Washington and Lee University School of Law

Washington and Lee University School of Law Scholarly Commons

Supreme Court Case Files

Lewis F. Powell Jr. Papers

10-1973

Wolff v. McDonnell

Lewis F. Powell Jr.

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/casefiles

Part of the Civil Rights and Discrimination Commons, and the Fourteenth Amendment Commons

Recommended Citation

Lewis F. Powell Jr. Papers, Box 457, Folder 25

This Manuscript Collection is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Supreme Court Case Files by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Await Discussion

Not Hold for Procunier (neither censorship of letters nor rt. to counsel is in this case)

Prison discipline case SG recommends Grant.

On reflection, I would grant this is a can of worms that has to be sorted out

B

SUPPLEMENTAL MEMO (Pool)

January 18, 1974 Conference
List 1, Sheet 2

No. 73-679

WOLFF, Warden, et al	Cert to CA 8
v.	Federal Civil (State Prisoner)
MCDONNELL	

Two features of this case warrant additional consideration: (1) The SG has filed an amicus brief in support of the warden's petition for cer[illegible] He objects to the extension of Morrisey and Scarpelli to the prison disciplinary s[illegible]ig, contending that the prison environment presents circumstances not addressed in those cases which require consideration of the governmental function and interest served by less formal procedures. He outlines the disciplinary procedures followed in the federal prison system (at issue here are procedures in a state (Nebraska) institution) and

characterizes them as providing sufficient procedural protection under those circumstances. He supports the view of petr that prison officials, not the DC, in the first instance should be given a crack at devising adequate procedures. The CA's indication of retroactive application of the new standards to be developed flies in the face of Morrisey (standards to be applied in the future, 408 U. S. at 490), and would present an enormous burden to the prison system. Finally, the CA's affirmance of the procedures set forth by the DC to handle incoming attorney-inmate mail are said to be unrealistic. Federal procedures are again set forth and are said not to unduly infringe on inmates access to the courts. (2) Concerning an issue not raised by the parties or the SG, as noted in the basic memo, the DC ordered "good time" restored in certain cases. The CA reversed that order on the ground that this Court's decision in Preiser v. Redriguez, 411 U. S. 475, held that restoration of good time could not be granted in a 1983 action; rather, the relief was in the nature of a habeas remedy mandating exhaustion of state remedies which had not taken place here. The CA held that it would nevertheless be appropriate for the DC to establish minimum due process requirements for procedures "which may result in serious penalties other than loss of good time." Petn appx at 6. Hal Scott has ascertained that part of the relief sought by resp was an order to restore to him good time wrongfully taken, Amended Complaint at 15, and that this was the only wrong suffered by him through the prison disciplinary procedure. The DC was therefore, under Preiser, apparently without jurisdiction to consider the adequacy of the disciplinary procedures, and the CA consequently could not order such consideration on remand.

Yes

I have my doubts

DISCUSSION: Although there is no final order except on the mail censorship program, the SG's involvement in this case brought by a state agency adds an element of concern about the impact the decision could have on prison administration even in this posture. The questionable base for the CA's remand for the establishment of due process standards may provide a ground for disposition on that issue.

1/15/74 Zengerle

PW

Inclined to Hold for Procunier 72-1465

A prison rights case in which CA 8 ruled favorably to prisoners on several issues — including mail censorship program (client-atty mail), & legal assistance program — but remanded to DC to work out detailed rules.

Case may not be ripe in view of remand.

See attached memo

SG Brief as amicus requests cert (see attached memo)

Deny

I don't think this is ripe for final resolution since the CA remanded to the DC to let it determine what procedures due process may require and whether they have been complied with. As to attorney mail issue, John Jeffries and I agree that the conflict with CA1 is insubstantial. It's best to leave this one alone for the present.

PRELIMINARY MEMO

Jan. 18, 1974 Conference
List 1, Sheet 2

No. 73-679

WOLFF, Warden, et al.

v.

MCDONNELL

Cert to CA 8
(Lay, Heaney and Stephenson)
Federal Civil

Timely

1. Resp, a prisoner, gained certain relief from the USDC (D. Neb.) (Denney) pursuant to his challenge to various penal procedures and practices, which relief was expanded by the CA's remand. Petr, the warden, challenges the extension of the right to counsel to prison disciplinary proceedings, the authority to set procedural standards given the DC upon remand, the restrictions placed upon the inmate mail censorship program, the extension of legal assistance to civil rights actions, and the retroactive application of the new due process standards.

