

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-141, 83-236, 83-283

TITLE HAWAII HOUSING AUTHORITY, ET AL., Appellants v.
FRANK E. MIDKIFF, ET AL.;
PORTLOCK COMMUNITY ASSOCIATION (MAUNALUA BEACH), ET
AL., Appellants v. FRANK E. MIDKIFF, ET AL.; and
KAHALA COMMUNITY ASSOCIATION, INC., ET AL.,
Appellants v. FRANK E. MIDKIFF, ET AL.

PLACE Washington, D. C.

DATE March 26, 1984

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 - - - - - x

3 HAWAII HOUSING AUTHORITY, ET AL., :

4 Appellants :

5 v. : No. 83-141

6 FRANK E. MIDKIFF, ET AL. :

7 - - - - - x

8 PORTLOCK COMMUNITY ASSOCIATION :

9 (MAUNALUA BEACH), ET AL., :

10 Appellants :

11 v. : No. 83-236

12 FRANK E. MIDKIFF, ET AL. :

13 - - - - - x

14 KAHALA COMMUNITY ASSOCIATION, :

15 INC., ET AL., :

16 Appellants :

17 v. : No. 83-283

18 FRANK E. MIDKIFF, ET AL. :

19 - - - - - x

20 Washington, D.C.

21 Monday, March 26, 1984

22 The above-entitled matter came on for oral

23 argument before the Supreme Court of the United States

24 at 1:52 p.m.

25

1 APPEARANCES:

2 LAURENCE H. TRIBE, ESQ., Cambridge, Mass.;

3 on behalf of Appellants.

4 CLINTON R. ASHFORD, ESQ., Honolulu, Hawaii;

5 on behalf of Appellees.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Hawaii Housing Authority against Frank E. Midkiff, et al.

Mr. Tribe, I think you may proceed whenever you're ready.

CRAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,
ON BEHALF OF APPELLANTS

MR. TRIBE: Thank you, Mr. Chief Justice, and may it please the Court:

This case tests the limits of federal judicial intervention into the legislative and the judicial processes of a state that has grappled since entering the Union with a land oligopoly traceable to its monarchy, very much as the original 13 colonies struggled with large landholdings traceable to the English crown.

Now, Hawaii's legislature attacked that problem by using eminent domain with fair compensation, the approach that the Appellees themselves preferred for federal tax reasons, but an approach that the U.S. Court of Appeals for the Ninth Circuit denounced as a forbidden taking from one private party to benefit another, as though the Land Reform Act somehow left the land market of Hawaii itself completely unchanged and

1 merely substituted a favored group of lessees for the
2 Bishop Estate and other supposedly disfavored owners as
3 the ruling oligopolists of the Hawaiian Islands.

4 Now, I should like to begin by showing how
5 wholly untenable that view is. The Appellees talk
6 repeatedly, as did the Ninth Circuit, of appeasing the
7 desires for land owning of the landless majority. As I
8 think it will become clear, that radically distorts the
9 aims of the legislation before this Court.

10 But it does, perhaps inadvertently, hit upon a
11 very fundamental truth, and that is that people
12 everywhere greatly prefer to own not only the home they
13 live in and invest in and build, but also the land on
14 which that home stands.

15 Now, of course there are unusual circumstances
16 -- and this Court has seen some of them -- that might
17 lead a perfectly well functioning land market to
18 separate surface from subsurface ownership, to separate
19 the ownership of the home on top of the land from the
20 ownership of what's under the land.

21 For example, in the case of Pennsylvania Coal
22 against Mahon, where the land contained valuable
23 minerals, the perfectly natural development was for a
24 few large mining companies to end up owning the mining
25 rights under very large tracts of land, and selling only

1 surface rights to a large number of individual
2 homeowners.

3 But of course, in most places, both in the
4 continental United States and in Hawaii, a normally
5 functioning competitive market would never yield so
6 bizarre a pattern, where literally tens of thousands of
7 individual homeowners are forced to build on top of land
8 that they must rent half a century at a gulp, despite
9 the fact that they want to buy that land at what a court
10 would approve as fair market value and are able to do
11 so. The situation is that a small number of owners
12 simply refuse to sell, and indeed those owners, as the
13 record unmistakably shows, keep even more land off the
14 residential market altogether, despite the great
15 demand.

16 Now, one might ask, why did this happen in
17 Hawaii if it doesn't happen elsewhere? The legislature
18 asked that question and, after extensive hearings,
19 reached the conclusions elaborately articulated in 1967
20 and reaffirmed in 1975 that there were in Hawaii crucial
21 artificial deterrents to the normal functioning of the
22 market, deterrents to the landowners selling the land
23 that those who lived on top of it wanted to buy.

24 Those deterrents included trust indentures
25 inherited from the Hawaiian monarchs. They included as

1 a very practical and crucial matter federal tax
2 disincentives, because the IRS made very clear to the
3 major landowners that were they to sell in large
4 quantities they would be treated as ordinary dealers in
5 real estate and would be taxed at ordinary income rates
6 on virtually 100 percent of the proceeds.

7 Now, that alone would not produce this bizarre
8 pattern were it not also for the shortage of nearby
9 competitors with land to sell. That is, whatever the
10 disincentives of the large landowners, if there were
11 adjacent landowners who for some reason were perfectly
12 happy to meet consumer preferences for a house on top of
13 the land and the land beneath as well, then this pattern
14 would not have developed.

15 But here, as the legislature found, there was
16 a shortage of alternative competitors, and indeed,
17 unlike some of the early American colonies, those that
18 did not directly break up major landholdings from the
19 crown but nonetheless found the holdings dissolved
20 through natural forces because people could just cross
21 the border and go to a place where they could buy the
22 land under their homes, that wasn't exactly available
23 because crossing the border plunks you in the middle of
24 the ocean.

25 So that was the situation that the legislature

1 confronted, and it found specifically that this land
2 oligopoly would not just naturally fade away; that
3 indeed it would persist because of these artificial
4 deterrents to sale; that it would keep forcing up land
5 prices and lease rents and the cost of living generally,
6 with grave economic and social consequences for the
7 entire state, unless the oligopoly was somehow broken up
8 by law.

9 Now, it was against that background that the
10 Hawaii Land Reform Act was passed. As a brief reading
11 of it will make plain to the Court, it does not simply
12 substitute a favored for a disfavored group of owners.
13 What it does is create a neutral mechanism for
14 identifying where it is that the land oligopoly was
15 actually causing demonstrable, palpable market failure.

16 The concept of this Act is that such market
17 failure is identifiable where large development tracts
18 are available only in the form of long-term leasehold of
19 the underlying land, despite the willingness and ability
20 of a sufficiently large number of small lot lessees to
21 buy individual lots at fair prices. That is, where you
22 have lessees who want to buy at fair prices, but all
23 they can get is long-term leaseholds in part of a large
24 tract, there is a demonstrable market failure.

25 Now, how would a legislature try to figure out

1 when that had occurred? Well, presumably it would wait
2 for applications by lessees to say, we're able and
3 willing to buy, but we're unable to do it because the
4 sellers will not sell.

5 And that's the way this Act works. That is, a
6 number of lessees, 25 or half the number in the tract,
7 whichever is less, file an application with the Hawaii
8 Housing Authority. That application is a signal that
9 the market has indeed failed, as the legislature
10 predicted it would throughout the islands.

