The Burger Court Opinion Writing Database

Wolff v. McDonnell

418 U.S. 539 (1974)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 20, 1974

Re: 73-679 - Wolff v. McDonnell

Dear Byron:

Please join me.

Regards,

WEB

Mr. Justice White

Copies to the Conference

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The majority concedes that prisoners are persons within the meaning of the Fourteenth Amendment, requiring the application of certain due process safeguards to prison disciplinary proceedings, if those proceedings have the potential of resulting in the prisoner's loss of good time or placement in solitary confinement, *supra,* at p. 29 n. 19. But the majority finds that prisoners can be denied the right to cross-examine adverse witnesses against them, and sustains the disciplinary board's right to rely on secret evidence provided by secret accusers in researching its decision, on the ground that only the prison administration can decide whether in a particular case the danger of retribution requires shielding a particular witness' identity. And in further deference to prison officials, the majority, while holding that the prisoner must usually be accorded the right to present witnesses on his own behalf, appears to leave the prisoner no remedy against a prison board which unduly restricts that right in the name of "institutional safety." Respondents thus receive the benefit of some of the constitutional rights of due process that the Fourteenth extends to all "persons." In my view, however, the threat of any substantial deprivation of liberty within the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 17, 1974

RE: No. 73-679 Wolff v. McDonnell

Dear Thurgood:

Please join me in your opinion in the above.

Sincerely,

Mr. Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 17, 1974

73-679 - Wolff v. McDonnell

Dear Byron,

I am glad to join your opinion for the Court in this case.

Sincerely yours,

P.S.

Mr. Justice White

Copies to the Conference

Uncorrected

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-7-74

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE WHITE delivered the opinion for the Court.

We granted the petition for writ of certiorari in this case, —— U. S. ——, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983 [1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondents requested damages and injunctive relief.

[1] The practices, rules and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972).

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnq

From: White, J.

Circulated: _____

Recirculated: 6-12-

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–679

Charles Wolff, Jr., Etc., et al., Petitioners, v. Robert O. McDonnell, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE WHITE delivered the opinion for the Court.

We granted the petition for writ of certiorari in this case, — U. S. —, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983[1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondents requested damages and injunctive relief.

[1] The practices, rules and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972).

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 5, 12-13, 24-27, 30-31

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

3rd DRAFT

From: White, J.

Circulated: _____

Recirculated: 6-20-74

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, v. Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE WHITE delivered the opinion for the Court.

We granted the petition for writ of certiorari in this case, — U. S. —, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983 [1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondents requested damages and injunctive relief.

[1] The practices, rules and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R WHITE

June 20, 1974

file

MEMORANDUM FOR THE CONFERENCE

Re: Cases Held for Wolff v. McDonnell, No. 73-679

1. Baxter v. Palmigiano, No. 73-1247 (CA1, Coffin and McEntee; Kilkenny, dissenting)

Respondent, a prisoner of the Rhode Island State Adult Correctional Institution, brought a § 1983 action for damages and injunctive relief, alleging procedural due process violations in connection with punishment by the prison disciplinary board--30 days in "punitive segregation." This confinement requires that the prisoner be locked in his cell full time. A prisoner in such confinement takes his meals in his cell, is deprived of recreation and exercise, and is not permitted to attend his work assignment. Although the board also recommended that respondent lose any good-time credits for which he was eligible, respondent, under a life sentence, was not eligible for such credits. The board also stated that respondent be considered for possible downgrading in "classification," which entails loss of privileges. At the hearing, the prisoner received timely notice, had an opportunity to appear before the board, an opportunity to call and examine witnesses, a statement of reasons from the board as to the basis of its decision. Further, the decision of the board was based on substantial evidence. These procedures, the "Morris rules," were furnished under state regulations, as a result of a consent decree entered in a prior case in the District Court of Rhode Island. Morris v. Travisano, 310 F. Supp. 857 (D. RI 1970). Respondent's objections to the hearing procedures were (1) his retained counsel was not allowed to be present or to participate at the disciplinary proceeding; (2) the Warden advised him before the hearing commenced that silence at the hearing would be held against him (even so, respondent did remain silent); and (3) that the board should have required adverse witnesses to appear in person before it, rather than rely solely upon the written

reports of prison officials. The District Court denied relief. The Court of Appeals reversed, based upon respondent's first two contentions. The third issue is no longer in the case. The Court of Appeals ordered the record expunged of all findings and decisions pertaining to the alleged infraction and the disciplinary board hearing.

As to retained counsel, the court noted that respondent was entitled to the assistance of a classification counselor to help him present his case to the board, and was permitted to consult with his retained counsel immediately before the hearing. It did not hold that retained counsel should be allowed full participation at the hearing, but should at least be present, and might speak on his client's behalf, where necessary. This goes further than the Court did in Wolff, where we held "that as a general rule inmates have no right to either retained or appointed counsel in disciplinary proceedings," and that only where there is an actual problem of illiteracy or complexity, would the inmate have the right to counsel-substitute.

