

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1170

TITLE UNITED STATES, Petitioner v. 50. ACRES OF LAND, ETC., ET AL.

PLACE Washington, D. C..

DATE October 2, 1984

PAGES 1 thru 55



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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. :

No. 83-1170

50 ACRES OF LAND, ETC., ET AL. :

:-

Washington, D.C.

Tuesday, October 2, 1984

The above-entitled matter came on for oral
argument before the Supreme Court of the United States
at 1:44 o'clock p.m.

APPEARANCES:

JOSHUA I. SCHWARTZ, ESQ., Assistant Solicitor
General, Department of Justice, Washington,
D. C., on behalf of Petitioner.

H. LOUIS NICHOLS, ESQ., Dallas Texas, cn behalf of
Respondent.

C C N T E N T S

ORAL ARGUMENT OF

PAGE

JOSHUA I. SCHWARTZ, ESQ.,

on behalf of the Petitioner

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H. LOUIS NICHOLS, ESQ.,

on behalf of the Respondent

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JOSHUA I. SCHWARTZ, ESQ.,

on behalf of the Petitioner -- rebuttal

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

2 CHIEF JUSTICE BURGER: Mr. Schwartz.

3 ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.

4 ON BEHAIF OF THE PETITIONER

5 MR. SCHWARTZ: Thank you, Mr. Chief Justice,
6 and may it please the Court:

7 This case is here on writ of certiorari to the
8 United States Court of Appeals for the Fifth Circuit.
9 The question presented is whether when the United States
10 takes property belonging to a state or local government
11 for federal use it is obliged by the just compensation
12 clause of the Fifth Amendment to pay compensation
13 measured by reference to the cost of a substitute
14 facility rather than the usual standard in condemnation
15 cases, the fair market value of the property that was
16 taken by the United States, even though in the
17 particular case a market exists for the kind of property
18 that was taken and it is found that the fair market
19 value measure is reasonably ascertainable in the
20 particular case.

21 The Court of Appeals answered the question in
22 the affirmative; the government contends that the answer
23 should be no.

24 The case arises from the taking of a 50 acre
25 site occupied by a sanitary landfill, occupied by the

1 Respondent, the city of Duncanville, Texas. That site
2 was taken, along with an adjacent site which was in
3 private ownership prior to the taking to accommodate a
4 Corps of Engineers flood control project, the site would
5 be flooded by the project, and therefore the United
6 States was obliged to pay compensation for it.

7 The taking was carried out pursuant to the
8 so-called quick take provisions of the Declaration of
9 Taking Act, which was effective on October 3, 1978.
10 Estimated just compensation of just under \$200,000 was
11 deposited into the registry of the court, and it was
12 later released to Respondent.

13 Following the taking, Respondent employed a
14 temporary landfill site which was in private ownership
15 for an interim period and later, approximately two years
16 later, began to use a new site located in Ellis County,
17 Texas, consisting of somewhat over 113 acres that it had
18 purchased and used as a substitute site. The usable
19 capacity of the substitute site, according to the
20 uncontradicted evidence, was somewhat greater than three
21 times that of the site that the United States had
22 acquired from the City of Duncanville.

23 A dispute arose in the District Court between
24 the parties as to the proper measure of compensation for
25 the taking. The government contended that the usual

1 fair market value standard should be applied.

2 Respondent claimed that it was entitled to recover the
3 entire sum that it alleged it had expended and would in
4 the future expend in improving -- in acquiring and
5 improving the substitute site in Ellis County.

6 The District Court was unwilling to resolve
7 the issue at the threshold. Instead, it determined to
8 allow both theories to go to the jury. Both parties
9 were allowed to present evidence in support of their
10 respective theories. The jury was asked by special
11 questions to return alternative verdicts: one, the
12 finding of substitute facilities standard of
13 compensation; the other, the fair market value measure
14 of compensation. The jury's verdicts were \$723,000, a
15 bit over \$723,000 for a substitute facilities measure,
16 and \$225,000 for the fair market value measure.

17 The District Court then proceeded to enter
18 judgment against the United States, but on the
19 government's theory as to the amount of just
20 compensation, the District Court held that in a case
21 such as this where fair market value is ascertainable
22 and it is found that a market exists for the property of
23 the kind taken, that is the measure that is required to
24 be employed under this Court's decisions; and
25 furthermore, the District Court found that the

1 Respondent had not even carried its burden of
2 presenting -- had not in any event presented a prima
3 facie case as to what a reasonable substitute facilities
4 compensation award might be, the District Court
5 observing that the only testimony proffered by
6 Respondent pertained to the site they had actually
7 acquired, a site that was three times as large as the
8 site that was taken, and the District Court also
9 observing that the testimony suggested that Respondent
10 had paid in excess of fair market value for its
11 substitute site.

12 The Court of Appeals reversed. The Court of
13 Appeals conceded that this case was, in their language,
14 rather different from a typical substitute facilities
15 case in that in this case fair market -- there was no
16 claim that fair market value was either unavailable or
17 unworkable; nevertheless concluded that Respondent was
18 entitled to have its compensation measured by reference
19 to the cost of the substitute facility.

20 The Court of Appeals did attach a significant
21 caveat, however, to that holding. It held that
22 Respondent was not entitled to the benefit of the
23 advantages that accrued from purchasing a larger site,
24 and that on remand, the case was remanded for a new
25 trial so that on remand the jury could be instructed to

1 make an appropriate deduction from the substitute
2 facility cost to wash out the windfall that might
3 otherwise result from the fact that the Respondent had
4 purchased a more, a larger and more capacious landfill
5 site.

6 The government's position, as it has been
7 throughout this case, is that the fair market value
8 standard, which is ordinarily preferred in this Court's
9 cases, is the proper measure of compensation for the
10 taking of Respondent's landfill site.

11 In the final analysis, our submission is that
12 what is lacking in the Court of Appeals rationale and in
13 Respondent's argument is any explanation of what is --
14 what is defective about the preferred fair market value
15 standard of compensation. It does not seem to be
16 controverted that the Court's decisions establish that
17 the fair market value standard is the preferred
18 mechanism. The Court's cases make two essential points
19 in support of that proposition. The first is that
20 market value assists, in an economy such as ours,
21 measures what Justice Frankfurter called the external --
22 has in it what Justice Frankfurter called the external
23 validity of values that make it a fair measure of public
24 obligation to compensate the loss incurred by a property
25 owner as a result of the taking of his property for

1 public use.

2 The point is that various individuals may have
3 different use values for property, but if we are to have
4 any common standard and a just compensation clause that
5 says the government must pay someone for its property,
6 there has to be a kind of lingua franca, a common
7 standard of compensation, and Justice Frankfurter
8 explained and the Court has quite uniformly held that
9 fair market value provides that objective standard.

10 The Court has also observed that the fair
11 market value standard has the considerable advantage of
12 ease of administration, although it is not -- there are
13 always arguments as to what fair market value might be
14 in a particular case, the method is relatively easy to
15 apply and has less complications and speculations
16 associated with it than competing methods.