11 At that point the Act relies on a state
12 agency, the Hawaii Housing Authority, to decide whether
13 or not condemning all or part of the tract in question
14 would serve the public purpose of creating a competitive
15 land market, and if the answer to that question is yes
16 -- and I suppose that it ordinarily would be, but one
17 can't tell because this is a facial attack on the law
18 and the law has only begun to be applied.

19 If the answer to that is yes, the Hawaii
20 Housing Authority takes all or part of the tract -- it
21 decides which part -- by eminent domain.

22 QUESTION: Precisely when does title pass to
23 the lessee?

24 MR. TRIBE: Under that scheme, title passes
25 from the landowner to the Hawaii Housing Authority at

1 the time a judgment is made condemning the land, but it
2 does not pass at that stage, Justice Brennan.

3 QUESTION: Well, when is valuation? When is
4 the valuation completed?

5 MR. TRIBE: The valuation process is
6 determined by a jury trial, and the jury trial occurs
7 before title passes. The jury trial occurs to decide
8 how much money must be paid as fair compensation.

9 QUESTION: Before title passes?

10 MR. TRIBE: Before title passes. And when
11 that fair compensation has been determined, then the --

12 QUESTION: When is it paid? When is it paid?
13 When is compensation paid?

14 MR. TRIBE: Compensation is paid after the
15 trial to determine what a fair amount of compensation
16 would be. At that point, the Hawaii Housing Authority
17 takes title. And it's at that point, Justice Brennan,
18 that a very distorted picture of the Act is presented by
19 the Appellees.

20 QUESTION: But after the Authority takes
21 title, the valuation has been fixed and the money's been
22 paid, when does the title pass to the tenant?

23 MR. TRIBE: Well, it may never pass to the
24 tenant. Under the Act as written, the Hawaii Housing
25 Authority under Section 516, parts 28 and 31, may hold

1 title, may choose to lease the property, may put it up
2 for public bidding.

3 But if the tenant has qualified and is able to
4 pay and does not own another nearby tract, then the
5 tenant presumably has priority and --

6 QUESTION: Presumably?

7 MR. TRIBE: Well, because the statute is not
8 entirely clear on that subject, and on its face the
9 statute suggests, although its purposes I think would
10 best be served by giving priority to the tenant, the
11 statute really places discretion in the state to decide
12 how best to dispose of the now disaggregated
13 landholdings, and the --

14 QUESTION: Well, you said, I think, that the
15 landowner is only one of a group of 25 or whatever that
16 number is.

17 MR. TRIBE: That's right.

18 QUESTION: But he may end up not ever getting
19 title?

20 MR. TRIBE: Well, if it should turn out that
21 circumstances changed and that the landowner no longer
22 wants to purchase or no longer can purchase, because his
23 eligibility must be determined both when the land is
24 designated --

25 QUESTION: Well, how about the agency just

1 doesn't want now to sell to him? Then what?

2 MR. TRIBE: I think that I would argue that
3 the agency doesn't have unfettered discretion simply to
4 hold onto it. The law says, for instance, that the
5 agency can't use this power to earn profit on the land.

6 But the point is that the statute makes it
7 plain that the agency is empowered to lease the land or
8 to sell it to the tenant.

9 QUESTION: And lease it to somebody else?

10 MR. TRIBE: Possibly. Obviously, if the Act
11 works as intended I wouldn't expect that to happen. But
12 it's important to see that the Act structurally has
13 three features that are very different from what the
14 Appellees would suggest and that make the Hawaii Housing
15 Authority anything but a vapid conduit.

16 First of all, it is suggested by the Appellees
17 that the Housing Authority may take only those lots for
18 which the individual occupant has filed an application.
19 That isn't true. It may take any or all of the lots in
20 the tract.

21 Second, they suggest that it must sell the lot
22 to the occupant, and, although it probably would end up
23 doing that, that's not a requirement of the Act.

24 And third, they suggest that the Hawaii
25 Housing Authority must pay owners with funds supplied by

1 the buyers rather than with public funds. Again, the
2 Act makes clear that purchasing these lots with public
3 funds is another option. Now, any reasonable
4 legislature that chose to do that would presumably find
5 a mechanism.

6 QUESTION: Do you think the agency could just
7 hang on until they can get a better price than the
8 valuation put on in the condemnation proceeding?

9 MR. TRIBE: Were it to do that, I think it
10 might violate the prescription against running the
11 system for profit. That is, the statute says that it's
12 not supposed to be used to generate surplus revenue for
13 the state.

14 And if the agency does, as the Act I think
15 implicitly contemplates, end up transferring title to
16 the current occupant, presumably any rational system
17 would tax the occupant with the benefit of then becoming
18 the owner. And so the fact that ordinarily the purchase
19 price would come from the occupant is what one would
20 expect.

21 In fact, let me say that I don't stress the
22 mechanical details to suggest that the Act would not
23 ordinarily work much as they suppose, but if it does it
24 simply means that the legislature was correct in its
25 assessment that once the tight grip of the oligopoly in

1 this case was broken, then one would see the
2 transactions flow naturally.

3 That is, then one would see those who lived on
4 the land, who wanted to buy the land under their feet,
5 could afford to do so, would simply do so. So that the
6 Hawaii Housing Authority facilitates that process.

7 QUESTION: And then I take it if the occupant
8 finally acquired title to the land, he could sell it?

9 MR. TRIBE: That's right, the occupant could
10 sell it.

11 QUESTION: No limitations whatever?

12 MR. TRIBE: Exactly. The occupant could sell
13 it. But the point is, there would now be a market
14 within which these sales would take place. That is, as
15 with any kind of divestiture of an oligopoly, whether
16 it's Bell Telephone or anybody else, one is not
17 interested here in state socialism or the government
18 continuing to run this land. This is not an urban
19 redevelopment case or an urban redevelopment tract.

20 The point is the public purpose here, the
21 public use, is to break up oligopoly, a fairly
22 traditional public purpose, and then let the market do
23 what it will.

24 QUESTION: And did you say the operation of
25 the statute has simply been suspended pending the result

1 of this litigation?

2 MR. TRIBE: Well, not entirely, Justice
3 Brennan. In fact, the statute has been put in what the
4 Appellees have called a holding pattern in all but one
5 case, and when I get to Pullman and Younger standing I
6 want to focus quite closely on that case.

7 It's the case of Kamiloiki Valley, and in that
8 case as this Court sits an appeal is being considered by
9 the Supreme Court of Hawaii in a proceeding that we will
10 argue ought to have led the courts below not to leap to
11 judgment, much less leap to invalidation of this
12 statute, but to abstain under either Pullman or Younger
13 or both.

14 QUESTION: Professor Tribe, I may be mistaken,
15 but I thought there was one exception, and that was if
16 the tenant ultimately acquired the property he could not
17 sell within ten years.

18 MR. TRIBE: Without giving the HHA an option
19 first to purchase. I think that's right, Justice
20 Blackmun.

21 QUESTION: There is that exception?

22 MR. TRIBE: Yes, there are certain
23 limitations. But I think it would be fair to say that
24 on the whole the point of the Act is to create a market
25 and not to have continuing supervision, and for that

1 reason we don't emphasize such marginal limitations as
2 there are.

3 QUESTION: Is there anything in the statute
4 which limits the time that the HHA can hold?

5 MR. TRIBE: If the HHA has not otherwise put
6 the market -- put the property up for sale and the
7 purchase price is tendered, I believe within 60 days,
8 title must then pass to the qualified purchaser.

