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PROCEDURAL DUE PROCESS IN PRISON DISCIPLINARY ACTIONS*

Correctional institutions throughout the United States regulate the day to day lives of approximately two hundred and twenty thousand convicted felons. The responsibility for the control of these inmates and the security of the penal institutions has been delegated by the various legislatures to administrative bodies. In order to carry out their delegated responsibility, these administrative bodies have also been given considerable discretion as to the methods to be used in maintaining order and discipline within the walls of the prisons. The respective agencies, both state and federal, not only adopt and promulgate rules governing inmate conduct, but also determines the procedures that will be employed by the agency in handling inmates who have allegedly violated those rules. The agencies establish the methods used to ascertain whether there has been an infraction of prison regulations and whether increased restraints on an inmate's liberty or other punishments are necessary because of an infraction.

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1. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS, Table 1 (1967).


3. Id.

4. See, e.g., OKLAHOMA STATE PENITENTIARY MANUAL OF RULES AND REGULATIONS GOVERNING INMATE TRUSTEE STATUS 9, 12, 14 regulating conduct with respect to prison staff; WYOMING STATE PENITENTIARY, RULES AND REGULATIONS FOR EMPLOYEES 12 (1967) regulating the mailing and censoring of legal documents; STATE OF GEORGIA, RULES AND REGULATIONS GOVERNING THE OPERATION OF STATE CORRECTIONAL INSTITUTIONS AND COUNTY PUBLIC WORKS CAMPS 20 (1968) prescribing the terminology to be used by inmates when referring to aspects of prison life; the rules and regulations of the Rhode Island Penitentiary set out in Morris v. Travisono, 310 F. Supp. 857 at 871-874 (D.R.I. 1970).

Rules regulating inmate conduct necessarily vary with each correctional authority's concept of how to best preserve internal order and maintain security within the institutions. The rules of conduct may be quite broad. Disciplinary action may be taken against an inmate for, "any conduct not conducive toward rehabilitation or betterment of an inmate", or "conduct . . . such as would discredit this institution."

While the substantive rules of penal institutions vary, the administrative procedures used to handle a disobedient prisoner are somewhat standard throughout the penal systems. Correctional institutions invariably provide a special confinement facility for those inmates who are guilty of serious infractions. This special facility is generally known as solitary confinement, although it may also be referred to as segregative confinement, punitive segregation, or a maximum security cell. Regardless of the name, its purposes are to segregate inmates dangerous to prison security and to deter inmates from misconduct. The intensity of the strictures needed to effect these purposes depends upon the recalcitrance of the inmate. Lesser penalties, such as denial of creature comforts, are imposed for less serious rule infractions. With a view toward the positive aspect of rule enforcement, most correctional systems provide a "good time" or "gain time" incentive. Time is credited to an inmate's total sentence for each specified period of time he actually serves without having any disciplinary action taken against him. For example, the federal system allows deduction from the term of the sentence (of from five to ten days) for each month served. Where an inmate has accumulated good time credit on his record, the total credit may be reduced by a forfeiture of it imposed as punishment for misbehavior. Not only may earned good time be forfeited, but moreover, the inmate may be prohibited from earning further good time as a result of disciplinary action. "These, together with adverse parole recommendations, are the main traditional disciplinary tools in institutions."

The use of these tools depends, of course, on whether a prisoner is found to have violated prison rules.

The fact of the violation may be determined by either the warden alone or by a disciplinary committee composed of members of the prison

