot implicate
5 some kind of liberty interest if it is construed by the
6 state that it does so, that another liberty interest by
7 virtue of the rules do, but in this case we have the
8 Lono versus Ariyoshi opinion, that specifically says
9 that this rule does not give rise to any expectation of
10 liberty. It does not give rise to any expectation that
11 Mr. Wakinekona will spend the rest of his incarceration
12 in Hawaii absent some kind of good cause.

13 So, we don't have that situation before us.

14 QUESTION: May I ask you this question, Mr.
15 Lilly? Supposing you had no rules at all, which in
16 effect you are saying that is what the Hawaii decision
17 amounts to here -- there are no substantive rules -- and
18 the prisoner alleged that it is, in his words, a
19 greivous loss to have to be transferred to the mainland,
20 and that the only reason he is being transferred is
21 because of the personal animosity that the man who has
22 the power to make the transfer has toward him
23 personally. He just doesn't like him.

24 Would he have a claim or not?

25 MR. LILLY: Not federal claim.

1 QUESTION: You don't think he would have a
2 federal claim. Because that is pretty much what this
3 case is, I guess.

4 MR. LILLY: That is what he is claiming, is
5 some kind of personal animosity.

6 QUESTION: Yes, and your position is, there is
7 no constitutional protection to an arbitrary transfer in
8 the sense of just motivated by hatred, personal hatred,
9 or something.

10 MR. LILLY: Yes, Justice Stevens, and also, it
11 was the administrator that made the decision, not the
12 hearing body. There is no allegation of bias on the
13 part of the administrator.

14 QUESTION: Well, I think we have to assume,
15 because the complaint is dismissed on its face, that
16 there was an adequate allegation of bias. Maybe it
17 doesn't make any difference if there is no liberty
18 interest involved.

19 MR. LILLY: There is no allegation of bias in
20 the complaint against the decision-maker, Antone Olim,
21 the person who made the decision to transfer, the one
22 who has --

23 QUESTION: Well, but wasn't it made by a
24 hearing board of several people?

25 MR. LILLY: You have a hearing body of four

1 people who make a recommendation to the administrator,
2 who makes the decision. He alleges bias on the part of
3 two members of that hearing body.

4 QUESTION: I see.

5 MR. LILLY: But not --

6 QUESTION: But from your point of view, it
7 would be the same case even if the administrator were
8 biased.

9 MR. LILLY: That's right. It would be the
10 same case. In fact, the purpose, if I may say briefly,
11 the purpose of these rules is, it is an administrative
12 tool. It is an informational gathering device. It is
13 not a fact-finding process, as characterized by counsel,
14 as the adjustment process is. This is a means of
15 gathering information to assist the decision-makers. It
16 is a means of providing inmate input. It is a means to
17 benefit inmates. And it also is --

18 QUESTION: A form of therapy?

19 MR. LILLY: One of the reasons why prisons
20 traditionally have these kinds of procedures is because
21 they find inmate frustrations and tensions lowered when
22 they have some kind of input. If decisions are made
23 without any reasons, without any input, without any
24 contact, they feel very frustrated, and so they have
25 rules like this to involve inmates in it, and they feel

1 better about it. It has a utility.

2 QUESTION: Even if it is just kind of a
3 charade?

4 MR. LILLY: Well, the ultimate decision is --
5 it is not a charade, and I don't think it is a mindless
6 event. It is not intended to be a mindless event. It
7 is meant to be an informational gathering process.

8 QUESTION: Isn't it somewhat a parallel to the
9 grievance procedures in labor relations?

10 MR. LILLY: It is, and --

11 QUESTION: To try to resolve these matters at
12 the lowest level possible on the way up?

13 MR. LILLY: And Mr. Wakinekona also had a
14 review process under the rules, which he didn't partake
15 of.

16 QUESTION: What if you read the Ninth Circuit
17 opinion as resting on a decision that he had a right to
18 a hearing under state law, and surely that if he had a
19 right to a hearing, he ought to have a right to a
20 hearing by an unbiased decision-maker.

21 MR. LILLY: The problem with the analysis is
22 that the due process analysis breaks down when you say
23 that the right to a hearing implicates liberty, and
24 therefore you have a right to a due process hearing to
25 protect your right to a hearing.

1 QUESTION: Well, what if you interpret it then
2 that here is the state imposing substantial hardships on
3 him by a decision of a biased decision-maker.

4 MR. LILLY: And what we say is, that is not of
5 a constitutional dimension, Justice White.

6 CHIEF JUSTICE BURGER: Thank you, gentlemen.
7 The case is submitted.

8 (Whereupon, at 1:48 o'clock p.m., the case in
9 the above-entitled matter was submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

CERTIFICATION

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

ANTONE OLIM, ET AL., Petitioners v. DELBERT KAAHANUI WAKINEKONA
#81-1581

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

BY

Pine Annand
(REPORTER)

RECEIVED
SUPREME COURT, U.S.
MARSHAL'S OFFICE

1983 JAN 26 PM 3 29