9 QUESTION: Mr. Tribe, does the Act apply to
10 the undeveloped tracts of land that these group of
11 landowners refuse to sell?

12 MR. TRIBE: No. The only theory, Justice
13 White --

14 QUESTION: If it did, would you have the same
15 arguments?

16 MR. TRIBE: Well, I suppose if the argument
17 were that their holding of the undeveloped land off the
18 market is itself a sign of oligopoly and that they must
19 be forced to put some of that on the market as well in
20 return for just compensation --

21 QUESTION: Wouldn't you have to?

22 MR. TRIBE: -- I think we would be making
23 exactly the same argument, though I suppose that the
24 record in the case would look different and the findings
25 that the legislature made would be quite different in

1 character.

2 There are other limits I suppose I might
3 mention, Justice Brennan, and that is that the HHA may
4 not sell to any purchaser more than one lot. And if by
5 some combination a purchaser were able to acquire, let's
6 say, two lots and another purchaser three and the two
7 purchasers together might be deemed owners of a single
8 development tract of five lots, then they again would be
9 subject to the Act.

10 And if for some reason, though, as I tried to
11 describe, the market would almost surely prevent it, the
12 competitive forces working on consumer desires to own
13 the land, if for some reason such purchasers began then
14 refusing to sell and leasing the land for 55 years or
15 longer, as the Appellees in this case do, then the Act,
16 which restructures the market, would again be
17 operative.

18 That is, this Act does not become functus
19 officio the moment the new owner occupies. This Act is
20 a permanent restructuring of the land market of Hawaii,
21 designed to create a market where now there is market
22 control.

23 And I think it's important to recognize that
24 that is hardly a radical step.

25 QUESTION: Well, in Hawaii now is all the

1 vacant land that was available now used up, that is
2 available for individual single family dwellings?

3 MR. TRIBE: Well, Justice White --

4 QUESTION: Is it pretty well exhausted?

5 MR. TRIBE: There certainly is a shortage of
6 land for single family dwellings. But were the economic
7 incentives to be changed, it might well happen that the
8 major landowners would take some of the land that they
9 have now allowed to lie fallow --

10 QUESTION: As long as they don't, as long as
11 they don't the available land is now taken up for single
12 family dwellings?

13 MR. TRIBE: There is some more, but the
14 shortage is substantial.

15 QUESTION: And what percentage of the single
16 family residential ownership is -- or residential units
17 is made up of --

18 MR. TRIBE: Of these leaseholds?

19 QUESTION: Yes.

20 MR. TRIBE: Well, I suppose the statistic that
21 I think may be most responsive to that question, Justice
22 White, is that of the single family houses on Oahu, the
23 percentage that are on leased land has been rising up
24 until at least 1978. It went from 16 percent in 1961 to
25 34 percent in 1974.

1 QUESTION: Well now, we're talking only about
2 Oahu?

3 MR. TRIBE: That's right, because the problem
4 is different.

5 QUESTION: Is it different on Hawaii and
6 Kauai?

7 MR. TRIBE: That's right. The problem,
8 however, is focused, the economic problem is focused on
9 Oahu, and the availability --

10 QUESTION: Well, the problem is quite
11 different in the other islands, isn't it?

12 MR. TRIBE: Well, the legislature --

13 QUESTION: Doesn't Oahu have half of the total
14 population?

15 MR. TRIBE: It's the overwhelming population
16 center and the overwhelming center of the urban
17 residential problem. But the legislature found that a
18 statewide solution would make more sense.

19 QUESTION: Is 33 percent or 30 percent, is
20 that normally what standards are for moving into
21 oligopoly?

22 MR. TRIBE: Well, but the relevant figure,
23 Justice White, would not, I suppose, be the percentage
24 of homes that are leased, but the percentage of land
25 which is controlled by a group of people who thereby

1 have market force.

2 QUESTION: Well, I know, but you just
3 suggested to me that the Act doesn't even purport to
4 deal with the land that is just undeveloped.

5 MR. TRIBE: But I was trying also to suggest,
6 Justice White, that the economic incentives to hold that
7 land off the market would be changed once competition
8 was restored within the residential area. That is,
9 right now --

10 QUESTION: Is that part of the findings?

11 MR. TRIBE: It is suggested by the legislature
12 that the practices, the market practices of deciding how
13 much land to allow for residential development are
14 affected by the concentration of market power. Here one
15 must remember that the top three private owners own 40
16 percent of the privately held land on Oahu. The top 12
17 own 80 percent. And by any test for oligopoly, or
18 indeed monopoly, when a small handful of owners own an
19 enormous percentage of the relevant resource, one has a
20 problem.

21 In any event, it's the legislature's task to
22 decide when that problem exists. In doing so, the
23 legislature in this case, following lessons I think as
24 old as Quia Emptores and the Statute of Uses, did what
25 the early colonies in part did in trying to throw off

1 the fetters of land monopolies traceable to a monarchy
2 and used a rather conventional antitrust approach, one
3 not so different from what this Court approved in Block
4 v. Hirsch, where the Court held that where land is
5 monopolized in comparatively few hands government may
6 redress a housing shortage by transferring control over
7 the reversionary interest, and there there wasn't even
8 compensation, as there is here.

9 Now, it's true that when a permanent measure
10 is installed which transfers the whole subsurface
11 property right to the surface owner, compensation may be
12 required, as it was in Pennsylvania Coal. But that is
13 provided here.

14 QUESTION: Mr. Tribe, in determining whether
15 there is a public purpose should the Court look at all
16 at the fact that only the application of private
17 individuals can trigger the effectiveness of this
18 Act --

19 MR. TRIBE: I would think --

20 QUESTION: -- and that should be possibly an
21 important factor?

22 MR. TRIBE: I would think, Justice O'Connor,
23 that unless this Court is to overrule New Motor Vehicle
24 Board v. Fox, that that really cannot be a factor at
25 all. In this case the Court made clear that a great

1 many regulatory schemes where the government seeks not
2 to be an officious intermeddler but to create a market
3 rely on a private triggering mechanism. So I think it
4 would be wrong to make that a factor.

5 QUESTION: But certainly in the Grendel's Den
6 case we had to look behind the actual ostensible purpose
7 to determine whether it was in fact a secular purpose by
8 the effectiveness of the church involvement, did we
9 not?

10 MR. TRIBE: No, Justice O'Connor. I think
11 that in the Grendel's Den case it was the vesting of
12 absolute veto power in a church in particular, power not
13 simply to initiate the governmental process but power to
14 mandate a veto, as in Eubank and Richmond, as in that
15 line of cases, that was the decisive thing.

16 QUESTION: Certainly this involves exclusive
17 power in a private individual to trigger the operation
18 of the Act.

19 MR. TRIBE: Quite often the judicial system
20 relies on the exclusive action of a private individual
21 to bring a suit, but that's the way government often
22 works. For the government to insist that it will create
23 a market no matter what, even if no one wants to buy or
24 is able to buy, would not make any sense at all, I
25 think.

1 And in general, I suppose their whole
2 philosophy, the philosophy of the Appellees in this
3 case, is that the involvement of private entities,
4 whether to trigger the Act or as the possible owners of
5 the property once the Act has done its job, creates a
6 terribly suspect situation.