17 The Court has, however, recognized two
18 situations in which fair market value may -- a departure
19 from fair market value may be warranted. The first is
20 the situation where a market simply does not exist for
21 the kind of property that was taken, and this exception,
22 it has been noted, may well apply to cases where taking
23 of public property such as a condemnation of a bridge, a
24 sewer line or a road which frequently simply do not
25 exist or don't have any counterparts in the private

1 sector. The Court's opinion in the Lutheran Synod case
2 suggests, although it does not hold, that in that kind
3 of case it may be appropriate to use a substitute
4 facilities measure of compensation, and in fact, the
5 government concedes that point in our brief in those
6 cases, and it seems only reasonable where fair market
7 value simply is not a workable system, or market value
8 in one sense simply doesn't exist, it is pointless to
9 insist that the courts apply it.

10 But there is no claim in this case, just as
11 there is no --

12 QUESTION: Mr. Schwartz, you say that in the
13 case of sewers and water lines, fair market value simply
14 doesn't exist. Are you saying that a finder of fact,
15 properly instructed with valuation instructions in that
16 kind of a case, in hearing testimony, couldn't place a
17 value on, say, a sewer line?

18 MR. SCHWARTZ: Well, our question -- a value
19 could be placed on it, but our -- the problem is what
20 would the right kind of testimony be? The usual methods
21 of establishing the normal fair market value standard,
22 which is to look to what a hypothetical buyer would pay
23 a hypothetical seller, are very difficult to apply
24 because no one would buy a sewer line, or it is at least
25 typically assumed that no one would buy, no one --

1 QUESTION: At least there haven't been any
2 sales.

3 MR. SCHWARTZ: There haven't been any sales,
4 there's no income from the property to capitalize, so
5 that the -- to say that a jury properly -- a trier of
6 fact properly instructed with the proper evidence is to
7 beg the question. The question is what proper evidence
8 there would be in developing --

9 QUESTION: Well, but you know, in cases where
10 there are no comparable sales, you can go to sometimes
11 to reproduction cost. Why can't you do that in the case
12 of a sewer line?

13 MR. SCHWARTZ: Your Honor, I don't think I
14 disagree with what you said. Our point is that the
15 substitute facilities measure which we concede is
16 applicable to that kind of taking of public property is
17 really not any different from a reproduction cost
18 measure which is sometimes applied in the taking of
19 private property. You do the same, although the labels
20 are different in each case, when no comparables are
21 available and perhaps there is no income to capitalize,
22 you look at what it would cost to build the substitute,
23 and then you discount for the -- for either depreciation
24 or the added value of the --

25 QUESTION: But why not say that is one form of

1 fair market value rather than saying where fair market
2 value can't be ascertained you resort to substitute
3 facilities.

4 QUESTION: Well, it isn't market value, is
5 it? I mean, it's fair value, but it isn't market
6 value.

7 MF. SCHWARTZ: It's a fair value, and I
8 don't -- I think it's -- I'm not sure it makes all that
9 much difference. It is true that terminologically, for
10 reasons that may be perfectly arbitrary, the courts have
11 referred to reproduction costs as the third and least
12 preferred of the fair market value methods. It is in a
13 sense quite different from the others, and if we wanted
14 to use the label substitution costs, both for a private
15 case in which reproduction cost is appropriate, as the
16 last alternative, the alternative of last resort, and
17 for public cases where it is the alternative of last
18 resort, the law wouldn't be any different. It seems to
19 me it is just a semantic question.

20 In any event, we tried to make clear in our
21 brief that the kind of situation where substitute
22 facilities is appropriate for a public entity is the
23 same kind of situation where reproduction costs would be
24 appropriate for a private entity. We don't see it as a
25 principle that has anything to do with the nature of the

1 entity that owns the property taken, in other words. It
2 is a principle that has to do with the market -- whether
3 there will be evidence available as to what the market
4 would bear for that kind of property.

5 But the point in this case, of course, is that
6 this is not that kind of case. It is conceded that
7 their fair market value was ascertainable. In fact,
8 Respondent's expert witnesses testified that this
9 landfill site would have sold in the open market, and
10 they adduced comparable sale equities, and they assigned
11 the fair market value to the property.

12 QUESTION: Well, Mr. Schwartz, I guess there
13 is language in our cases that something other than fair
14 market value can be used in two instances: one, if you
15 don't have a fair market value, which you have been
16 discussing; or secondly, where it is manifestly unjust
17 to the owner or the public to apply a fair market value
18 principle.

19 Now, did the court below attempt to analyze
20 this case within that framework to determine whether it
21 is manifestly unjust here to use fair market value?

22 MR. SCHWARTZ: No. The court --

23 QUESTION: Could, could a case like this,
24 where you are taking a landfill, for example, or some
25 other public facility that must be replaced, would it

1 ever be appropriate to analyze it in terms of that
2 manifestly unjust standard? Could it fit?

3 MR. SCHWARTZ: Your Honor, I hesitate to say
4 no, never, but I think the pertinent question that needs
5 to be answered is why would it be -- try to understand
6 why it might be manifestly unjust in a particular case,
7 and neither the Court of Appeals nor Respondent has
8 explained why it might be manifestly unjust. But it
9 seems to me that there are a number of reasons that have
10 been thrown out --

11 QUESTION: Well, okay, would it include the
12 fact that inevitably this local government is going to
13 have to acquire a substitute because it is under an
14 obligation to dispose of trash and garbage; and
15 secondly, because it is going to have to make a
16 substantial additional expenditure to do it over and
17 above acquiring the land, if those were the facts?

18 MR. SCHWARTZ: We are not satisfied that
19 either of those would establish the kind of manifest
20 injustice, and I would like to -- that the Court has in
21 mind, to the best of my understanding, and I would like
22 to explain why that is so.

23 The Court of Appeals focused on the first of
24 the points that you made. Although they didn't actually
25 say that there was an impermissible or unjust divergence

1 between the so-called indemnity principle of just
2 compensation and fair market value, they did, but in
3 distinguishing this Court's decision in Lutheran Synod
4 say, this case is different because there's an
5 obligation to replace the property.

6 We don't think that the obligation to replace
7 the property is a sufficient distinction for several
8 reasons, and most of what I have to say follows the line
9 of analysis that is in Justice White's concurring
10 opinion in the Lutheran Synod case.

11 Certainly private entities frequently have
12 either a legal -- may well have legal obligations to
13 replace property, and in any event, certainly have the
14 same pragmatic imperatives to replace property that a
15 public condemnee may experience. The Court's opinion in
16 Lutheran Synod points out that noncommercial property
17 owners, the most obvious and important example of which
18 is homeowners, hold their property for use and not for
19 its stream of income or its investment value, typically,
20 and certainly if the Highway Department puts an
21 interstate highway through your home, it is difficult to
22 conceive of any greater imperative to replace that home,
23 and I submit that irrespective of legal or practical
24 obligation, a public body such as Respondent doesn't
25 have a greater necessity to replace the facility.

1 QUESTION: Well, it may have a more immediate
2 necessity. If what has been taken is the public water
3 supply or the, in this case, sanitary landfill, the city
4 or the county has an obligation tomorrow to have
5 something in place to take care of that.