2. FACTS: Resp, a prisoner at the Nebraska Penal Complex, brought this action in the DC under 42 U.S.C. §§ 1983 and 1985 on behalf of all the prisoners, seeking injunctive and declaratory relief against numerous administrative procedures and practices of the Complex. As relevant here, the rulings of the DC and CA are as follows.

Resp challenged the disciplinary proceedings of the Complex on procedural due process grounds. The essential nature of the challenge centered on the procedures followed by the Complex in removing prisoners' accumulated "good time" based on prisoner violations of rules set forth in Complex regulations. The DC held that while CA 8 had not yet ruled that procedural due process applied to good time revocation, Morrissey v. Brewer, 443 F.2d 942, Neb. statutory requirements did apply, and they required that the prisoner violations relied upon constitute "flagrant and serious conduct." Good time revocations had been accomplished where such violations had not taken place; in such instances petr was required to restore the good time. The CA, noting the reversal of Morrissey by this Court, 408 U.S. 471, held that procedural due process requirements did apply to prison disciplinary hearings. Existing Complex procedures did not provide minimum due process. The CA held that, upon remand,

> specific requirements, including the circumstances in which counsel may be required, should be laid down by the District Court after hearings. Petn Appx at 4.

In denying petr's petn for rehearing, the CA noted that it followed Gagnon v. Scarpelli, 411 U.S. 778, in holding that counsel is required only in those

cases where counsel is essential to fundamental fairness. Petr was to be given an opportunity to state whether counsel would be provided or permitted in those cases "which must be reheard for lack of . . . due process pursuant to this opinion." Petn Appx at 50. The CA had required in its opinion that

> the District Court must, on remand, determine what procedures are necessary to meet minimum procedural due process and whether they are being met. Petn Appx at 7.

It had also held that it would be appropriate for the DC to order expunged from prison records determinations of misconduct that arose from hearings that failed to comport with minimum due process requirements.

Resp challenged the inmate mail censorship program. As to incoming inmate mail from attorneys, the DC held that it should be handled in accordance with CA 8's opinion in Moore v. Ciccone, 459 F. 2d 574. (To be opened only if various detection methods fail to disclose contraband, and there is a real possibility that contraband will be included in mail from an attorney; if marked "privileged," to be opened only in the presence of the inmate.) The CA amplified the rule in affirming it, holding that it would be a simple matter to ascertain (by telephone, e.g.) whether the mail was indeed from an attorney, and if so, the possibility that an officer of the court would transmit contraband was too remote to justify opening all legal mail.

Resp challenged the inmate legal assistance program. Regulations of the Complex provide that there be designated one lay inmate legal advisor, to whom recourse could be had without the Warden's permission. Inmates were also permitted to assist one another with the Warden's written

permission. The DC held that, assuming such permission is freely given, the regulations satisfied the "reasonable alternative" standard set forth in Johnson v. Avery, 393 U.S. 483. The CA held that the evidence revealed that permission had been denied solely because of the existence of the inmate legal advisor. Accordingly, on remand the DC was to determine whether Johnson was satisfied solely by reference to the inmate legal advisor assistance. Petr was given the burden of establishing in specific terms the need for legal assistance and showing that the State was reasonably meeting that need. In determining the need, petr was required to "take into account the need for assistance in civil rights actions as well as habeas corpus suits." Petn Appx at 10.

3. CONTENTIONS:

(a) Petr argues that the requirement of counsel at prison disciplinary proceedings goes beyond Morrissey (parole revocation) and Scarpelli (probation revocation), which involved the more important right of personal freedom, and that this Court should resolve the scope of the right to counsel in this area, especially considering the civil rights actions that will be spawned if the right to counsel is extended as the CA suggests.

Resp replies that the CA only applied the case-by-case approach of Scarpelli, and that the DC may not find a right to counsel following the remar hearing, making the case premature.

(b) Petr contends that the CA erred in letting the DC decide in the first instance the minimum requirements of procedural due process, citing Morrissey ("We cannot write a code of procedure; that is the responsibility of each State.")