As to the right to remain silent, an issue not dealt with in Wolff, the court recognized that if the inmate could remain silent, the board would have to rely exclusively on the statements of witnesses, which would be time consuming and might encourage confrontations. Also, by remaining silent, the inmate would sacrifice his most important defense. The court therefore felt that use immunity should be granted, protecting the inmate against use of the statements at any subsequent criminal trial for the conduct which is the subject of the hearing. Reliance was placed on Kastigar v. United States, 406 U.S. 441 (1972). The inmate was to be informed of his right to such immunity.

I will vote to vacate and remand this case under Wolff. The holding on retained counsel would appear inconsistent with our opinion. Also, given that this is not even solitary confinement, the procedures required in Wolff may not be applicable. As to use immunity, given the applicability of the privilege against self-incrimination in the prison setting, see Mathis v. United States, 391 U.S. 1, 4-5 (1968), any compelled incriminating statements made by the prisoner would presumably be suppressed at a subsequent criminal trial. It would also seem that prison officials should not compel incriminating testimony for use at a subsequent criminal trial and that if the testimony is

needed for purposes of the disciplinary hearing, use immunity should be furnished. See Lefkowitz v. Turley, 414 U.S. 70 (1974). This is not an easy case, but on this point I would deny certiorari.

2. Travisano v. Gomes, No. 73-1335 and Gomes v. Travisano, No. 73-6470 (conditional cross-petition) (CA1 Coffin; Campbell, concurring; Kilkenny, dissenting).

Eight prisoners in Rhode Island's correctional facility for adult males were transferred to state and federal prisons in other States without notice or hearing of any kind. Transfers to both state and federal prisons are authorized by R.I.G.L. § 13-11-1 et seq; R.I.G.L. § 13-12-1, and 13 U.S.C. § 5003, under circumstances where the transferor authority decides, among other things, that rehabilitation can be furthered at another institution. There are no standards set up, however, in terms of the "cause" for transfer. These statutes are addressed to a compact between States and States and the Federal Government, to effect transfers. The prisoners brought this § 1983 action challenging the lack of due process afforded.

The District Court found that the transfers had a number of adverse consequences. Among others, the receiving institution placed each transferred inmate in solitary confinement from two to six weeks, the transfers suggested that the prisoners involved were troublemakers and thus affected parole chances, and the availability of institutional programs, i.e. educational classes was usually curtailed. The District Court noted that the purpose of the transfers seemed punitive since transferees had disciplinary charges dropped against them. The court held that prisoners were entitled to a set of procedural safeguards substantially similar to the "Morris rules," see No. 73-1247, Baxter v. Palmigiano, supra. Additionally, the USDC required, as a matter of state and federal statutory law, see statutes cited, supra, a pre-transfer investigation by the transferor of the rehabilitative programs of the institution and a statement of the reasons for the transfer. The court also required periodic review of the transferee's status at the receiving institution. The court ordered that the respondents who were transferred be returned to custody, and that the required procedures be furnished them. The court did, however, establish an exception for emergency situations, where

immediate severance was necessary to control the prison. In that case only post-transfer hearings, held at the earliest opportunity, were to be required.

The Court of Appeals affirmed in part and reversed in part. First, it endorsed the emergency exception and the requirement for a post-transfer hearing. Second, it required the "Morris rules" to be applied where the transfer is made to punish the prisoner for his past conduct. These procedures were also to apply to post-transfer hearings in emergency situations. These procedures go beyond those required by this Court's opinion in Wolff, insofar as they provide for cross-examination. Third, the Court of Appeals identified a third category, non-disciplinary transfers, where the following procedures were required: (1) notice that a transfer is contemplated; (2) notice of the reasons for a proposed transfer; (3) a personal hearing before the decision-maker; and, (4) a reasonable opportunity to controvert factual assertions supporting the proposed transfer. The Court of Appeals left it to the District Court to fashion an order for a "hearing tribunal which can aspire to reasonable objectivity while recognizing the responsibility and wide discretion of the warden or superintendent" and to work out an informal record-keeping requirement, short of a verbatim transcript.

As to all transfers, the Court of Appeals endorsed the USDC requirements that the prison authorities forward a statement of reasons for the transfer to the transferee institution, and that the status of transferred prisoners be periodically reviewed, but refused to require, as either a matter of due process or statutory interpretation, that correctional officials investigate the rehabilitative and educational programs of receiving institutions or that specific recommendations for treatment be made.