7 Now, if the public use requirement means
8 anything of that sort, then it seems to me Block v.
9 Hirsch must be overruled, Berman v. Parker must be
10 overruled, the Mill Act decisions of 1885 must be
11 overruled, and the Court will end up reading the public
12 use requirement as a requirement that all public
13 purposes must be executed through purely public
14 governmental enterprises, that private enterprise can
15 play no role in a legitimate governmental scheme.

16 It seems to me that that is not the law.

17 QUESTION: Do you think that the public
18 purpose requirement requires or carries with it any
19 requirement that the public purse be at risk?

20 MR. TRIBE: I think, Justice O'Connor, it
21 doesn't. It didn't in the cases like Highland Boy and
22 others where the private individual ended up paying for
23 what was involved.

24 QUESTION: Isn't that a sensible sort of a
25 safeguard against a majoritarian taking?

1 MR. TRIBE: I guess, Justice O'Connor, the
2 reason I don't think so, although it has some intuitive
3 appeal, the reason I don't think so is that if the
4 public decides that it wants to spend public money,
5 let's say benefiting a crony of the mayor, so it will
6 take a factory, turn it over to the mayor, I would think
7 it makes matters worse, not better, that the mayor's
8 friend doesn't even have to pay.

9 In a case like this, it's perfectly natural
10 that those who occupy should be the ones who are taxed
11 by the public.

12 In any case, let me briefly turn to the
13 abstention issues, because it seems to me that if this
14 Court does have doubts along the lines that you're
15 suggesting -- is there genuinely a public purpose -- and
16 if the Court for the first time in decades were willing
17 to repudiate legislative findings --

18 QUESTION: Mr. Tribe, you're pretty
19 half-hearted about the abstention doctrine. Basically,
20 if we'll rule for you on the merits you want us to say
21 abstention was not required, but if we're inclined to
22 doubt you on the merits you want us to go back and say
23 the court should abstain.

24 MR. TRIBE: No, Justice Rehnquist, I believe
25 abstention, unless we go with Justice Brennan's dissent

1 in Thibodaux, that abstention was required, but the
2 Court could quite efficiently say that in dictum and
3 uphold this law on the merits, rather than dragging out
4 what I think is frankly a wholly unsubstantiated attack
5 against the validity of the law.

6 We are not trying to have it both ways. From
7 the very beginning, as we explain in our reply brief, we
8 have urged that there should be abstention.

9 QUESTION: Well, I thought you suggested
10 earlier that there are so many uncertainties about this
11 statute and the whole scheme that we ought to wait until
12 we hear from the state court.

13 MR. TRIBE: If you think those uncertainties
14 could invalidate it, then of course you must wait.

15 QUESTION: Suppose we don't?

16 MR. TRIBE: Then I thin it would be proper for
17 the Court either to require abstention or to decide
18 that, since so much water has gone under this --

19 QUESTION: I thought you said earlier that
20 it's presently pending in the Hawaiian Supreme Court,
21 that you were going to urge upon us was reason enough
22 for our insisting on abstention.

23 MR. TRIBE: I would like to do just that, I
24 would like to do just that.

25 Let me say as to Pullman abstention, if there

1 are any doubts about the public purpose, it is the
2 courts of Hawaii in the now pending case that should
3 answer the question.

4 But that pending case shows you precisely how
5 Younger abstention also was mandated. That is, in that
6 case a trial on just compensation was held in November
7 of '82, a trial on public use was held in 1983. But for
8 all practical purposes, once the Hawaii Housing
9 Authority decided that it would serve a public purpose
10 to take the Kamiloiki tract on March 30, 1979, that case
11 was pending and under Younger there should have been
12 abstention.

13 And in fact we have argued, I think without
14 any meaningful rebuttal from the Appellees, that as
15 early as February 22nd, 1979, six days before this
16 federal complaint was filed, they had every opportunity
17 to present to the Hawaii Housing Authority all of their
18 constitutional objections, and they did so in a letter,
19 in a letter which urged it on constitutional grounds to
20 go for them.

21 Now, it seems to me that when that happens,
22 for this Court to reach the merits is wholly
23 unnecessary, although as a matter of judicial economy,
24 feeling that the state has unjustly been dragged through
25 years of litigation, if it is clear to the Court, as I

1 think it could well be, that this law is obviously valid
2 on its face, the Court might well say so.

3 Let me reserve the remainder of my time if I
4 may.

5 CHIEF JUSTICE BURGER: Mr. Ashford.

6 ORAL ARGUMENT ON CLINTON R. ASHFORD, ESQ.,

7 ON BEHALF OF APPELLEES

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

10 This is not a regulation case. This is not an
11 urban land economics case. This is a taking case. This
12 case will decide, hopefully, if the public use
13 requirement of the Fifth Amendment is satisfied by a
14 mere legislative declaration that the taking is for a
15 public purpose. And hopefully it would also decide
16 whether such declaration shields the statute from
17 judicial scrutiny and analysis and, in a proper case,
18 from being declared unconstitutional.

19 At stake, if the Court please, is a
20 fundamental right in our system, and that is the
21 fundamental right to own, use and possess property free
22 from government intervention or interference so long as
23 it's being done in a lawful manner, and free of
24 government compulsion to transfer it to another owner
25 merely because the public interest, it is asserted, is

1 thereby served.

2 This statute is absolutely unprecedented. No
3 legislature ever before has been so bold as to transfer
4 a private title or to set up the machinery for
5 transferring a private title from A to B --

6 QUESTION: Is there any factual setting in our
7 whole system that's comparable to the situation in
8 Hawaii in terms of land?

9 MR. ASHFORD: Hawaii has somewhat of a unique
10 land history, Your Honor, but that unique land history,
11 despite what Mr. Tribe says, has got nothing to do with
12 this. If there is a concentration of land in Hawaii, it
13 certainly is no greater than in the U.S. as a whole.
14 And concentration in any event is not going to be solved
15 by this statute.

16 However, our case doesn't depend upon the
17 application of the facts to it.

18 QUESTION: I don't understand your comment
19 about it being no greater a concentration than in the
20 U.S. as a whole. Would you expand on that?

21 MR. ASHFORD: Yes, Justice Blackmun. There
22 was a study done in 1978 by the United States Department
23 of Agriculture on land ownership in the United States.
24 That study found, among other things, for example, that
25 less than half of one percent of the major landowners

1 owned 40 percent of the land.

2 In Hawaii government collectively owns
3 somewhere between 40 and 45 percent. The figures are a
4 little hazy with regard to federal ownership. But while
5 we do have many big landowners, we also have thousands
6 upon thousands upon thousands of small landowners.

7 QUESTION: Well, do you really compare federal
8 lands on that percentage with the land owned by this
9 trust? Federal, Congress could dispose of that in any
10 way they wanted, the federal lands.

11 MR. ASHFORD: Yes, sir.

12 QUESTION: And they're doing it all the time
13 over the years, aren't they?

14 MR. ASHFORD: That is correct, Your Honor.
15 And the State of Hawaii could dispose of state lands as
16 another means of solving these problems of shortage of
17 housing and so forth if it wanted to. There are other
18 means by which all of this could be accomplished.

19 QUESTION: What percentage of the land is
20 owned by the State of Hawaii?

21 MR. ASHFORD: About 35 percent.

22 QUESTION: On Oahu?

23 MR. ASHFORD: That's in the state as a whole,
24 and this statute has statewide application. It is not
25 limited to Oahu only.