Resp replies that the DC will merely be testing the existing regulations of the Complex against the constitutional requirement, the content of which is to be determined by the courts.

(c) Petr objects to the restriction on inmate mail censorship, arguing that it could be "a very expensive matter" to verify attorney-senders by telephone, and that distant attorneys will be unfamiliar to petr and therefore not made trustworthy by mere telephone verification. Smith v. Robbins, 454 F.2d 696 (CA 1), which affirmed the rule that prison officials may inspect all mail from attorneys in the presence of the inmate, is said to create a conflict.

Resp contends that the financial and administrative burdens of the CA's procedure present no reason for overturning it. Smith is merely another Circuit's similar handling of the same problem.

(d) Petr argues that the inclusion of civil rights actions in the matters to be considered by petr in determining the need for legal assistance goes beyond prior law which spoke of legal assistance only for post-conviction relief.

Resp replies that such cases as Johnson v. Avery protected access to the courts for prisoners to present their "complaints," not limited to post-conviction relief. Again, petr's objection is said to be premature.

(e) Petr contends that the CA's ordering the expungement of records and rehearing of cases that lacked due process minimums retroactively applies the due process standards established (i.e., the standards to be established by the DC). Retrospective application should at least await a separate case where the issue would be specifically litigated.

Resp contends that the new standards should be applied retroactively since the deficiencies they reveal (would) go to the integrity of the truth-finding function.

4. DISCUSSION: The only matter presented in final form is the CA's approval of the restrictions on the mail censorship program imposed by the DC. The CA rejected the approach of other Circuits that have permitted prison authorities to open incoming mail from attorneys in reliance upon its earlier opinion in Moore v. Ciccone, which based the restrictions on the right of access to the courts. The other issues, while more important, present only hypothetical problems since the DC must yet act following a remand hearing. The CA seems to have treated summarily the extent of right to counsel and of legal assistance, and due process in prison disciplinary proceedings, but it may be that the DC will on remand provide an uncert-worthy disposition. It will at least sharpen the issues. The mail censorship restrictions alone could provide a vehicle for this Court to consider the inmate-attorney mail problem, as opposed to the personal mail problem involved in Procunier v. Martinez, No. 72-1465, but the posture of the case and its numerous other issues suggest another case might be more appropriate.

There is a response.

Zengerle   Ops in petn appx

1/9/74

JA

Conference 1-18-74

Court CA - 8 Voted on ...., 19...

Argued ...., 19... Assigned ...., 19... No. 73-679

Submitted ...., 19... Announced ...., 19...

CHARLES WOLFF, JR., ETC., ET AL., Petitioners

vs.

ROBERT O. McDONNELL, ETC.

10/23/73 - Cert. filed.

Most Justices thought case to be premature — but I doubt that it is any more premature than Detroit case which also sent back to implement.

Grant

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.		✓												
Powell, J.		✓												
Blackmun, J.		✓												
Marshall, J.			✓											
White, J.			✓											
Stewart, J.			✓											
Brennan, J.			✓											
Douglas, J.			✓											
Burger, Ch. J.		✓												

G

March 15, 1974, Conference
List 5, Sheet 2

No. 73-679

Grant
Owens

WOLFF, Warden

v.

McDONNELL

Motion of Resp for Appointment of Counsel

CA 8 appointment also motion to proceed pro hac vice GRANT
shity

The Court granted cert to CA 8 in this case on January 21 to review the CA's judgment extending the right of counsel to prison disciplinary proceeding and finding unconstitutional the restrictions of the inmate mail censorship program. The Court also granted resp's motion to proceed IFP.

Petr now requests that Douglas F. Duchek, Esquire of Lincoln, Nebraska, be appointed to represent him. Mr. Duchek has been involved

in this case since 1970 and participated in the litigation below. Mr. Duchek has served as court-appointed counsel in the USDC (Neb.) and in CA 8.

Apparently, Mr. Duchek has not been a member of the state bar for the three years required for admission to the bar of this Court. He states that if argument is heard prior to June 25, 1974, it will be necessary that he argue _pro hac vice_. If after that date, Mr. Duchek anticipates being a member of the bar of this Court.