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6. TENNESSEE STATE PENITENTIARY, GUIDANCE MANUAL FOR PRISONERS 7.
7. MAINE STATE PRISON, INFORMATIONAL RULES AND REGULATIONS FOR INMATES 42, 43.
8. The Federal Bureau of Prisons and all states except Kansas, Utah and Louisiana have statutes providing for good time credit.
12. CORRECTIONS, supra note 1, at 50.
staff. The procedures that will be followed depend upon the agency responsible for the correctional institution. In the federal system, an inmate facing a forfeiture of good time should be allowed: a hearing before a committee authorized to impose the punishment; a summarized record of the hearing; notice at the hearing of the details of the alleged misconduct; an opportunity to make a statement on his own behalf if he pleads guilty; assistance of a staff member if the inmate chooses to plead not guilty; notice of the final decision in his case; and an opportunity to appeal that decision to the Director of the Bureau of Prisons by uncensored mail. These provisions are similar to those used in the Missouri State Penitentiary, however, appeal is made to an authority within the prison and the Missouri prisoner is allowed to present evidence in rebuttal. Wisconsin has also initiated procedures that are substantially the same as those in the federal system. As has been pointed out, the use of a hearing is not the only method of dealing with the inmate. The warden of a federal penitentiary may overturn the finding of the disciplinary committee, "if warranted by the evidence and if appropriate under the circumstances." The independent conclusion of the warden of how best to dispose of the matter is also permissible in Missouri.

In the past, courts have generally refused to review disciplinary action within the prisons. The reasonableness of the administrative action has been considered to be a matter beyond the scope of judicial inquiry. This deference accorded the discretion and expertise of the correctional authority has been manifested by a number of rationales.

In Roberts v. Pegelow, a Black Muslim inmate of a federal penitentiary received two weeks loss of amusement privileges and forfeited sixty days of accumulated good time for eating "on the wrong mess." The inmate petitioned for a writ of habeas corpus challenging the disciplinary action as arbitrary. In affirming the district court's denial of the petition, the Fourth Circuit Court of Appeals refused to consider whether the infraction reasonably justified the punishment. The court stated that:

14. Supra, note 5.
17. Supra, note 5.
18. Roberts v. Pegelow, 313 F.2d 548 (4th Cir. 1963); Siegal v. Ragen, 180 F.2d 785 (7th Cir. 1950); United States ex rel Atterbury v. Ragen, 237 F.2d 953 (7th Cir. 1956); Williams v. Steele, 194 F.2d 32 (8th Cir. 1952); Lowe v. Hiatt, 77 F. Supp. 303 (M.D. Pa. 1948), cert. den., 337 U.S. 44 (1949).
19. 313 F.2d 548 (4th Cir. 1963).
So long as the punishment imposed for an infraction of the rules is not so unreasonable as to be characterized as vindictive, cruel or inhuman, there is no right of judicial review to it. . . . Such questions have consistently been held to be nonjusticiable, for routine security measures and disciplinary action rest solely within the discretion of the prison officials and their superiors in the Executive Department. 20

In Siegal v. Ragen 21 a state prisoner alleged that the warden of the state prison had deprived him of rights secured by the United States Constitution: (1) by abolishing a legal department set up by the prisoner, (2) by mismanaging a prisoner's amusement fund and (3) by imposing isolated confinement on the prisoner for criticizing the warden. The Seventh Circuit concluded that none of the warden's actions deprived the prisoner of a right secured by the Constitution, and that their only redress at this point must be sought from the state courts. The court observed that control and regulation of internal discipline of state penal institutions was a power reserved to the state. 22

Another doctrine used by the courts to avoid interfering with prison discipline is the concept of failure to exhaust administrative remedies. This is true only where the petition seeks habeas corpus, as opposed to injunctive relief under 42 USC § 1983. 23 For example, in Lowe v. Hiatt, 24 the District Court for the Middle District of Pennsylvania considered a federal prisoner's objections to the treatment he received in prison. The prisoner's record indicated, "clearly that he entered the institution with an avowed intention of refusing to comply with the prison regulations." 25 The federal prisoner was not without administrative relief in view of the establishment of a "prisoner mail box." This was a procedure through which inmates might write letters, uncensored in the institution, to the Director of the Bureau. 26 Since the prisoner had failed to pursue this administrative remedy, his petition for habeas corpus was denied.