Since the Court of Appeals based its analysis of due process on the extent of the deprivation suffered by those transferred, rather than any state-created liberty, as the Court did in Wolff, this is a somewhat different and more difficult case. Absent any state regulation governing the causes of transfers, analysis verges on substantive due process. As to the procedures, assuming liberty is involved and the Fourteenth Amendment therefore applicable to all types of transfers, insofar as cross-examination is involved, the procedures specified for the post-transfer emergency hearings and the "punitive" transfers exceed those required

for Wolff. As to the non-punitive transfers, the procedures are probably valid.

I would vacate and remand this case under Wolff. If liberty is involved here, the procedures, at least for two types of transfers, will have to be adjusted accordingly. Also , as to liberty, even if a regulation does not exist, evidence was developed in the District Court opinion regarding the informal system of such transfers, and arbitrary application of this practice might be a sufficient basis for implicating due process protections. Also, I think that the Court of Appeals, in the first instance, and this Court later, if necessary, could benefit by a reexamination of the case at this point. The prisoners have filed a conditional cross-petition to make sure that they will be able to raise their objections to the Court of Appeals decision if this Court decides to take the case. Given that we will vacate and remand, this petition should be denied.

3. Bensinger v. Bach, No. 73-1584 (CA7 Swygert, Hastings, Cummings-Order).

The CA 7 held, in this § 1983 action challenging mail procedures at the Illinois State Penitentiary, that prisoners are entitled to be present during the opening of "legal mail" addressed to them in prison. Accordingly, it reversed the judgment of the District Court dismissing the complaint for failure to state a claim and remanded for further proceedings. In Wolff, the Court noted that the constitutional foundation for such a requirement was somewhat slippery, but did not reach the issue because the State had accepted the right of the inmate to be present when mail from attorneys was opened.

The State contends that this result conflicts with Sostre v. McGinnis, 442 F. 2d 178 (CA2 1971), cert. denied sub nom. Oswald v. Sostre, 405 U.S. 978 (1972) and Frye v. Henderson, 474 F. 2d 1263 (CA5 1973). Both of these cases dealt only with the latitude of prison officials to censor mail. Sostre held that it was improper for prison officials to delete certain material included in letters from a prisoner to his attorney. Frye rejected an attempt by a prisoner to enjoin prison officials from censoring any of his outgoing mail, as well as his incoming mail, from his attorney, on the grounds that the control of prison mail is a matter of prison administration. That holding is certainly undercut by the Court's opinion in Procunier v. Martinez, ___ U.S. ___ (1974).

Absent a conflict, I would deny this petition.

P.R.W.

pp 24-25, 27, 29, 35, 37

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: _____

Recirculated: 6-21-74

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE WHITE delivered the opinion for the Court.

We granted the petition for writ of certiorari in this case, — U. S. —, because it raises important questions concerning the administration of a state prison.

Respondent, on behalf of himself and other inmates of the Nebraska Penal and Correctional Complex, Lincoln, Nebraska, filed a complaint under 42 U. S. C. § 1983 [1] challenging several of the practices, rules, and regulations of the Complex. For present purposes, the pertinent allegations were that disciplinary proceedings did not comply with the Due Process Clause of the Federal Constitution; that the inmate legal assistance program did not meet constitutional standards and that the regulations governing the inspection of mail to and from attorneys for inmates were unconstitutionally restrictive. Respondents requested damages and injunctive relief.

[1] The practices, rules and regulations of the Complex under challenge in this litigation are only in force at that institution, and are drafted by the Warden, and not by the Director of Correctional Services. Since no statewide regulation was involved there was no need to convene a three-judge court. See *Board of Regents* v. *New Left Education Project*, 404 U. S. 541 (1972).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1974

MEMORANDUM TO THE CONFERENCE

Re: No. 73-679 -- Charles Wolff, Jr., v. McDonnell

In due course I hope to circulate a dissent in this case.

T. M.

No. 73-679 - Wolff v. McDonnell

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated: JUN 14 1974

Recirculated: _____

MR. JUSTICE MARSHALL, dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see Procunier v. Martinez, ____ U.S. ____, ____ (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

1st DRAFT

From: Marshall, J.

Circulated: JUN 18 1974

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, v. Robert O. McDonnell, Etc. | On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE MARSHALL, dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see *Procunier* v. *Martinez*, — U. S. —, — (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause in prison disciplinary proceedings. I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I

The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Marshall, J.

Circulated: _____

Recirculated: JUN 2

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73–679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June —, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see *Procunier* v. *Martinez*, — U. S. —, — (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause in prison disciplinary proceedings. I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I

8, 4, 5, 7, 11, 12, 13

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnqu

From: Marshall, J.

SUPREME COURT OF THE UNITED STATES

Circulated: _____

Recirculated: JUN 24

No. 73-679

Charles Wolff, Jr., Etc., et al., Petitioners, *v.* Robert O. McDonnell, Etc.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

[June 26, 1974]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting in part.