6 MR. SCHWARTZ: The homeowner has an equal --

7 QUESTION: The homeowner can go rent something
8 temporarily. Sure, you need a place to live, but it is
9 not the same. The public entity has an obligation to
10 keep these public services going.

11 Now, can that be a factor in determining what
12 is manifestly unjust?

13 MR. SCHWARTZ: It still seems to me that you
14 need something else. In fact, the argument made in
15 Lutheran Synod which the Court found to be factually
16 inapplicable there, that the necessity of replacement
17 might, the Court said might, and expressly reserved the
18 question which we have here today, might be sufficient
19 to show injustice, was based on two claims: one, the
20 claim of need to replace, and second, the claim that the
21 replacement facility would for some significant reason
22 beyond the local -- the condemnee's control, be greater
23 than the fair market value.

24 Unless there is that disparity in existence,
25 it seems logically irrelevant to worry about whether you

1 need to replace it because fair market value should be a
2 sufficient replacement.

3 In this case neither the Respondent nor the
4 Court of Appeals has explained why it is that it is in
5 the nature of thingsd that a replacement site is more
6 expensive. If that is not so, fair market value doesn't
7 impcse a hardship, and the need to replace, while it may
8 be relevant, is not a sufficient condition for --

9 QUESTION: Well, what if the cost of the
10 substitute was significantly less? It might be to the
11 government's advantage to compel a substitute facility
12 cost measure because you could pay the local government
13 less.

14 MR. SCHWARTZ: We are aware of that, and in
15 our brief we have made our choice. We concede that the
16 fair market value standard is the applicable one. The
17 cases generally suggest that that is true, that fair
18 market value should be paid when it is in excess of the
19 substitute facility's cost, and the reasoning behind
20 that is whether or not the municipality actually chooses
21 to make that use of its property, if it owns property
22 and has the legal right to sell it, it has -- it could,
23 at least hypothetically, sell it in the marketplace,
24 take the money, and then recreate that -- carry out its
25 function at another site.

1 And we agreed that the rule must work both
2 ways, and yet we suggest that it ought to work in the
3 manner that fair market value is the standard either
4 way. In fact, I was going to point out it is our
5 submission that it is possible to read the record to
6 suggest that in this case the Respondent may well be
7 receiving quite a fair shake, quite an advantageous deal
8 by getting fair market value compensation.

9 Respondent's claim for a far greater sum is
10 based on its testimony as to what it actually paid for
11 its replacement site. That testimony was that they paid
12 some \$583,000 for the site, but the government's
13 appraisers who testified on that question, who were the
14 only ones who testified as to what the fair market value
15 of that site was, said that it was not in excess of
16 \$200,000.

17 So that is obviously one of the defects in
18 this --

19 QUESTION: Well, how did the jury come in with
20 \$750,000?

21 MR. SCHWARTZ: The truth is, Your Honor, we
22 don't have any way of knowing. The jury picked a number
23 that was much lower than Respondent's claim and much
24 higher than ours, and one of the problems that we see in
25 a substitute facilities standard, even if it is

1 corrected, as the Court of Appeals acknowledged it had
2 to be, by a far more rigorous instruction than was
3 actually given, that some discounting was needed, it is
4 still quite difficult to know how the jury will proceed,
5 and we believe that there is a substantial risk of
6 unfair prejudice to the United States because the jury
7 or other trier of fact will be confronted with some --
8 could be confronted with some very large numbers.

9 And again, even if they -- we just don't see
10 the need to depart from the fair market value system.

11 But if I could continue to explain where I am
12 going, the other fact which appears to be undisputed
13 here is that the new site was three times -- had three
14 times the useful life of the old site. If you put that
15 fact together with the evidence that suggests this site
16 had a fair market value of one third of what was
17 actually paid, one could come to the conclusion that the
18 substitute facilities cost, the reasonable substitute
19 facilities cost for an equivalent facility may have been
20 less than the fair market value.

21 QUESTION: Well, wouldn't the Court of Appeals
22 adjustments take care of that?

23 MR. SCHWARTZ: Well, that on -- on that we
24 have several difficulties. The first thing is the Court
25 of Appeals said --

1 QUESTION: Well, wasn't it aimed at that?

2 MR. SCHWARTZ: The Court of Appeals said
3 that --

4 QUESTION: If the substitute facility is
5 obviously twice as big, or lasts twice as long, I would
6 suppose the adjustments would take care of that.

7 MR. SCHWARTZ: Well, there is some possibility
8 of that. There are several reasons for being concerned
9 that that is not an adequate response. The first is
10 that the Court of Appeals declined to prescribe how this
11 should be done. It said one way you might do it is the
12 way the Second Circuit suggested in a case called
13 Certain Property in the Borough of Manhattan, which
14 requires a quite mechanical discounting for the added
15 lifetime, and the government obviously would be far
16 better protected under that system than it would be
17 under the instruction given here. And yet the Court of
18 Appeals explicitly declined to require that. And that
19 obviously gives us unease.

20 QUESTION: But it did vacate the --

21 MR. SCHWARTZ: It did, but it placed us in
22 quite a grey area, where we do not see -- and the
23 other -- and of course, there is also the question of
24 the Court of Appeals' other adjustment. The Court of
25 Appeals said yes, it may be that the price paid for a

1 substitute facility was unreasonable in this case. That
2 is a question for the jury.

3 The question is how is the jury to decide
4 that? We would submit the only way a jury can know
5 whether a price is reasonable is to look at the fair
6 market value of a substitute facility.

7 But that entails a new item of complication,
8 that is, to present comparable sales as to the new
9 facility. And that in fact happened in this case, a
10 point which I regret not emphasizing in my brief. The
11 government's appraisers went out and did two sets of
12 appraisals. They appraised comparable sales to
13 establish the value, the fair market value of the
14 substitute site and found that what had been paid was
15 grossly in excess of fair market value.

16 But if you are going to make that adjustment
17 and you are going to make the other adjustment, it seems
18 to me that there are essentially two possibilities.
19 Either it will be done rigorously and you will have gone
20 all the way around the barn and ended up back where you
21 started out, or else somewhere along the line some
22 prejudice to the government will have crept in because
23 it wasn't done rigorously, because the jury was dazzled
24 by some large numbers that were brought out.

25 Those things suggest to us that there is no

1 reason to change what the Court has called a clear,
2 easily administrable rule. No suggestion -- there has
3 been no showing here that the kind of manifest injustice
4 that the Court has suggested might be relevant actually
5 arose here.

6 The kinds of reasons that have typically been
7 suggested as to why there might be injustice seem to us
8 insufficient. If you pay an unreasonable price for a
9 substitute site, it is not unjust that the condemnee
10 bear that price. If you take a much larger, more
11 valuable substitute site, it seems to us not unjust that
12 the condemnee should, which has the benefit of what it
13 bought with that extra cost, should bear that.

14 QUESTION: Didn't you have a chance to put on
15 your evidence?

16 I gather you did; you put on your evidence as
17 to what this substitute facility was worth.

18 MR. SCHWARTZ: Yes, Your Honor. In fact,
19 we --

20 QUESTION: You said you were the only evidence
21 about that.

22 MR. SCHWARTZ: We -- the government presented
23 a -- presented evidence to challenge many of the items
24 in this list of figures which is in the petition
25 appendix at 16a and 17a that the Respondent presented,

1 and I think we seriously challenged in the jury's eyes
2 many of those figures.