1 The procedures used under this statute are
2 also privately controlled, and the scheme is all
3 privately financed. If the statute is validated by this
4 Court, it will be the same as writing the public use
5 requirement out of the Constitution. You will be at the
6 beginning of a continuum which really has no end.

7 QUESTION: Well, do any of our cases suggest
8 that the public use requirement of the Fifth Amendment
9 is anything more than what the legislature says it is?

10 MR. ASHFORD: Your Honor, our whole point in
11 being here is to urge this Court not to surrender to
12 mere legislative declarations. Deference may be due
13 them, but not surrender.

14 QUESTION: But what cases do you have in mind
15 from this Court that say this Court should in effect
16 second-guess the legislature as to a public use?

17 MR. ASHFORD: Justice Rehnquist, we're not
18 here to ask this Court to second-guess the legislature.

19 QUESTION: Well, do you know of any cases that
20 say that this Court may say that something said by the
21 legislature is a public use is not in fact a public
22 use?

23 MR. ASHFORD: I would analogize it, Justice
24 Rehnquist, to the situation, to the approach that this
25 Court takes in examining regulations to determine

1 whether those regulations effect a taking, and in that
2 kind of analysis what the Court does is to look at the
3 impact of the statute upon the owner's property. It
4 measures the impact on the value of the property, on the
5 owner's ability to exclude others, upon his use of the
6 property -- in other words, the aggregate --

7 QUESTION: To decide whether there's been a
8 taking.

9 MR. ASHFORD: Correct, Your Honor. And we
10 would suggest that exactly the same type of analysis is
11 required in this case to determine whether there is in
12 fact a public use.

13 QUESTION: But I don't think that follows at
14 all. I think the guts of the Fifth Amendment
15 condemnation clause is to guarantee that where there has
16 been a taking the owner gets fair compensation, and that
17 isn't even an issue here, that these owners are going to
18 get fair compensation.

19 You want us to go further and say that even
20 where fair compensation is paid, the state can't condemn
21 unless the courts agree with the legislature's
22 assessment of public purpose, and I don't think any of
23 our cases support that.

24 MR. ASHFORD: That is precisely our position,
25 Justice Rehnquist.

1 QUESTION: Well, actually, though, Mr.
2 Ashford, didn't Berman and Parker say explicitly that
3 review of a legislative determination of public use is
4 at best an extremely narrow one?

5 MR. ASHFORD: That is correct, it did.
6 However, I would invite Your Honor's attention to the
7 fact that in Berman against Parker the taking was by
8 government for itself.

9 And the other cases, Old Dominion Land
10 Company, TVA against Welch, these other cases which make
11 the same kind of broad statements about deference to the
12 Congressional determinations or legislative
13 determinations, all of those, sir, were cases in which
14 the government was taking the land for itself and
15 putting it to use. There was some private development
16 of land in Berman -- I'll get to that in just a few
17 moments -- but in all of those cases where those
18 statements were made it was government taking it for
19 itself.

20 Mr. Justice Rehnquist, just to come back to
21 your point, sir, Justice Stewart said in Hughes against
22 Washington, which was another taking case, granted, that
23 the Constitution measures the effect of an Act not by
24 what the state says or what it intends, but what it
25 does.

1 QUESTION: How many people joined him in that
2 statement?

3 MR. ASHFORD: That was his concurring opinion,
4 and that is our position here.

5 The public use requirement and the just
6 compensation requirement are two separate and distinct
7 requirements. It is our position, Your Honor, that they
8 must both be met, and the mere statement by the
9 legislature that the public use requirement has been met
10 is not adequate.

11 This Court, in exercising its judicial
12 function --

13 QUESTION: Well, the legislature said more
14 than that. It said there's a public use and here's what
15 it is, and they said what it is. And what's wrong with
16 that declared purpose?

17 MR. ASHFORD: Well, if this --

18 QUESTION: You say -- it certainly is a
19 reason. You just say it's not an adequate reason for
20 taking property.

21 MR. ASHFORD: Our point is this, Mr. Justice
22 White. If there is a problem, there's a legitimate
23 problem to be solved, the legislature has the power to
24 solve it, but it must do so in a constitutional way.
25 And it is our position here that this statute does not

1 do it in a constitutional way, because here we have a
2 taking of title, title is transferred from private owner
3 A to private owner B, with the government intervening
4 solely and merely as a conduit in the passage of that
5 title.

6 And irrespective that the legislature said
7 that that is a public use, all of the indicia, if one
8 examines the statute, collectively demonstrate that it
9 is purely a private use. Let me get to that, if I may.
10 There is an aggregation of indicia here which we think,
11 notwithstanding what the legislature said about this
12 statute, clearly brands it as a taking for private
13 purposes.

14 The use and useability of the property, first,
15 does not change. Neither the property taken nor any
16 property served nor the environs, nothing is changed
17 here. Not even a change of possession is contemplated.

18 Secondly, this is a private transfer from
19 private owner A to private owner B. The government is
20 in the picture solely and merely as a conduit. It
21 cannot act at all in bringing about any of this activity
22 unless and until the aggregate, the requisite number of
23 lessees take certain action. Unless and until that
24 happens, the government can't act under this statute.

25 QUESTION: Well, on your statement about the

1 government being a conduit, wasn't that true in every
2 one of the cases, not here, not in this Court that I'm
3 aware of, where there was a waterfront clearance or a
4 slum clearance? The land was condemned for a declared
5 public purpose and then was sold to the highest bidder
6 some time later on. It went directly from private to
7 private, through the government.

8 MR. ASHFORD: There is very definitely a
9 difference between cases such as those Your Honor
10 mentions, including Berman, and our case, Your Honor,
11 because in those cases there is a government plan, there
12 is a comprehensive detailed study made to bring about a
13 certain change in the use of the land. The government
14 then embarks upon the carrying out of that plan and
15 effects the change in use.

16 It happens to use private developers to
17 accomplish that, but the plan is to change the use in
18 the property, and it's merely the means of carrying that
19 out that involves a private title.

20 Here the whole purpose of the statute is to
21 vest private title in the lessees, and that's the end of
22 it. Beyond that there is no government control, no
23 regulation whatever.

24 QUESTION: Mr. Ashford, aren't typical
25 antitrust divestiture orders just orders that you take

1 from A to give to B, two private people?

2 MR. ASHFORD: Justice O'Connor, I am not an
3 antitrust lawyer, but my understanding of antitrust
4 remedies are that, even with divestiture, the private
5 owner is given an opportunity over a period of time to
6 get rid of the title. He is able to do that in a free
7 market. He is not limited to selling it to one person.
8 There are many differences between what a person is
9 forced to do under divestiture and what this statute
10 forces a person to do, which is to sell to one person
11 only, upon his application, using his money.

12 That's another element of the statute that I'd
13 like to invite to the Court's attention. In this whole
14 scheme, not only the costs of the condemnation
15 proceeding, but all of the compensation is paid by the
16 private party who ends up with the title. In the
17 redevelopment cases, Mr. Chief Justice, you do have the
18 government at least paying the compensation and then
19 getting back the money. Here the compensation is all
20 paid by the lessees.

21 QUESTION: Well, theoretically, I guess you
22 could have a situation where the private lessee didn't
23 end up paying the bill and the government agency
24 continued to hold the property, is that right?