The reluctance of federal courts to interfere with prison discipline is supported by dicta of other cases. While holding that a prisoner's presence during the appeal of his conviction was not a matter of con-

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20. Id. at 550.
21. 190 F.2d 785.
22. Id. at 788.
25. Id. at 305.
26. Id.
stitutional right but of appellate court discretion, the United States Supreme Court in *Price v. Johnson*\(^2\) stated that, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a restriction justified by the considerations underlying our penal system."\(^2\) The Eighth Circuit Court of Appeals affirmed the dismissal of a petition for habeas corpus in *Williams v. Steele*.\(^2\) The dismissal was based on the ground that despite allegations of mistreatment in the petition, the appellant set forth facts indicating that he was lawfully held in custody. The court went on to say that even were they to have habeas corpus jurisdiction, they could not provide redress for the mistreatment complained of by the petitioner. The court stated that,

> [S]ince the prison system of the United States is entrusted to the Bureau of Prisons under the Attorney General... the courts have no power to supervise the discipline of prisons nor to interfere with their discipline..."\(^3\)

It has been suggested that this statement gave the initial impetus to the tendency of federal courts to refrain from interfering in the administration of prison discipline.\(^3\) This "Hands-off Doctrine" appears to have retained its vitality in the Eighth Circuit. In the recent case of *Burns v. Swenson*\(^3\) the Eighth Circuit Court of Appeals was faced with the question of whether certain procedural regulations of the Missouri State Penitentiary were constitutionally required. The state correctional authority had made provision for: notice of a misconduct charge against a prisoner; a hearing on the charge before a committee of at least three persons; representation by counsel or a counsel substitute in serious cases; disclosure of the evidence against the inmate; and a written summary of the committee's decision with the opportunity for formal review.\(^3\) Inmate Burns was suspected of participating in a murderous assault. He had been identified by one eyewitness. Because Burns had already had disciplinary action taken against him in the past and was regarded by the prison administration as a "troublemaker and a behind the scenes agitator,"\(^3\) the warden removed Burns to a maximum security cell without taking any formal action against

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27. 334 U.S. 266 (1948).
28. *Id.* at 285.
29. 194 F.2d 32.
30. *Id.* at 34.
32. 430 F.2d 771 (8th Cir. 1970).
33. *Id.*
34. *Id.* at 775.
him.\textsuperscript{35} Approximately six months later Burns appeared before an ad
hoc policy committee which reviewed the warden’s action. Normally,
such action is considered by a statutorily authorized Prison Classifi-
cation Committee.\textsuperscript{36} No record of the proceedings was made other
than a simple affirmance of the warden’s decision and a notation that the
inmate was recommitted to the maximum security cell indefinitely. Ap-
proximately one year thereafter his status was again reviewed, though
this time by the Prison Classification Committee. No change resulted.
A third review of the prisoner’s assignment was eventually made, al-
though he was not present at this final review. His total segregative
confinement lasted slightly more than three years.

In considering Burns’ allegation that the warden violated his Four-
teenth Amendment right by suspending the normal procedure estab-
lished by the state, the Eighth Circuit concluded that the normal pro-
cedures, while penologically desirable, were not constitutionally neces-
sary.\textsuperscript{37} The Court of Appeals reasoned that:

\begin{quote}
[F]ederal court review of state prisoner’s complaints arising out
of the internal administration, conditions, or discipline in the prison
is narrowly circumscribed. Unless deprivation of constitutional
dimensions are involved, Federal courts should be loathe to inter-
fere.

In the present posture of the suit, the degree to which prison offi-
cials may have departed from desirable procedures or state stan-
dards cannot be magnified into a fundamental constitutional error
mandating a decree from this tribunal.\textsuperscript{38}

It is apparent that many courts are of the opinion that the considera-
tions of administering our penal systems justify the withdrawal of many
procedural due process rights guaranteeing the fairness of disciplinary
action taken by the prison administration.