3 QUESTION: Well, you did -- you did it as well
4 as you could, and the jury just didn't believe you.

5 MR. SCHWARTZ: Well --

6 QUESTION: Or they didn't accept your story,
7 anyway.

8 MR. SCHWARTZ: Well, I don't think it is fair
9 to say that we did it as well as we could. Of course,
10 the Court of Appeals --

11 QUESTION: Well, you had your chance, though.

12 MR. SCHWARTZ: Well, the Court of Appeals
13 agreed that we were handicapped by an improper District
14 Court instruction which did not direct the jury to do
15 what it should have done. But the other thing is the
16 government made a deliberate choice not to go through
17 cost by cost because the government, while it was
18 interested in protecting its flank, did not choose to
19 try this case entirely on the two alternative theories;
20 only partially so. We did what we thought was necessary
21 to let some of the air out of the other side's case, and
22 yet we did not want to present a -- take them, take the
23 jury all the way around the barn ourselves. It seemed
24 to us that that was --

25 QUESTION: Well, then, I guess you are stuck

1 with it if we think the substitute facility view is all
2 right; you are stuck with the Court of Appeals
3 deductions from this \$750,000, I take it.

4 MR. SCHWARTZ: Well, we don't really know what
5 that will amount to.

6 QUESTION: On remand, on remand are they going
7 to redetermine the value of the substitute facility or
8 just determine some deductions?

9 MR. SCHWARTZ: My understanding of the terms
10 of the remand is that we will have an entirely new
11 trial, so I don't suppose the government would be stuck,
12 but again, if I may make the point --

13 QUESTION: Why would they set aside the
14 \$750,000 valuation as a base from which to make some
15 deductions?

16 MR. SCHWARTZ: I believe the Court of Appeals
17 was persuaded by the government's argument to this
18 extent, that there was a fundamental lack of a proper
19 standard in the District Court's instruction, so there
20 was no telling what that \$750,000 represented, whether
21 it just represented some ad hoc notion of compromise.

22 QUESTION: Let me go back, Counsel.

23 Isn't the basic rule fair market value unless
24 it is not ascertainable?

25 MR. SCHWARTZ: That would be our submission.

1 The Court's cases, as Justice O'Connor pointed out,
2 have always held open the possibility that some other
3 kind of injustice could be demonstrated. Our submission
4 is simply that nothing of that kind has been shown
5 here. We don't think the Court needs to decide that
6 there could never be any other circumstance, but nothing
7 in the nature of the taking of a public property where
8 fair market value exists and is readily ascertainable
9 presents that kind of injustice. And that seems to be
10 the end of the matter.

11 And if there are no further questions, I --

12 QUESTION: I suppose if the federal government
13 was taking a local airport, you might have difficulty
14 finding a fair market value of the airport as such
15 unless it was adaptable for development, real estate
16 development.

17 Would that be the type of case where they
18 might turn to some other standard?

19 MR. SCHWARTZ: An airport case might be,
20 although it might be that there -- that a low -- as an
21 airport has some special features, a large, assembled
22 tract, but it might be that, depending on the area you
23 are in, that plain, raw, undeveloped land would
24 essentially be fungible. It would be a question of the
25 improvements. It would be a factual question as to

1 whether or not there were comparable sales, and I don't
2 think I can give a categorical answer.

3 That is the kind of a case in which --

4 QUESTION: It really would be hard to sell
5 O'Hare Airport, wouldn't it?

6 MR. SCHWARTZ: I would think so, although
7 maybe in some areas a small private, relatively small
8 airport might be different. I don't think I can give a
9 categorical answer to that. But that would be the kind
10 of case in which it would be open to contend that the
11 fair market value standard really isn't workable.

12 And this case, we submit, is quite different.

13 CHIEF JUSTICE BURGER: Mr. Nichols?

14 ORAL ARGUMENT OF H. LOUIS NICHOLS, ESQ.

15 ON BEHALF OF RESPONDENT

16 MR. NICHOLS: Mr. Chief Justice, and may it
17 please the Court:

18 This case is noted on your docket as being
19 United States of America v. 50 Acres of Land, et al.,
20 and I represent the et al. I represent 28,000 citizens
21 in the City of Duncanville whose sanitary landfill was
22 taken by the United States and who seek to receive just
23 compensation under the Fifth Amendment for a public
24 facility which was taken and which had to be replaced by
25 the local government.

1 The question is what is just compensation, not
2 just what is any compensation, but what is just
3 compensation where a local facility is being taken by
4 the federal government and which must be replaced not
5 net year sometime, but has to be replaced tomorrow?

6 You know, you pick up your garbage; you have
7 got to put it down someplace. Everybody wants you to
8 pick it up, but nobody wants you to put it down in their
9 neighborhood. So it isn't a matter of going out and
10 buying you another piece of land tomorrow and start
11 dumping garbage there. You've got to find you a piece
12 of land, you've got to find it in an area where you're
13 not going to have a lot of neighborhood opposition.

14 QUESTION: Mr. Nichols, how much time elapsed
15 in this case between the first notice you had of the
16 condemnation and the actual taking by the government,
17 the dispossessing?

18 MR. NICHOLS: Your Honor, they gave us the
19 immediate notice and says, like I say, normally we'd
20 give you 90 days, but we want it immediately because we
21 don't want you to pollute our lake anymore, so you go
22 out and get you another site.

23 And they -- and I filed a motion to give us
24 more time, and we were able to work out a month or two,
25 while we went out and acquired a temporary facility that

1 was owned by someone else that we could use
2 temporarily.

3 If you use the federal government's position
4 that only market value is the proper measure of damages,
5 they would not even pay the \$110,000 that we had to
6 spend as extra expenses temporarily while we were trying
7 to find another facility. So they wanted it -- in the
8 file there's a letter from Colonel Wall that says
9 normally we would give you 90 days, but we want to get
10 this site immediately, and we know it is going to be a
11 job for you to get another site, but you go out and get
12 it anyhow, so we did.

13 QUESTION: What, did you have less than 90
14 days or more than 90 days?

15 MR. NICHOLS: Oh, we had only, we had only
16 about two months, less than 90 days.

17 They wanted it immediately. I got a little
18 time by going into court and filing a motion, dragging
19 my feet, while we were trying to find another location.
20 But they wanted it the next day.

21 QUESTION: You referred, Mr. Nichols, to the
22 language of the Constitution --

23 MR. NICHOLS: Yes.

24 QUESTION: -- which is the starting point, but
25 hasn't that language been embellished by construction to

1 place on the meaning of the Constitution fair market
2 value as the primary --

3 MR. NICHOLS: Well, this Court has not said
4 that, Your Honor. This Court has not -- as a matter of
5 fact, this Court has said that fair market value is not
6 the only measure of compensation.

7 QUESTION: Not the only, no, but isn't that
8 the starting point through the law generally? I am not
9 speaking of our Court here.