DISCUSSION: This case is scheduled for argument in April. If Mr. Duchek is appointed, he will have to appear _pro hac vice_.

Ginty

3/13/74

AF

Conference 3-15-74

Court ....
Argued ...., *19...*
Submitted ...., *19...*

Voted on................., *19...*
Assigned ...., *19...*
Announced ...., *19...*

No. 73-679

WOLFF

vs.

McDONNELL

MOTION

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		AB-SENT	NOT VOT-ING	
		G	D	N	POST	DIS	AFF	REV	AFF	G	D			
Rehnquist, J.														
Powell, J.														
Blackmun, J.														
Marshall, J.														
White, J.														
Stewart, J.														
Brennan, J.														
Douglas, J.														
Burger, Ch. J.														

Jeffries

No. 73-679 WOLFF v. McDONNELL Argued 4/22/74

Cert. from CA 8's aberration as to what D/P is required in prisons.

SG, because of importance of case, argued it personally as amicus. I'm generally in accord with her position.

See p 6 SG's Br. for procedure in Fed. Prisons in disciplinary hearings.

As to mail, in Fed Prisons all is subject to censorship but in presence of inmate.

No counsel is necessary.

The standards for determining what procedure is "due" were stated in Cafeteria (& by me in Grant): must consider & evaluate the interests of the individual & those of State in context of the function of State. Prisons are unique & not analogous to any other setting.

Kammerlohr (Asst A G)

There should be no Const. rules - leave these to prison authorities.

Johnson v. Avery (right to access to counsel) applied to H/C. We should not extend it to 1983 actions.

Read Avery.

CA 8's decision is constitutional as to (1) procedural D/P & (2) right to counsel.

Morrissey probably controls on D/P as to loss of good time - which determines eligibility of control.

As to mail issue, Neb thinks Fed practice is appropriate: open all mail but in presence of counsel.

Bork (SG - Amicus)

Urges avoidance of rigid const. rules.

CA 8 applied mechanical the procedural rules of Morrissey & Gagnon. Those cases show that what is "due" depends on circumstances.

The private interests implicated and the nature of the governmental function involved determine what process is "due". (This was said in Cafeteria & I've repeated it more clearly in my Grant concurrence).

See pp 13, 14 of SG's brief for comparison of Morrissey/Gagnon with Fed Bureau Procedures

Four rights asserted:

1. Rt to confront & X-exam
2. To counsel
3.

The private interests (inmates) here very different from Morrissey/Gagnon. The other interest, nature of Gov't function, so different that application of Morrissey would be quite "impossible"

Book (Cont.)

Principals couldn't impose discipline if due process hearings were required before discipline could be imposed. Witnesses would not testify - for fear of retaliation if no other.

Counsel would change these informal + proceedings would polarize present community. Would convert informal conferences into confrontations + extended trials.

See S G Br. p 6 for Fed regs.

Dachek (for Rask).

Three issues:

1. Do Morrissey/Gagnon rules apply?

"Good time" is involved in every disciplinary hearing — as results are in record & considered by Parol Bd.

There is no adequate state remedy.

McDonnell is only named plaintiff in the class action suit. Counsel conceded, resp. to Rehnquist, that complaint does not aver that each of the deprivations claimed had happened to him — but only to some member of class. Counsel argued that McDonnell was "chilled" in exercise of other rights.

Counsel concedes that some definition must be made of a "grievous loss". His brief only mentions solitary confinement & dry cell confinement. But "good time" is involved in "every" disciplinary case.

Most cases do not reach the Disciplinary Committee in Neb. Prison systems. Most are resolved informally. (If I write — I should check this out)

Dachek (cont)

The basic position of Resp. is that summary/Gagnon control because good time is involved in all disciplinary cases — affects inmates record.

See p 10 of Resp Brief for the D/P sought in this case.

Commends Br. of Nat Council on Crime & Delinquency.

good point

~~Pr~~ Prison tension will be relieved if prisoners ~~[illegible]~~ think they are being ~~treated~~ fairly

[But Fed Rules seem to provide fairness. See p 6 of SG's Br)

Responding to White, counsel said he is not concerned by discipline decisions imposed informally (e.g. denial of TV or cafeteria) — but only by hearings before Disciplinary Committee. Only this Committee has power to order dry cell or solitary punishment, or other sanctions which go into record.