25 MR. ASHFORD: Under this statute?

1 QUESTION: Yes.

2 MR. ASHFORD: Theoretically you could, Justice
3 O'Connor. But the whole policy of the statute is to
4 pass the title through the government to the lessees. A
5 question was asked of Mr. Tribe on this point. Justice
6 Brennan asked it, I believe, and the statute when it
7 talks about using the power of eminent domain to acquire
8 the title says in the very same section, which is
9 516-22, that this chapter is to govern the disposition
10 of that title.

11 And in Section 516-28 it is stated: "It shall
12 be the policy of the Hawaii Housing Authority to
13 encourage the widespread fee simple ownership of
14 residential lots." All of the findings, and indeed all
15 of the operations, of the statute contemplates that the
16 government will be merely a conduit in the passage of
17 title from private party A to the private lessee.

18 QUESTION: Well, is that an argument in favor
19 of abstention, to let the state courts decide the
20 operation of the statute or the policy?

21 MR. ASHFORD: There hasn't been any question
22 raised as to how the statute does in fact operate that I
23 am aware of, Justice O'Connor. And the basic core
24 question here is is this a public use. The legislature
25 declared it to be, we concede that. But it is a

1 judicial function to declare the public use.

2 If the legislature is permitted to itself
3 define constitutional limits on its own power, then
4 those limits no longer have any meaning.

5 QUESTION: Well, what's wrong with that
6 declared purpose? It wants to spread out the ownership
7 of residential property. Now, certainly that's going to
8 be the effect of the statute. There's going to be more
9 people owning residential property than there were
10 before. Why shouldn't that qualify as a public
11 purpose?

12 MR. ASHFORD: Because of the aggregate of the
13 methods under which this statute --

14 QUESTION: The owner who has to sell gets his
15 money out of it.

16 MR. ASHFORD: But that is just compensation
17 only. That is not public use.

18 QUESTION: I understand, I understand that.
19 What's wrong with spreading the ownership of residential
20 property as a public purpose?

21 MR. ASHFORD: I don't have any quarrel with
22 that as a public purpose, but under this --

23 QUESTION: Well, why isn't the case over,
24 then?

25 MR. ASHFORD: Because under this statute and

1 under the Constitution you cannot constitutionally
2 accomplish that purpose by taking A's property and
3 giving it to B, and that is the core of what the case is
4 about.

5 In this case, that is all that happens, A's
6 property is taken and is given to B. There is no --

7 QUESTION: But that's for the purpose of
8 spreading the ownership of residential real estate. Now
9 what's wrong with that purpose?

10 MR. ASHFORD: If the Court please, a
11 legitimate purpose must be accomplished by lawful
12 constitutional means. Assuming the legitimacy of the
13 purpose here, our challenge to the statute is the means
14 by which it is carried out, because it fails to
15 recognize the public use limitation of the Fifth
16 Amendment. And that public use limitation does not
17 permit a legislature to behave as this legislature has
18 behaved.

19 QUESTION: Well, if that's just going to be
20 your syllogism, how come it's a public use for a
21 railroad to be able to go out and condemn property of a
22 private person, and the title goes directly from one
23 private person to another?

24 MR. ASHFORD: There's more to it than that,
25 Mr. Justice.

1 QUESTION: Well, there's a public purpose.
2 The reason they're doing it is to promote transportation
3 and railroads.

4 MR. ASHFORD: But the railroad is in effect
5 similar to government itself. It is a regulated entity,
6 and through the regulation of that entity the public
7 continues to have some interest and some control over
8 the situation.

9 In this situation there is no control
10 whatsoever by the public or by --

11 QUESTION: How about your common law easement
12 of necessity?

13 MR. ASHFORD: I'm not sure I understood your
14 question, Your Honor.

15 QUESTION: Where a person who owns a parcel of
16 property which has no access to a public road is
17 entitled under many circumstances to condemn an access,
18 one private owner condemn an access through another
19 private owner's property in order to get himself to a
20 public road.

21 I don't know if it's universally true. It
22 certainly was in the place where I practiced.

23 MR. ASHFORD: I am only aware of two cases in
24 which this Court has validated such takings, Your
25 Honor.

1 QUESTION: Well, do you think if something was
2 uniformly subscribed to at common law in England and in
3 many states in this country it needs this Court to
4 validate it, to call it an accepted practice?

5 MR. ASHFORD: There are differences between
6 those cases and this, because it is not merely a private
7 party ending up with title, as in the cases that you
8 mentioned, but in this case the taking is initiated,
9 financed and controlled by the private party. There is
10 no government intervention whatsoever except to act as
11 the conduit for passage of title. There is no
12 government plan, predetermined plan to be followed.
13 There is no restriction upon the use of the property
14 once it has been transferred.

15 These elements collectively demonstrate in our
16 view that this is purely a private taking. Indeed, any
17 public benefit that arises from this arises only
18 incidentally to the party, the private party who
19 initiates the condemnation, who identifies the property,
20 and who pays for it, ending up owning it and using it,
21 and there is no change in use whatsoever.

22 The kinds of cases which Your Honor is
23 referring to I think are those in which there is a de
24 minimis taking and in which either or both of the
25 property taken and the property served by the taking

1 will have their uses changed and would become more
2 productive and more useful to the economy. There's
3 nothing of that nature whatsoever in this case.

4 QUESTION: Well, suppose a group of farmers
5 out West form an irrigation company and their object is
6 to build some ditches and a reservoir and irrigate their
7 farm, and when that company gets formed it suddenly has
8 the power to condemn property, and it takes property
9 from various people for the benefit of this group of
10 farmers.

11 MR. ASHFORD: In that situation you have a
12 scheme, Your Honor, which is wrought by government, if
13 you will, and employed and brings about certain changes
14 in land use, and it makes otherwise worthless land
15 productive, and that is deemed to be useful to the
16 economy. That is the justification for those
17 drainage --

18 QUESTION: Well, is that very far from saying
19 we ought to have -- we ought to spread the ownership of
20 residential property? It might improve the market.

21 MR. ASHFORD: Justice White, in this case we
22 end up with a multiplicity of owners, but we don't end
23 up with a multiplicity of new uses or any new
24 productiveness or anything of that nature, as always
25 occurs --

1 QUESTION: Well, but it's a much less
2 cluttered use and ownership, is it not? Isn't there a
3 difference as to whether people are likely to develop
4 property when they have this limitation of very limited
5 ownership?

6 MR. ASHFORD: All of these properties are
7 fully developed, Mr. Chief Justice. Indeed, only fully
8 developed properties can be taken under this statute.
9 Only those properties on which the taking parties
10 already own houses, and that is the only kind of
11 property that can be reached under this statute.

12 I'd like to --

13 QUESTION: But you don't think that there is a
14 state purpose, a public purpose in trying to take some
15 of these fetters off of the ownership?

16 MR. ASHFORD: Well, the property is now freely
17 alienable, Mr. Chief Justice. There are -- the
18 leasehold title and the fee simple title are separated
19 and they're held by different parties, but each of those
20 titles is fully alienable.

21 QUESTION: Then are you suggesting that the
22 purposes of the legislature were not rational?

23 MR. ASHFORD: We think that the purposes were
24 irrational, and the means that they chose to carry out
25 those purposes were irrational, but our case does not

1 depend upon that. That is a portion of our due process
2 argument.