10 MR. NICHOLS: The starting point is just
11 compensation, that what is just compensation. Just
12 compensation is just indemnification, and this Court has
13 said that the way you get to just indemnification is by
14 the adoption of certain workable rules, and that we have
15 applied market value as being a workable rule in some
16 circumstances, but in other circumstances it may not be
17 a proper rule to be followed by this Court.

18 So I think we have to find out what teachings
19 do we receive from this Court because you know and I
20 know that what just compensation in the Fifth Amendment
21 means is what you say it means. I mean, this is the
22 bottom line, the end of the line; what you say is just
23 compensation is just compensation.

24 So what have you said in the past as to what
25 is just compensation? First, you've said that we have

1 not determined what is just compensation under the Fifth
2 Amendment where a public facilities property is being
3 condemned. You noticed that in the Lutheran Synod
4 case.

5 And Mr. Justice White noted that we will
6 reserve that to another day. Well, this is that day.
7 This is the day for you to decide what is just
8 compensation when a public facility has been taken and
9 which must be replaced, what is just indemnification to
10 the community which has lost a public facility which had
11 to be immediately replaced to protect the public health
12 of the community.

13 Now, that is really what we are here to decide
14 today.

15 QUESTION: Well, now, Mr. Nichols, I guess
16 your city had the right to go out and condemn another
17 parcel and take it right away.

18 MR. NICHOLS: They have a right to get it in
19 about 30 days, but the problem is not solved by that,
20 Your Honor. The problem -- getting the land is just the
21 beginning of it. The problem is solved in going out and
22 satisfying the state that this is a suitable site for
23 which you can receive a permit, and satisfying the
24 state's requirements as to how you may use that site.

25 There's no problem buying a piece of land.

1 That's no problem. You know, you may not be very
2 interested in landfill, but wait until you try to locate
3 one in somebody's neighborhood, and then you will find
4 out what the interest is.

5 QUESTION: Or a prison.

6 MR. NICHOLS: Or a prison, sure.

7 So in this instance, certain things had to be
8 done. We went out first, we found this piece of land
9 that we could buy, and we found a piece of land where
10 there won't be a lot of neighborhood opposition. That's
11 one thing you don't want, a lot of neighborhood
12 opposition.

13 We found a piece of land which could be used,
14 and it was within a reasonably close distance. You
15 know, you don't want a landfill a hundred miles away
16 where the garbage trucks have got to go a hundred miles
17 every day. So you try to find one as close to the city
18 as you can get.

19 And we found one reasonably close, two miles
20 further away, but on a better highway, so you get there
21 in about the same amount of time.

22 Then we made the application to the state for
23 a permit on this. We had public hearings on this.
24 Everybody had an opportunity to be heard.

25 They then take about 120 days to decide

1 whether we are going to give you a permit on it. Then
2 they give you a permit and say, well, you can use this
3 if you do this, this, this and this, one of which was to
4 remove a natural gas pipeline that ran through this
5 property that cost us \$334,000 to move. That was
6 removed as a public safety measure.

7 QUESTION: Now, would the cost of that be
8 includable in the substitute cost figure that you would
9 urge?

10 MR. NICHOLS: Yes, it was included.

11 QUESTION: And that the CA 5 would allow to be
12 considered on remand?

13 MR. NICHOLS: It was, it was included.

14 Let me talk about what happened in the trial
15 court for a moment and what happened in the Court of
16 Appeals.

17 This case was tried in the trial court because
18 the judge would not decide which was a proper measure,
19 since you had not decided it. And the court said we
20 will try it both ways, so we tried it both ways. We
21 offered this, and there wasn't any question but what we
22 could sell our piece of land. You know, landfill sites
23 are hard to come by, and the private landfill companies
24 would like to buy one that is already permitted, the
25 neighbors are already happy with it, you've got not

1 problem.

2 So we tried it both ways. We put on the
3 evidence of what we could get for our land. In the
4 meanwhile, we had already bought, permitted, equipped
5 and were operating the new landfill site at that time.

6 QUESTION: The temporary one or the --

7 MR. NICHOLS: The permanent one.

8 QUESTION: The permanent one.

9 MR. NICHOLS: We had spent \$1,276,000 for that
10 site. Much of that expense would have been attributable
11 and charged off whether we were buying a 50 acre site or
12 a 113 acre site. The moving of the pipeline, the
13 building of a road for access to it, satisfying, getting
14 engineer studies made --

15 QUESTION: You are saying in effect, Mr.
16 Nichols, that anything, any damage that was really
17 proximately caused to you by the condemnation ought to
18 be picked up by the government.

19 MR. NICHOLS: I'm saying that any reasonable
20 expense that was reasonably necessary to provide a
21 reasonably adequate substitute facility.

22 QUESTION: Well, but I think you are going
23 against a large body of condemnation law there because
24 traditionally, for instance, the owner of a small
25 business whose site is condemned gets the fair market

1 value of the site, but he gets nothing for good will,
2 nothing for moving expenses. Congress enacted a bill a
3 few years ago that said over and above just
4 compensation, we will pay you for these sort of items,
5 but that has never been thought to be part of just
6 compensation.

7 MR. NICHOLS: Well, the Circuit Court, the
8 Second Circuit, and the California Court has held that
9 where you have a public condemnee, it's a unique
10 situation and you use different rules to determine, to
11 determine the loss sustained by the community.

12 QUESTION: Well, why should that, why should a
13 public condemnee such as your client be any different
14 from a small businessman who suffers incalculable
15 causal damage as a result of a condemnation?

16 MR. NICHOLS: Two reasons, Your Honor, I
17 believe. One, or first is they acquire and hold
18 property, use property for an entirely different
19 purpose, as a public condemnee.

20 QUESTION: Well, so what? So what?

21 MR. NICHOLS: Well, you asked me why I think
22 there's a difference, and I think --

23 QUESTION: You say it's a different purpose --

24 MR. NICHOLS: They do --

25 QUESTION: Why should the different purpose

1 make any difference?

2 MR. NICHOLS: Because this Court has said that
3 the function of the Fifth Amendment is to see that
4 fairness and equity are the result of the condemnation
5 pay, and if --

6 QUESTION: Well, you can make that argument
7 just as well in the case of your small businessman as
8 you can in the case of your local government.

9 MR. NICHOLS: And the other reason that goes
10 with that is that the local government has a duty,
11 either legally or factually, to replace the facility.

12 QUESTION: Why has that got anything --

13 MR. NICHOLS: Private individuals --

14 QUESTION: No, why has that got anything to do
15 with it? I know you are stating that, but why does that
16 bear on the question?

17 MR. NICHOLS: It bears upon the fact that that
18 relates to the loss sustained by the community upon the
19 condemnation of a public facility, and this Court has
20 said that the objective to be reached in just
21 compensation is to indemnify for loss sustained.

22 Now, the loss --

23 QUESTION: The small, the small businessman is
24 either going to have to get back in business or starve.

25 MR. NICHOLS: He may not get back in business

1 at all. He may get enough money to live off the
2 interest of it.

3 QUESTION: Well, usually people like to get
4 back in business.

5 MR. NICHOLS: Not necessarily, Your Honor. I
6 think maybe, but in this instance, and the whole basis
7 for this holding of the Fifth Circuit was the basis that
8 the city was obligated, obligated to acquire a
9 substitute facility.