White asked if counsel is required where inmate has admitted guilt. Answer is ambiguous

(Cont on back)

Duchek (cont)

Argued that CA 8's ruling ~~that~~ in mail (no censorship — prison authorities may telephone correspondent if in doubt) is correct. The Fed. Reg. violates 1st Amend. Rts. Act of opening letter — even if let. is not read — violates 1st Amend.

Asks that CA 8 decision be affirmed & made retroactive — to extent of expunging all records.

Kammerlohr (Rebuttal)

In Preiser v Rodriguez good time was involved.

State does have Declaratory Judgment, Injunctive remedies in a Preiser v. Rodriguez situation — where we held that in 1983 state remedies must first be exhausted.

??

Library

1. Legal assistance for Civil Rts actions.
No duty to provide counsel

2. Atty Client Relationship
In gen. correspondence, no right of confidentiality.
But correspondence with atty should be confidential. Judge Coffin affirms this, but says mail may be opened in presence of inmate. Nolan v. Fitzpatrick. Neither petr. nor S.G. ask for anything else.
6th Amend. Rt
Add Note as to a Kunstler.

3. Procedural D/P
Liberty interest
Minor discipline (see SG Br 31 for range of sanctions)

John says none of parties deny that some due process is required in certain cases - See SG's Note 5 p17

Sanctions that affect length of confinement (loss of good time) clearly

73-679 Wolff 4/23

Cf with John J

Questions

Library

1. Legal assistance for Civil Rts actions.
No duty to provide counsel

2. Atty Client Relationship
In gen. correspondence, no right of confidentiality.
But correspondence with atty should be confidential. Judge Coffin affirms this, but says mail may be opened in presence of inmate. Nolan v. Fitzpatrick. Neither petr. nor S.G. ask for anything else.
6th Amend. Rt
Add note as to a Kunstler.

3. Procedural D/P
Liberty interests
Minor discipline (see SG Br 31 for range of sanctions)
John says none of parties deny that some due process is required in certain cases - See SG's Note 5 p17

Sanctions that affect length of confinement (loss of good time) clearly

Severe sanctions

affect liberty. Solitary confinement & dry cell may also implicate a liberty interest (most DC Cts have so held) – but this is not as clear as loss of good time. Third category of sanctions that arguably implicate liberty interest is a transfer to a different level of confinement (e.g. to maximum security prison).

These 3 are often implicated together.

Two steps to D/P analysis: 1st, is there a prop. or liberty interest, & 2nd what process is due.

John agrees that full panoply of process prescribed by Morrissey & Gagnon are not applicable.

D/P in prison environment is minimum. Standard should be fundamental fairness – & this varies. John would not try to itemize – leave this to adm.

John generally agrees with SG's Fed Rules – except as to rt. to witnesses in ~~John thinks~~ cases of "Other Discipl. Actions". ~~Other~~ Fed Rule OK as to loss of good time cases

No. 73-679, WOLFF v. McDONNELL Conf. 4/23/74

The Chief Justice absent

Douglas, J. Affirm
Affirm as to solitary confinement & dry cells - but not go beyond.

Brennan, J. ~~[illegible]~~ Affirm
Agrees largely with Douglas.

Stewart, J. Pass (see below)
Case is premature. The π was merely transferred from one job(?) to another.
No D/P issue.
CA8 went too far. This case is different from Morrissey & Gagnon. Prison environment quite different.
Would prefer to dismiss as improvidently granted - but if we pass on merits Potter in doubt as to how far he'd go.
x xxx.
After discussion, Potter said he'll probably end up with Byron, etc.

White, J. Reverse (Modify)

CA8 went beyond remanding on Morrissey & Gagnon - it purported to pass on substantive issues.

Doubts whether there is standing here. Could dismiss for want of juris.

On merits, is about where SG & Fed. Prisons are. There is const. right to D/P, but agrees that Fed Prison Rules satisfy D/P

Only reach merits if he is satisfied on standing & case & controversy

(Potter spoke up to say he is inclined to agree with White)

Morrissey & Gagnon do not apply.

Marshall, J. Affirm

In doubt as to standing - but would affirm on merits.

Blackmun, J. Part Reversal & part affirmance

On merits,

Some D/P is due - not whi sure but inclined to agree with W.