Not all aspects of the administration of internal control and security
are beyond the scope of judicial review. Federal courts have recog-
nized and have exercised their power to correct abuses of administra-
tive authority where they have been found to be unconstitutional. It
seems clear that courts will not deter to the discretion of prison authori-
ties where the courts find a violation of the Eighth Amendment.\textsuperscript{39}

\textsuperscript{35} Inmate classification and assignment to maximum security cells is usually
\textsuperscript{36} Id.
\textsuperscript{37} 430 F.2d at 775.
\textsuperscript{38} Id. at 776.
\textsuperscript{39} See, e.g., Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965) requiring safe-
guards surrounding the imposition of corporeal punishment in order to keep it within
the bounds of the Eighth Amendment; Jordan v. Fitzharris, 257 F. Supp. 674 (N.D.
ther may an inmate's right to free exercise of his religion be unduly restricted because of the necessity for good order within the prison. The Equal Protection Clause of the Fourteenth Amendment has served to invalidate prison practices of segregating prisoners on the sole basis of race. State penal institutions have been prevented from interfering with a prisoner's access to the courts despite the argument that providing access inhibits the effective preservation of prison order. In determining whether prison practices are unconstitutional, the courts have consistently considered the obvious necessity for discipline within the institution and the policy of previous decisions leaving the means of effecting that discipline to the administrative authority. Nevertheless, the judicially enunciated list of a prisoner's constitutional rights has been enlarged.

The Constitutional protections relate not only to the methods of punishing regulation violations and of controlling inmate conduct, but also to the procedural processes used by the correctional authority to determine whether imposition of any punishment is justified. While it had previously been noted that the due process clause of the Fourteenth Amendment followed the individual into prison and protected him from unconstitutional action carried out under color of state law, only recently have cases held that a prisoner is entitled to certain elements of procedural due process before he may be subjected to prison discipline. Federal courts have differed, however, in their interpretations

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Cal. 1966), enjoining the state from holding prisoners in the prison solitary confinement unit, the conditions of which were found to be violative of the Eighth Amendment.

40. See, e.g., Sostre v. McGinnis, 334 F.2d 906 (2nd Cir. 1964), in which the court declared that, "a prisoner has only such rights as can be exercised without impairing the requirements of prison discipline." p. 908. It went on to hold that allegations that prison officials violated the petitioners First Amendment rights to free exercise of religion raised a justiciable issue; Pierce, Sostre, SaMarion v. LaVallee, 293 F.2d 233 (2nd Cir. 1961), rejecting the argument that prison disciplinary actions were executive action and that therefore allegations of First Amendment violations by the warden did not raise justiciable issues.


42. Johnson v. Avery, 393 U.S. 483 (1969) held that prison regulations attempting to prevent one inmate from assisting another in the preparation of petitions of habeas corpus were invalid because they constituted an unjustified interference with a prisoner's right to seek redress under 28 U.S.C. § 2242.

43. The Fourteenth Amendment reads in part, "... nor shall any State deprive any person of life, liberty, or property without due process of law,..." U.S. Const. amend. XIV. The Fifth Amendment binds the federal government with respect to due process. That Amendment reads in part, "... nor shall any person..., be deprived of life, liberty, or property, without due process of law;..." U.S. Const. amend. V.

44. Jackson v. Goodwin, 400 F.2d 529 (5th Cir. 1968).

45. Sostre v. Rockefeller, supra, note 11; Carothers v. Follette, 314 F. Supp. 1014 (S.D.N.Y. 1970); Kritsky v. McGinnis, supra, note 10. The above cases were brought
of what elements of procedural due process must be present.\textsuperscript{46}

In \textit{Sostre v. Rockefeller}\textsuperscript{47} the state prisoner was confined in punitive segregation indefinitely for refusing to cease communicating with his attorney about matters which the warden felt were not directly related to the prisoner's case, and for refusing to answer the warden's questions about an organization mentioned in Sostre's letters. Neither of the grounds for imposing the punishment constituted a violation of prison regulations, nor was Sostre charged with any such violation. During the time that the inmate remained in punitive segregation he was unable to earn good time credit.