10 Now, that was a -- and that was the way the
11 case was tried in the trial court.

12 QUESTION: But now, I still don't understand
13 from your submission, you have repeated the phrase
14 several times, that the city was obligated to do this.

15 MR. NICHOLS: Yes, sir.

16 QUESTION: Why does that make any difference?

17 MR. NICHOLS: Because it relates to the damage
18 sustained by the city, and the Fifth Amendment is an
19 indemnification provision, and if they have to replace
20 it, they are entitled to be indemnified for the loss
21 sustained, and the loss to a public entity that has to
22 replace a facility is not the loss of the 50 acres, but
23 the loss sustained by the community is the cost of
24 acquiring a needed substitute facility. That's the
25 loss.

1 QUESTION: But what -- no case from this Court
2 supports that proposition, does it?

3 MR. NICHOLS: That's because this Court says
4 we haven't ruled on that question yet. There will be in
5 a month or two, I guess.

6 QUESTION: Suppose the only place you could
7 get would require a road that cost \$80 million to get to
8 the place?

9 Would that be the cost?

10 MR. NICHOLS: Well, let me say --

11 QUESTION: Would the government have to pay
12 eighty --

13 MR. NICHOLS: Well, it would be, Your Honor,
14 it would be the cost if that was a reasonable and
15 necessary expense to provide a reasonably adequate
16 substitute facility, and the other side of the coin is
17 suppose it only cost \$1000 and the land was worth
18 \$200,000, I think all we are entitled to is the
19 reasonable cost of a reasonably adequate substitute
20 facility, whether it is more or less of the value of the
21 land being condemned, because that is the loss and
22 damage sustained by the public.

23 Now, this case was tried on the basis that the
24 jury would be asked to determine the reasonable cost of
25 providing a reasonably adequate and necessary substitute

1 facility. As a matter of fact, if you will read the
2 record, the charge to the jury was not objected to by
3 the government, but as a matter of fact, was tailored to
4 meet the government's position that the cost of the
5 substitute facility would include the words "the
6 reasonable cost," which the court put in, "of a
7 reasonably adequate substitute facility," which the
8 court put in, and that was what the jury was asked to
9 decide.

10 QUESTION: Well, the government, did the
11 government agree from the very outset that it would go
12 to the jury on this bifurcated instruction?

13 MR. NICHOLS: No, sir. We both, we both
14 objected. I claimed strongly that substitute facilities
15 doctrine was --

16 QUESTION: Was the only one.

17 MR. NICHOLS: Based -- our claims held

18 QUESTION: And the government said the --

19 MR. NICHOLS: And they said ours is the only
20 one, except that I tried mine much stronger both ways
21 than they tried theirs. They felt rather confident on
22 the --

23 QUESTION: Did you try the case below?

24 MR. NICHOLS: Yes, I did.

25 QUESTION: Before the jury?

1 MR. NICHOLS: I have tried it from the very
2 beginning.

3 QUESTION: Now I understand.

4 MR. NICHOLS: And --

5 QUESTION: Let me pose this question to you.

6 MR. NICHOLS: Yes.

7 QUESTION: I don't know how big Duncanville is
8 but I suppose --

9 MR. NICHOLS: Twenty-eight thousand, Your
10 Honor.

11 QUESTION: How many?

12 MR. NICHOLS: Twenty-eight thousand.

13 QUESTION: You have got a local courthouse,
14 state courthouse.

15 MR. NICHOLS: There's a state courthouse.

16 QUESTION: Now, if the United States came
17 along and said we want to build a federal building
18 there, everybody would like to have the federal
19 building, but in determining value, it is pretty hard to
20 find a market for your courthouse because not many
21 people want to buy a courthouse as such, and I thought
22 it was understood that these alternative methods were to
23 meet that kind of a situation where you can't really
24 find the fair market value of a local county courthouse
25 of 28,000, a city of 28,000 people.

1 So there you might get something other than --
2 you'd have to have another value, so you might go to
3 reproduction cost or something like it.

4 MR. NICHOLS: Or you buy it, if that is the --
5 if the facts support that, if that's the -- if the facts
6 support it, that you could not sell it or that that was
7 an unfair method. Now, what this Court has said in
8 previous cases is that when market value has been too
9 difficult to find, that is an occasion where you can
10 deviate from it, or when its application would result in
11 manifest injustice to the owner or public, and in that
12 instance it would be to our little public or the
13 government's big public, it would be manifestly unjust
14 to the little public or the big public.

15 QUESTION: Well, do you think this case fits
16 that proviso?

17 MR. NICHOLS: Yes, I do, Your Honor, and the
18 reason I make that is because the undisputed testimony
19 in this case is that there were no other sites available
20 for a sanitary landfill.

21 The undisputed evidence is that the price
22 which we paid was the price that we had to pay to get
23 this site, and they got the 113 acres to avoid having to
24 pay severance damages. They could not have gotten it
25 for any less, they could not have gotten another site,

1 and this is the only site that we knew of that would
2 have been permitted by the state to use as a landfill.

3 QUESTION: Well, now, the Court of Appeals
4 didn't appear to me at least to be making a
5 determination on the manifest unjust result basis.

6 MR. NICHOLS: Well, I think that they -- that
7 when you read the fact that they were referring to, the
8 Borough of Manhattan Case and the Borough of Brooklyn
9 case and the Red Bluff, California case, they were
10 taking a position there, I believe, that whether there
11 is a market value or not, that if the facility must be
12 replaced, that the cost of a substitute facility is a
13 proper measure of damages to reimburse the loss
14 sustained by the public where there is a public
15 condemnee.

16 In this instance, the Court attempted to deal
17 with that in the manner in which it was submitted to the
18 Court. First, the Court let in evidence showing that we
19 got a bigger tract of land, that we had more acres, we
20 had more area for landfill, and they had an itemized
21 expense of every dollar we spent. That all went to the
22 jury. They knew we spent \$1,276,000 where we had a
23 landfill that would last longer and hold more garbage.

24 The case was argued to the jury not -- we did
25 not argue that we wanted \$1,276,000 from the jury. We

1 argued that what we were entitled to was what the jury
2 found to be the reasonable cost of a reasonably adequate
3 substitute facility which we had to acquire to protect
4 the public health of our people.

5 They knocked off \$500,000 some odd for what we
6 had spent in making the very adjustments that the Fifth
7 Circuit says should be made in order to be sure that
8 there's not a windfall. The jury made those --

9 QUESTION: Why didn't you cross-petition up
10 here?

11 MR. NICHOLS: I did, and you turned it down so
12 fast I couldn't hardly catch my breath.

13 QUESTION: That's right, you did, and you
14 wanted us to set aside the remand.

15 MR. NICHOLS: Yes, simply because I had the
16 question raised -- the government hadn't objected to the
17 instructions. The trial court hadn't ruled on them. It
18 wasn't raised in the Circuit Court, but the Circuit
19 Court remanded, and I just thought it wasn't right. I
20 just thought if I could get my \$723,000 up here, if I
21 would ask you to give it to me.