3 The core of the case is, if the legislature
4 declares it to be a public use, does this Court just
5 accept that or does this Court make its own inquiry?

6 QUESTION: May I ask sort of a modified
7 question. Supposing the Hawaiian legislature amended
8 the antitrust law for the State of Hawaii to provide
9 that no person may own more than ten percent of the real
10 estate on which single family dwellings are located,
11 thereby intending to increase competition in the sale of
12 real estate, as you do here.

13 Would that be unconstitutional in your view?

14 MR. ASHFORD: That would be a regulation.

15 QUESTION: It would accomplish precisely the
16 same purpose as this statute.

17 MR. ASHFORD: If, Your Honor, there was a
18 legitimate objective to be served by --

19 QUESTION: The objective is to increase the
20 ownership of real estate and improve the competition in
21 the market for single family lots.

22 MR. ASHFORD: And they've chosen a means which
23 is reasonably calculated to lead to that end, and I
24 would say it would be constitutional.

25 QUESTION: Isn't this means reasonably

1 calculated to lead to that end?

2 MR. ASHFORD: But a due process test is not
3 the only test that needs to be applied here. We have a
4 specific constitutional limitation.

5 QUESTION: No, there's not a limitation.
6 There's a requirement that when it's done in this way
7 you must pay just compensation.

8 MR. ASHFORD: There is a requirement also for
9 public use, and it's our position that the public use
10 requirement is not met when you have a taking merely
11 from A to B with --

12 QUESTION: Well, my example, the hypothetical
13 I gave you, contemplated that all the sales would be to
14 other private purchasers, and I go farther and say that
15 the statute only be enforceable by the suit of a private
16 party, as you have under the antitrust laws an
17 individual can bring suit.

18 I don't see much difference between the two
19 laws in terms of public purpose.

20 MR. ASHFORD: The difference is in the fact
21 that there is an express public use requirement which
22 must be met. That express requirement is not an
23 integral part so far as --

24 QUESTION: So you would withdraw your
25 objection if this statute said you must sell your land

1 to the present owner? It will not be taken by the
2 state, but you must sell directly to them at a fair
3 market value. Then you have no objection?

4 MR. ASHFORD: That is what the statute in
5 effect does.

6 QUESTION: Well then, but my example -- you
7 said there's no problem with my example and my example
8 would require that.

9 MR. ASHFORD: But your example I think, Your
10 Honor, was a bit different, because you were taking
11 about the property being sold to a wide variety of
12 people and not to the particular person who was residing
13 on it.

14 QUESTION: Well, supposing the statute said
15 the owner must sell off parcels of real estate to the
16 present occupants until his ownership is reduced to no
17 more than ten percent of the total acreage in the
18 state.

19 MR. ASHFORD: I think that there would be a
20 very good question, Your Honor, whether or not that
21 would be, notwithstanding it's called a regulation, that
22 it in fact is a taking, and then if so --

23 QUESTION: No state money involved, no state
24 involvement at all except as a referee on the price, I
25 suppose.

1 MR. ASHFORD: But nevertheless, there's a
2 mandatory obligation to sell.

3 QUESTION: Until you reach the ceiling.

4 MR. ASHFORD: And that could constitute a
5 taking, and if so then you have to have a public use,
6 and your hypothetical assumes a legitimate public use.

7 QUESTION: The very public use that the
8 Hawaiian legislature found to exist in this case.
9 That's what I assumed.

10 MR. ASHFORD: We don't concede to that as a
11 public use, if the Court please.

12 I'd like to spend a minute or two on Berman
13 against Parker, because it is distinguishable from this
14 case and it does not control this case. In that case
15 there was a tract identified by a government agency.
16 Here the tract to be taken or the land to be taken is
17 identified by the private party who ends up with the
18 title.

19 In Berman against Parker the condemnation was
20 initiated, controlled and paid for by a government
21 agency. None of those circumstances exist in the
22 current case.

23 In Berman against Parker, there was a
24 predetermined comprehensive plan for redevelopment of
25 these areas. That plan was contributed to by three

1 separate public agencies: the National Capital Planning
2 Commission, the District of Columbia Commissioners, and
3 the District of Columbia Redevelopment Land Agency.

4 Here the HHA is involved solely as a conduit for title.

5 There were massive changes in use to be
6 accomplished through the redevelopment plans.
7 Delapidated old buildings were to be torn down, open
8 spaces were to be created, slums were to be eliminated,
9 new buildings were to be constructed. The entire
10 environment of the property taken and the property
11 surrounding it was to be totally changed.

12 In our situation, nothing happens. The lessee
13 presumably stays in possession or, if he wants to, he
14 can lease to someone else or he can sell the place, all
15 without any control by government at all.

16 The ten-year limitation, incidentally, Mr.
17 Justice Blackmun, applies only if the government
18 supplies the funds which the lessee uses to purchase the
19 property. Absent government funds being supplied and
20 borrowed by the lessee, which has not happened in any
21 case, as the record in this case demonstrates, the
22 ten-year limitation does not apply.

23 So that the private owner who supplies the
24 funds can do as he will with the property with only one
25 other exception, and that is if he chooses to lease it

1 for more than 20 years it brings it back under the
2 operation of the Act. But absent that one single
3 exception, there is no control over the use of the
4 property.

5 QUESTION: Was this Act challenged just as
6 soon as the first application was made, or have there
7 been a lot of transfers under this Act?

8 MR. ASHFORD: There have been so-called
9 "friendly condemnations," as the record reflects, where
10 owners did go through the court process and there were
11 transfers made.

12 QUESTION: Why do you call it "friendly"? You
13 mean the Act was just operating like it was supposed
14 to?

15 MR. ASHFORD: No, I mean, Your Honor, that the
16 HAA, the taking agency, and the party whose property was
17 taken agreed beforehand upon the taking and the price to
18 be paid and so forth, and that's in the testimony of Mr.
19 of Kohatsu.

20 QUESTION: Well, so then is there any history
21 about what happened to the lots?

22 MR. ASHFORD: Any mystery about what happened
23 to them?

24 QUESTION: Any history, history. Do you know
25 what happened to those lots?

1 MR. ASHFORD: No, I don't, Your Honor. I know
2 in some takings, in some transfers by my client on
3 agreed upon prices with lessees outside of the operation
4 of this Act, there have been a lot of resales of these
5 same properties.

6 QUESTION: And has the price generally
7 escalated --

8 MR. ASHFORD: It has.

9 QUESTION: -- or gone down?

10 MR. ASHFORD: It has.

11 QUESTION: Gone up?

12 MR. ASHFORD: It has. I refer to Wai-Kahala
13 in particular.

14 QUESTION: Mr. Ashford -- go ahead.

15 QUESTION: So that -- so that this present
16 system that the Act attacks, it hasn't operated to raise
17 real estate prices?

18 MR. ASHFORD: It hasn't operated to lower
19 them, sir.

20 QUESTION: Well, if as soon as the lots are
21 sold the price goes up, the old system certainly didn't
22 escalate the price.

23 MR. ASHFORD: A logical conclusion, Your
24 Honor.

25 QUESTION: So there's no market power.

1 QUESTION: Mr. Ashford, I suppose there have
2 been a number of friendly accommodations or uses of this
3 statute because of the attractive tax benefits of the
4 condemnation system, is that correct?