The District Court for the Southern District of New York found that the prisoner had no prior written notice of any charge against him; that no record of the discussions between the prisoner and the warden was made; that the prisoner was not charged with any violence, with attempting to escape, with inciting to riot, or with any similar charge; and that the prisoner remained in punitive segregation for more than a year. The district court also found:

\begin{quote}
That punitive segregation under the conditions to which plaintiff was subjected . . . is physically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time. . . .\textsuperscript{48}
\end{quote}

As a result of this confinement, Sostre lost one hundred and twenty four and one third days of good time which might otherwise have hastened his consideration for parole.\textsuperscript{49}

In considering the plaintiff's allegation that the warden's actions constituted a violation of the plaintiff's right to procedural due process, the court purported to follow:

\begin{quote}
That firmly established due process principle that where governmental actions may seriously injure an individual, and the reasonableness of that action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the evidence adduced at the
\end{quote}

\begin{flushright}
\textsuperscript{46} Compare cases cited in note 45, supra, with Burns v. Swenson, supra, note 32.
\textsuperscript{47} Supra, note 18.
\textsuperscript{48} \textit{Id.} at 868.
\textsuperscript{49} \textit{Id.} at 872.
\end{flushright}
hearing. In this connection, the decision-maker should state the reasons for his determination and indicate the evidence upon which he relied. Finally... an impartial decision-maker is essential.\textsuperscript{50}

In light of this principle, the court held that before the prisoner could have been confined to punitive segregation he should have been given: (1) advance written notice of the charges against him designating the prison rule violated; (2) a hearing before an impartial decision-maker at which the prisoner could confront his accusers and call witnesses on his own behalf; (3) a written record of the hearing, decision and reasons therefore; and (4) the right to retained counsel or a counsel substitute.\textsuperscript{51} The court held these procedures must be applied, not only where the inmate faces punitive segregation but also wherever good time may be forfeited or the ability to earn it denied.\textsuperscript{52}

Construing prison disciplinary procedures in this case as subject to constitutional requirements of basic due process clearly goes beyond the holdings of previous courts that such matters are non-justiciable.\textsuperscript{53} Rather than defer to administrative expertise and discretion, the district court in \textit{Sostre v. Rockefeller} analyzed the effect of the governmental action on the individual, and applied constitutional standards to the action. However, the court in \textit{Sostre} did indicate that although the issues raised were of constitutional dimensions there should be an attempt to obtain redress through administrative channels, as did the court in \textit{Lowe v. Hiatt}.\textsuperscript{54} In \textit{Sostre}'s case though, the higher administrative authority was aware of the warden’s actions and had made no response to them. In the court’s opinion, this fact obviated the need for initial formal appeal to that authority.\textsuperscript{55}

With respect to exhaustion of administrative remedies, the district court in \textit{Carothers v. Follette}\textsuperscript{56} went even further. In that case, the inmate had not appealed the disciplinary action taken against him to the Director of Corrections for the state. The Director was not aware of the disciplinary action. The district court held that a mere letter to an administrator of state corrections protesting disciplinary action was hardly worthy of classification as an administrative remedy, and the prisoner need not be required to use this procedure.

The inmate in \textit{Carothers} was confined in punitive segregation for

\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Cases cited note 18, supra.
\textsuperscript{54} Id.
\textsuperscript{55} 312 F. Supp. at 882.
\textsuperscript{56} 314 F. Supp. 1014.
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making what the warden considered false and lying statements about the prison administration to the inmate's parents and for failure to comply with restrictions on the prisoner's exercise privileges. The plaintiff inmate was summoned before a disciplinary board consisting only of a deputy warden, who acted solely on the report of an officer who had read the letter to the inmate's parents. On the same date, the plaintiff was sent to solitary confinement for an indefinite term. He remained there for four and one half months and was deprived of sixty days of accumulated good time. The prisoner received no notice of any charge against him. He was not entitled to any representation. No record was made of the hearing.