22 I don't think I'm going to get it now, you
23 know. I'd like to.

24 (Laughter.)

25 MR. NICHOLS: It's like we'd all like to be

1 rich and good looking, but I don't think I'm going to be
2 any more of that today than I'm going to get that
3 judgment.

4 But anyhow, the point is, the point is that if
5 the purpose of the Fifth Amendment is to indemnify a
6 local community for its loss, then you determine what
7 the loss is, and then -- that's what the jury tried to
8 decide there, and they made every adjustment that the
9 Circuit Court talked about.

10 QUESTION: Well, you are treating
11 indemnification and compensation as being, having the
12 same content, meaning the same thing.

13 MR. NICHOLS: This Court has said that the
14 purpose of the just compensation clause is
15 indemnification. That's what you all said, and I
16 believe it's true.

17 QUESTION: Mr. Nichols, can I ask you a
18 perhaps a question which will display my ignorance to
19 you, but the Fifth Amendment talks about the taking of
20 private property for public use without just
21 compensation.

22 I know there are some lower court cases, but
23 has this Court ever said that the taking of public
24 property shall be paid for by just compensation?

25 MR. NICHOLS: As I recall, this Court has said

1 that they haven't said that yet, but that doesn't mean
2 that there are lower courts that construe that language
3 in the Fifth Amendment to apply to public property being
4 taken by a paramount public authority. And they have --
5 no one has really challenged that that I know of.

6 QUESTION: I understand the government doesn't
7 challenge it, but I just -- is it -- we have never, or
8 have we ever said that the right standard is just
9 compensation?

10 MR. NICHOLS: I have not found a case where
11 you said that. I have not found a case -- but I have
12 never found a case where that question was really
13 seriously raised by anybody.

14 Now, what you do find, what you do find in
15 your cases in brief is that the United States government
16 takes the position and they argue that. They don't
17 argue market value in this situation. They take the
18 position that if you don't have to replace that public
19 facility, then we don't have to pay you anything, or we
20 pay you nominal value.

21 QUESTION: I don't think they take that
22 position.

23 MR. NICHOLS: Well, they have taken that
24 position in cases cited in the brief and cases cited in
25 the Fifth Circuit opinion.

1 QUESTION: Well, I know, but you mean they
2 wouldn't pay you market value for what you could sell
3 this land for?

4 MR. NICHOLS: They say, they say that in some
5 cases, if you do not have to replace it, you have been
6 relieved of the cost of the maintenance of the
7 facility --

8 QUESTION: I thought your opposition here
9 stood up and said it is always market value, whether it
10 is going to cost you that much or not.

11 MR. NICHOLS: Well, that's what he's arguing
12 today, Your Honor, but there are other cases where the
13 United States government is a party where they have
14 argued and urged and received a finding that they will
15 receive only nominal value.

16 QUESTION: That may be. That isn't their
17 submission here, though.

18 MR. NICHOLS: Certainly it isn't. They could
19 be --

20 QUESTION: All right, it isn't.

21 MR. NICHOLS: The consistency of the
22 government's position in this case has been their
23 inconsistency because in one case they were arguing
24 market value only, only market value.

25 QUESTION: By the way, what statute did the

1 United States proceed under here?

2 MR. NICHOLS: I don't believe I can tell you
3 that.

4 QUESTION: Does the statute they proceeded
5 under, do they give the procedure as to how compensation
6 is to be determined?

7 MR. NICHOLS: They give the Quick, prescribed
8 procedure for acquiring possession --

9 QUESTION: Does that happen to use any words
10 about what the measure of damages is?

11 MR. NICHOLS: No, sir, it does not.

12 QUESTION: The statute doesn't say a word
13 about that.

14 MR. NICHOLS: No, it does not.

15 It seems to me that --

16 QUESTION: You mean they can't turn this into
17 a statutory case.

18 MR. NICHOLS: No, sir. You know, I've heard
19 this -- I've been sitting here two days now. You all
20 have argued statutes, you've argued what Congress
21 intended.

22 What now we are talking about is only what
23 does the just compensation clause of the Fifth Amendment
24 mean where a public facility has been acquired by the
25 federal government and where the local entity had to

1 replace that public facility in order to protect the
2 health of the community.

3 Now, that is what -- it is so simple that you
4 don't have to go back and find out what Congress
5 intended or how many other laws there are. What does
6 the Constitution mean when it says you are entitled to
7 just compensation?

8 In this case, the federal government says that
9 since there is a market value, that market value is just
10 the compensation we are entitled to, just the
11 compensation, not that it is just compensation, but just
12 the compensation we are entitled to. And the question
13 here is what is just, just indemnity to a local
14 community who through no fault of its own lost a
15 facility they had to go out and replace the next day?

16 QUESTION: What would be your position if the
17 government gave you notice and you, just about six
18 months before you were going to fill up that landfill?
19 Within six months you are going to have to go out and
20 replace it for this \$1,200,000, and the government gives
21 you notice and says six months from now we want that
22 property, just at the very time where it will be of
23 absolutely no use to you whatsoever for a landfill, and
24 you will have to go get another one.

25 So you would say that they could have your

1 property for nothing?

2 MR. NICHOLS: I would say that I could not be
3 damaged, and that --

4 QUESTION: Well, you have a piece of property
5 there that now you can build buildings on it, and --

6 MR. NICHOLS: I don't know whether you could
7 or not. Now, you just added some little something to it
8 that you had not --

9 QUESTION: No, the landfill was --

10 MR. NICHOLS: If I had a piece of land --

11 QUESTION: What was the, what was the
12 testimony at the trial? How did they have market
13 value? How did they arrive at market value, what that
14 piece of property could be sold for?

15 MR. NICHOLS: What that piece of property
16 would sell for today permitted as a landfill and with so
17 many acres of it filled and so many acres of it
18 unfilled. That's what --

19 QUESTION: And what was the use of the land
20 that was filled?

21 MR. NICHOLS: It could probably in that
22 area -- and this is what is customary -- could probably
23 be used for open space, park area, grow trees, because
24 you can't build over the landfill, and for years you've
25 got methane gas coming out of it. So it's really not

1 usable for any commercial activity.

2 QUESTION: But you could sell it for something
3 apparently.

4 MR. NICHOLS: Well --

5 QUESTION: The testimony was you could sell
6 this property including --

7 MR. NICHOLS: As a landfill.

8 QUESTION: Including the piece that was
9 filled.

10 MR. NICHOLS: Well, it could be sold as a
11 landfill, no question about it, not a word, but you
12 asked what it would be worth after that. The value, in
13 my opinion, in that location, based upon the evidence,
14 and I'm only giving my opinion --

15 QUESTION: Would be zero?

16 MR. NICHOLS: I heard that argument earlier.

17 QUESTION: Would be zero, would be zero.

18 On my taxes, the value would be zero, is that
19 it?

20 MR. NICHOLS: On, I think it may have some
21 value. But I don't know that we've been damaged. And
22 that's not a situation where we were replacing a
23 required public facility with one that was similar.

24 Now, if we had six months left -- let's just
25 take it one little -- if we had only six months left of

1 that facility when it was taken over by the government,
2 we would only be entitled to what it would cost to
3 acquire a facility that was good for six months.