I join Part VIII of the Court's opinion, holding that the Complex may not prohibit inmates from assisting one another in the preparation of legal documents unless it provides adequate alternative legal assistance for the preparation of civil rights actions as well as petitions for habeas corpus relief. I also agree with the result reached in Part VII of the opinion of the Court, upholding the inspection of mail from attorneys for contraband by opening letters in the presence of the inmate. While I have previously expressed my view that the First Amendment rights of prisoners prohibit the reading of inmate mail, see *Procunier* v. *Martinez*, — U. S. —, — (1974) (concurring opinion), and while I believe that inmates' rights to counsel and to access to the courts are also implicated here, I do not see how any of these constitutional rights are infringed to any significant extent by the mere inspection of mail in the presence of the inmate.

My disagreement with the majority is over its disposition of the primary issue presented by this case, the extent of the procedural protections required by the Due Process Clause in prison disciplinary proceedings. I have previously stated my view that a prisoner does not shed his basic constitutional rights at the prison gate, and I

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 19, 1974

Re: No. 73-679 - Wolff v. McDonnell

Dear Byron:

This was not an easy opinion to write. I think you have handled it well and I am glad to join it.

Sincerely,

H. A. B.

Mr. Justice White

cc: The Conference

June 9, 1974

No. 73-679 Wolff v. McDonnell

Dear Byron:

You have written a fine opinion in a difficult case, and I expect to join you.

I do have several suggestions, of varying importance, which I submit for your consideration.

1. Your draft states (p. 13) that all that is required to circumvent the holding in Prieser is for the complainant to claim damages in addition to a declaration of his rights with respect to good time credit. This may be a permissibly narrow reading of Prieser, but I see no reason to eviscerate it. Every jail-house lawyer in the country would get the message promptly and we would be back where we started with no brakes on the filing of 1983 claims without recourse to state remedies.

At the recent Fifth Circuit Conference, I was told - in a private session with circuit judges - that the Circuit's most serious problems in terms of increases in the caseload were prisoner and Fourth Amendment claims. One district judge (ED of Georgia) told me that he was averaging about 40 prisoner claims per month, filed as new and separate suits.

The point I raise is not an easy one to resolve entirely satisfactorily. But we can at least require the complaint to satisfy the district court that the damage claim is one of substance, and is not averred for the purpose of assuring 1983 jurisdiction. In the absence of such a showing, the district court should apply Prieser. I recognize that this suggestion still leaves Prieser relatively vulnerable to being bypassed. Yet, it would give the district court an opportunity to dismiss some of the marginal and frivolous suits.

2. On page 32, the draft cites Procunier v. Martinez in a way which might be misconstrued. Martinez does not proscribe all censoring of incoming mail. Rather, it is addressed to regulations authorizing censorship to a greater extent than is necessary to protect legitimate governmental interests. See Martinez, slip opinion, 16, 17.

3. I would like to change the first full sentence at the top of page 30, to read as follows:

> "As the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court."

I am afraid that the concluding paragraph in Part V (commencing at the bottom of p. 29) is too much of an invitation for the bringing of additional suits whenever changes are made in the prison disciplinary process, however, incidental they may be to the balancing approach of your opinion. I have been told by district judges that whenever we hand down an opinion on rights of prisoners, the result is a new wave of litigation by inmates. I hope we can lay a few things to rest.

4. In Part VII the draft appears to hold that if a communication is "specially marked as originating from attorneys", it will "not be read" - although it could be opened to check possible enclosure of contraband. This means that any letter, on the envelope of which the sender merely writes "from an attorney", can not be read by prison authorities even in the presence of the inmate. Letters containing escape plans or other permissibly censorable material could enter the prison without safeguards of any kind. Even if we required that the name and address of the lawyer be shown on the exterior of the envelope (which would be more efficacious than merely showing "originating from attorneys"), this could easily be used as a cloak for the sending of dangerous messages to inmates. There are some 400,000 lawyers in the country, some of whom are closely allied with the Mafia and other criminal groups. Moreover, if a letter came from some distant area, even with the name of the lawyers on the exterior, there would be no dependable way for prison authorities to verify his status as a lawyer.*

*Martindale, contrary to popular belief, does not contain all practicing lawyers.

Possibly the best solution is to require that a lawyer, desiring to correspond with a prisoner, first identify himself and his client to the prison authorities. Thereafter his mail, properly identified on the exterior of the envelope, would not be read.

I will be happy to discuss any of these points with you.

Sincerely,

Mr. Justice White

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 12, 1974

No. 73-679 Wolff v. McDonnell

Dear Byron:

I am glad to join your fine opinion.

Sincerely,

Mr. Justice White

CC: The Conference

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 18, 1974

Re: No. 73-679 - Wolff v. McDonnell

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

Copies to the Conference