5 MR. ASHFORD: Yes, there have been, Your
6 Honor.

7 QUESTION: Mr. Ashford, let me try again as to
8 how you would distinguish what took place right here in
9 Washington. There were whole areas of Washington that
10 were terribly run down and they were condemned. I've
11 forgotten the details about the housing authority, but
12 they were condemned and taken -- the same was true down
13 on the waterfront -- and then sold to private parties.

14 Do you think this purpose in Hawaii is less a
15 public purpose than the purpose of eliminating slums?

16 MR. ASHFORD: The Hawaiian situation, Your
17 Honor, is entirely different, because when the sales
18 were made here in Washington, D.C. --

19 QUESTION: I realize it's quite different, but
20 is it different in principle, in terms of the public
21 nature of the purpose declared?

22 MR. ASHFORD: I think it is entirely different
23 in principle, because there were massive changes in use
24 of the property. You had slums eliminated, new
25 conditions created, and so forth.

1 Nothing of that nature is taking place under
2 this statute. The only thing that happens is that,
3 instead of one owner, you're going to have several
4 hundred or even several thousand owners. There's a
5 change in ownership, but there is no change in use or
6 useability of the property, and nothing happens other
7 than A has the title instead of B having it.

8 And that is what makes this case so very
9 different. There is no government plan beforehand.
10 There is no continuing government oversight or control,
11 and none of the property is directly used for public
12 purposes such as schools or parks or whatever, in the
13 case of these redevelopment plans.

14 QUESTION: What happens in the few cases, in
15 these friendly suits or friendly sales? Has the
16 Internal Revenue Service insisted on taxing the proceeds
17 at straight income tax rates?

18 MR. ASHFORD: All of these have taken place,
19 according to my understanding, Justice White, under
20 rulings from the Internal Revenue Service which have not
21 taxed the proceeds as ordinary income.

22 QUESTION: So that I suppose if your clients
23 were forced to sell a lot of these, many, many lots
24 under this Act -- suppose the Act is upheld, so that
25 there'll be hundreds of lots sold under this. Do you

1 know, is it predictable that the proceeds will not be
2 taxed as capital gain?

3 MR. ASHFORD: I think that they will not be.

4 QUESTION: Not be taxed --

5 MR. ASHFORD: I think that they have not been
6 and that they will not be, if the Act is validated.

7 QUESTION: You mean taxed as what, income
8 or --

9 MR. ASHFORD: No, capital gain. I think that
10 they will not be taxed as straight income, but they will
11 be taxed as capital gains.

12 Now, the point has been made that my clients
13 urged the legislature to arrive at this result. But if
14 you're confronted by a thug and said that you're going
15 to get a terrible beating, shall I use a two by four or
16 a steel pipe, well, obviously you're going to select the
17 two by four. This is a choice merely of lesser evils.

18 Thank you.

19 CHIEF JUSTICE BURGER: Do you have anything
20 further, Mr. Tribe?

21 REBUTTAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.,

22 ON BEHALF OF APPELLANTS

23 MR. TRIBE: Yes, briefly, Mr. Chief Justice.

24 Speaking for the State of Hawaii and not I
25 think for any thugs, this law I think is plainly valid.

1 And I think I now finally understand the circle that
2 lies at the heart of the Appellees' argument. The
3 circle is this: It's okay to take this property, but
4 you need a public purpose.

5 So Justice White asks: Why isn't spreading
6 ownership a public purpose. And then we're told: Oh,
7 that's a public purpose, but you need to act
8 constitutionally. And then we ask: Why isn't this
9 constitutional? Oh, because there's no public purpose.

10 I suppose they try to escape from that circle
11 by one narrow escape route, and that is to argue that
12 the government must somehow always take for itself.
13 Justice Rehnquist and Justice White ask about the
14 irrigation cases and the road cases, and we're told
15 they're distinguishable, as is the Chief Justice's
16 question about urban redevelopment, because there, you
17 see, the government has a plan.

18 We have a plan, too; they just don't like our
19 plan. Our plan is to break up their market power. As
20 Justice O'Connor perceives and as Justice Stevens'
21 question I think indicates, this is just like other
22 forms of divestiture.

23 But their answer is divestiture is regulation,
24 it's not taking. I think this Court really is concerned
25 with realities and not just labels. The reason that

1 taking is used rather than regulation is that they had
2 the lobbying power to avoid the regulatory route.

3 And when they point out, more or less equating
4 themselves with the government, that the government too
5 has a lot of land, why doesn't it sell it, I think I
6 understand what people in Hawaii mean when they say that
7 these landowners are Hawaii's other government.

8 When they also say that this statute is
9 unprecedented, that no legislature has ever been so
10 bold, I am reminded of the Virginia legislature in 1779
11 which broke up landholdings in a way parallel to this,
12 of the Connecticut legislature in 1793, and of
13 Pennsylvania in 1799. This is not unprecedented
14 action.

15 And even if you take the pigeonholing approach
16 of insisting that it be compared explicitly with other
17 contemporary exercises of the taking power, it doesn't
18 look all that unprecedented to me. It's not really
19 different from *Pennsylvania Coal v. Mahon*, where
20 property rights were, this Court held, in effect taken
21 from the owner of the mining rights under the land and
22 transferred to the surface owner.

23 What followed from that? That there was no
24 power to do it because it went from A to B? No, all
25 that followed was that you had to compensate, and there

1 is no challenge --

2 QUESTION: Well, that's all the putative
3 condemnee asked for in Pennsylvania Coal against Mahon.

4 MR. TRIBE: I suppose the condemnee, though,
5 might have been happy to have the law wholly
6 invalidated. The brief I think urged also invalidation,
7 and the Court made clear, I think, that if there were
8 compensation that's all that would be required. In
9 fact, the key line in Justice Holmes' opinion is that
10 the State of Pennsylvania must not take a constitutional
11 shortcut, it must pay.

12 Now, when the State of Hawaii decided to use
13 eminent domain, to avoid the constitutional shortcut of
14 the Maryland type law that required the inclusion of
15 options to purchase, it's remarkable that then the
16 Appellees turn around and say, because we're using
17 eminent domain, with its guarantees of compensation,
18 that now you should strike the law down.

19 And it's remarkable that they say that because
20 those people who occupy the land will, of all things,
21 end up paying for it, that that makes this law
22 unconstitutional. We don't think this Court should so
23 hold.

24 Thank you.

25 CHIEF JUSTICE BURGER: Thank you, gentlemen.

1 The case is submitted.

2 (Whereupon, at 2:52 p.m., argument in the
3 above-entitled matter was submitted.)

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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:

#83-141-HAWAII HOUSING AUTHORITY, ET AL., Appellants v.

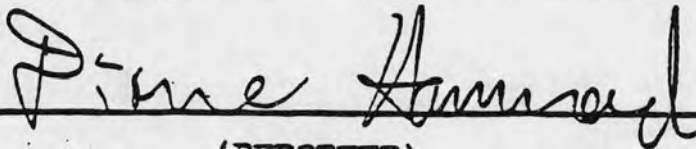
FRANK E. MIDKIFF, ET AL;

#83-236-PORTLOCK COMMUNITY ASSOCIATION(MAUNALUS BEACH), ET AL.,
Appellants v. FRANK E. MIDKIFF, ET AL: and

#82-283-KAHALA COMMUNITY ASSOCIATION, INC., ET AL., Appellants
v. FRANK E. MIDKIFF, ET AL.

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