4 Now, how much you had to pay for it is not
5 just going out and buying one acre, you fill up one acre
6 in six months, but how much do you have to spend to make
7 it a permitted, public facility?

8 We say in this instance that market value is
9 not the proper measure of damages; market value wouldn't
10 even reimburse us for the \$110,000 we spent for
11 temporary use.

12 We say that if the purpose of the just
13 compensation clause is to compensate or indemnify the
14 public for its loss, then we are entitled to whatever it
15 cost, reasonably, to provide a reasonable facility.
16 That's the instructions that were given to the jury at
17 my request and at the government's request.

18 I think that if you will read the opinion in
19 the United States v. Borough of Manhattan cited in the
20 brief, you will find a rule of law that I would say is
21 the proper rule of law and one to be considered and
22 adopted by this Court, since you have not ruled on it in
23 the past, and it is this:

24 One, the substitute facility doctrine has been
25 developed to meet the unique needs of public

1 condemnees. In addition to citing numerous cases, this
2 Court also cites cases where school grounds,
3 playgrounds, parking lots in other jurisdictions, the
4 Second Circuit particularly, have approved the
5 substitute facility as the measure of damages there,
6 even if there was a market value of the property being
7 condemned.

8 Simpli stated, this rule assures that
9 sufficient damages will be awarded to finance the
10 replacement of the condemned facility. The substitute
11 facility -- and this is your language -- is not an
12 exception carved out of the market value test, it is an
13 alternative method available in public condemnation
14 proceedings, alternative method available in public
15 condemnation proceedings, citing other cases from the
16 Second and Ninth Court. Where circumstances warrant, it
17 is another arrow in the trier's bow when confronted with
18 the issue of just compensation.

19 When public condemnee proves that there is a
20 duty to replace a condemned facility, it is entitled to
21 the cost of constructing a functionally equivalent
22 substitute, the cost of constructing a functionally
23 equivalent substitute, whether the cost be more or less
24 than the market value of the facility taken, more or
25 less. It works both ways, cuts both ways.

1 QUESTION: You would apply that rule --

2 MR. NICHOLS: That if the structure -- sir?

3 QUESTION: You would apply that rule to the
4 hypothetical I gave you about taking your local
5 courthouse, that if you could build another one for
6 less, then you'd --

7 MR. NICHOLS: Then that's all we're entitled
8 to, a replacement, a reasonably adequate substitute
9 facility.

10 QUESTION: But if you built it 40 years ago,
11 you probably couldn't build it for that much money
12 today.

13 MR. NICHOLS: You can't, you see, you can't
14 build a new bridge or a new highway for that much -- for
15 what it cost to build it originally, but no one contends
16 that you only get a 90 percent depreciate the bridge
17 when you are going to replace the bridge. They give you
18 a new bridge, and that's no problem. And we're not even
19 asking for that. All we are asking for is replacement
20 of the facility.

21 And finally --

22 QUESTION: What do you think the rule is that
23 there is no duty to replace? Then it is market value,
24 isn't it?

25 MR. NICHOLS: I think if there is no duty to

1 replace --

2 QUESTION: Or is it zero?

3 MR. NICHOLS: I think that the Court has not
4 ruled on that, and the Circuits hold both ways.

5 QUESTION: How about your --

6 MR. NICHOLS: What I think? I think that it
7 should be zero because the duty is to indemnify the
8 loss. If there has been no loss, there is no
9 indemnification called for.

10 Finally, I say that if a structure is
11 reasonably necessary for the public welfare,
12 compensation is measured not in terms of value but by
13 the loss to the community occasioned by the
14 condemnation.

15 Thank you very much.

16 CHIEF JUSTICE BURGER: Do you have anything
17 further, Mr. Schwartz?

18 ORAL ARGUMENT OF JOSHUA I. SCHWARTZ, ESQ.

19 ON BEHALF OF PETITIONER -- REBUTTAL

20 MR. SCHWARTZ: A few factual points if time
21 permits.

22 Justice Stevens, the question about the
23 applicability of the just compensation clause to taking
24 of publicly owned property is addressed at page 16 of
25 our brief at Note 9.

1 Justice White, the cross-petition that was
2 filed in this case, I just want to remind the Court,
3 concerned a procedural question about the plain error
4 rule.

5 QUESTION: May I just follow up on that?

6 I know it was addressed in Note 9, but is
7 it -- am I correct in understanding that although the
8 Court has held that there is the power to condemn, there
9 has been no holding on what the measure of compensation
10 is?

11 MR. SCHWARTZ: I think --

12 QUESTION: That's what I understood Note 9 to
13 say.

14 MR. SCHWARTZ: I think that's right. Those
15 cases did not address it, and Lutheran Synod suggests
16 that that is an open question.

17 Justice O'Connor, you mentioned a point which
18 we think significant. The public condemnee is better
19 off than a private condemnee in one respect; it, too,
20 has the power of condemnation.

21 With respect to Respondent's claim that there
22 was no other property that could be taken, we think the
23 record suggests that that claim be judged skeptically.

24 One of the government's comparable sales in
25 this case was the site which Respondent used on an

1 interim basis for the two years prior to the acquisition
2 of the Ellis County site. That site not only could have
3 been condemned, but in fact did trade hands in the
4 private market during the two year period that
5 Respondent was using it. That's one of the comparable
6 sales. Comparable sales show that its value was about a
7 quarter to -- a quarter of that rate that Duncanville
8 paid in this case.

9 Finally -- and these are only illustrations of
10 the problems that crop up if you are to entertain a
11 substitute facilities measure, Respondent suggested that
12 the State of Texas required the removal of the pipe, gas
13 pipeline in this case. At page 418 of the transcript,
14 Mr. Nichols reading from the terms of the permit, the
15 permit, said no waste disposal operation shall be
16 accomplished within 30 feet of any petroleum products
17 pipeline or within 20 feet of its corresponding
18 easement. In this case, that meant a total of 50 feet
19 on either side.

20 QUESTION: I still have a problem with the
21 fact, what was wrong with the instructions to the jury?

22 MR. SCHWARTZ: Assuming --

23 QUESTION: You have a jury verdict pursuant to
24 instructions. You didn't object to the instructions did
25 you?

1 MR. SCHWARTZ: We had a global objection that
2 we made clear from the very start that this theory ought
3 not be entertained at all, and not clear why we had to
4 object specifically as to how you ought to frame the
5 instruction that we said ought not be given.

6 QUESTION: But you didn't object to the
7 instruction.

8 MR. SCHWARTZ: We didn't object to the --

9 QUESTION: So if the instruction is all right,
10 you lose.

11 MR. SCHWARTZ: If that instruction was all
12 right, but we contend that it was not. The Court of
13 Appeals agreed that it was not all right. So we think
14 that this case is not likely to turn on this point.

15 I see my time has concluded.

16 CHIEF JUSTICE BURGER: Thank you, Counsel.

17 The case is submitted.

18 (Whereupon, at 2:41 o'clock p.m., the case in
19 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:
#83-1170 - UNITED STATES, Petitioner v. 50 ACRES OF LAND, ETC., ET AL.

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BY

Paul A. Richardson

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