Reverse on atty mail issue. Affirm on Law library & ?

Powell, J. Reverse in Major Part & affirm in Part:

I'm essentially with White on D/P issue

See my yellow notes of 4/23 on this & other issues. I used these at Cf.

Rehnquist, J.

Same as White, Blackmun LFP.

I thought you might like this. JCJr. p.30

THE NEW YORK TIMES, MONDAY, MAY 6, 1974

Grievance Procedure Is Set Up In U.S. Prisons to Curb Lawsuits

By WARREN WEAVER Jr.
Special to The New York Times

WASHINGTON, March 23—The Bureau of Prisons has established a new grievance procedure for inmates of Federal institutions that is expected to check the flow of prisoners' lawsuits into the already overburdened Federal courts.

The policy, which goes into effect on April 1, will not affect the thousands of inmates who go to court each year to challenge the convictions that resulted in their imprisonment, but it should dispose of some of the litigation brought by those complaining about prison conditions and practices.

Norman A. Carlson, director of the prisons' bureau, said in a letter to all Federal district judges that the change had resulted from a proposal by Chief Justice Warren E. Burger that was subsequently tried out in three institutions.

About 4,000 state and Federal prisoners file lawsuits every year, charging the authorities with mistreatment or denial of civil rights. This constitutes about a quarter of the petitions filed by prisoners, a figure that has risen from 2,000 to more than 17,000 in the last dozen years.

State Action Expected

Chief Justice Burger told the American Bar Association last year that if the Federal prisons adopted an internal system of hearing complaints that must be used before a lawsuit is permitted, many states would follow the example and put the same procedures into effect in their institutions.

As an example of a case that need never have gotten into the courts, Mr. Burger told of a prisoner who accused a guard of taking seven packs of cigarettes from him without justification and wound up in District Court twice and the United States Court of Appeals once.

Under the new procedure, a prisoner with a grievance can file a complaint with his warden, who must respond within 15 business days. If he is still not satisfied, the inmate may appeal to the director of the Bureau of Prisons, who must answer in 30 business days.

During a four-month test at the Federal institutions in Atlanta, Danbury, Conn., and Tallahassee, Fla., 35 per cent of the prisoners' requests were granted, obviously eliminating any basis for a lawsuit. Wardens denied 51 per cent of the complaints, but only about one-third of such decisions were appealed.

Of 17 appeals on which the Bureau of Prisons ruled, prisoners' requests were granted in four cases, denied in eight and a compromise solution reached in five. Ten appeals are pending.

Among the most numerous complaints during the test period were requests for transfer, complaints about mail, visits and telephone calls, disciplinary controversies and requests for credit for time previously served in jail and for good conduct.

H.E.W. Proposes New Rules On Conflicts of Interest

WASHINGTON, May 4 (AP)—The Department of Health, Education and Welfare has proposed new rules aimed at preventing "real or apparent" conflicts of interest among former employes in the spending of $22-billion a year.

Under the rules, an organization would be barred from receiving noncompetitive H.E.W. grants or contracts if it hired or was considering hiring a former department employe.

In addition, each organization seeking a competitive award would be required to notify H.E.W. whether it employed or was considering employing a former department employe.

Waste Treatment Aided

BOSTON,, May 4 (AP)—The United States Environmental Protection Agency has awarded a total of $2,163,179 to two Massachusetts towns, Orange and Maynard, for construction of waste treaement facilities.

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.

June 12, 1974

<u>No. 73-679 Wolff v. McDonnell</u>

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 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

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,

B

Mr. Justice Marshall

cc: The Conference

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

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

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 feflection 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
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

THE C. J.	W. O. D.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.
				4/30/74				
Join BRW 6-21-74	Dissent 1st draft 6-11-74	Join TM 6/17/74	Join BRW 6-17-74	1st draft 6-7-74 2nd draft	Will Dissent 6-11-74 Dissent	Join BRW 6-19-74	Join BRW 6-12-74	Join BRW 6-18-74
				6-12-74 3rd draft 6-20-74	in Part 1st draft 6-18-74 2nd draft			
				4th draft 6-21-74	6-20-74 Third Draft 6-24-74			

73-679 Wolff v. McDonnell