In evaluating the prisoner's claim, under the Civil Rights Act, that the procedures used by the prison violated his rights to procedural due process, the District Court for the Southern District of New York noted, "that prison officials are not dealing with a group of genteel citizens noted for their lawabiding characteristics." It was also observed that in order to maintain discipline a warden and other personnel should be given flexibility and be allowed to take immediate action where the inmates create violent disorder. Those facts notwithstanding, the district court refused to abstain and proceeded to apply federal constitutional standards to the procedures of the prison, and concluded that:

[D]espite the peculiar and difficult problems in prison administration, we cannot accept defendant's contention that the essential elements of fundamental procedural fairness—advance notice of any serious charge and an opportunity to present evidence before a relatively objective tribunal—must be dispensed with entirely because of the need for summary action or because the administrative problems would be too burdensome.

Although a prisoner does not possess all of the rights of an ordinary citizen he is still entitled to procedural due process commensurate with the practical problems of prison life.

The plaintiff spent four and one half months in punitive segregation, thereby losing the opportunity to earn forty six days of good time and forfeiting sixty days of accumulated good time. Since the disciplinary procedures used to effect this loss did not meet the court's concept of elementary procedural due process under the conditions encountered,
the prisoner had all the lost good time restored to him and the prison was enjoined from keeping him in solitary confinement. The district court refrained from ordering the correctional authority to establish fair and reasonable procedures because the court in *Sostre v. Rockefeller* had already done so.  

The District Court for the Southern District of New York in *Sostre* ordered that the state correctional authority initiate procedures consistent with the holding of the court on the requirements of procedural due process. In approving of this order as fair and reasonable, the *Carothers* court appeared to go beyond its interpretation of what is absolutely required for constitutional due process in the prison situation. The *Carothers* court regarded advance notice of the charges and a hearing before a relatively objective tribunal to be the minimum procedures necessary. The *Sostre* concept of the essential elements of procedural due process also includes cross examination, rebuttal evidence, counsel or a counsel substitute, and a written summary of the proceedings. While *Carothers* approves of these additional requirements as fair and reasonable, it does not appear to regard them as essential. This would be the case unless the *Carothers* court implicitly included the additional requirements demanded in *Sostre* in the *Carothers* concept of fair hearing.

In this connection the District Court for the Northern District of New York held, in *Kritsky v. McGinnis*, that a hearing must be afforded the petitioner charged with a serious violation of prison rules; that the hearing must be meaningful in both time and place; that the decision reached at the hearing must be a reasoned one; and that the rationale be recorded.

The inmate in *Kritsky* had remained in his cell and had refused to conform to prison routines as a protest against prison policy. He was summarily removed to a maximum security cell. Ten days later, the inmate was confronted by a prison official who advised the inmate that he was charged with advocating riot and incendiaryism within the prison. Asked how he pleaded to the charge, the inmate responded not guilty. He was immediately sentenced to eighteen months of lost good time.

The district court observed that, “firmness and application of quick and adequate discipline is clearly an essential to safeguard the security

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62. *Id.* at 1029.
63. 312 F. Supp. at 889.
64. 314 F. Supp. at 1029.
65. *Id.* at 1028.
of a large prison and circumvent the start or spread of possible riot and rebellion.” Nevertheless, the court held that since the right to be heard before being condemned to suffer grievous loss of any kind is so fundamental to the basis of our society, the hearing given the inmate was manifestly insufficient. Procedural due process demanded a meaningful hearing including a recorded rationale of the authority’s decision. The mere fact that some type of hearing was held would not satisfy the constitutional requirement.

The petitioners in Sostre, Carothers and Kritsky each suffered a detrimental effect on their good time credit, either by forfeiting earned good time or by being unable to earn further good time. Each petitioner also faced increased restrictions on his present liberty in the form of a special type of confinement within the prison. Each district court considering the circumstances surrounding the imposition of punishments on the petitioners concluded that their interests in the proceedings were sufficiently substantial to warrant the use of certain elements of procedural due process. Also, two circuit courts of appeal have recently considered the issue of whether punitive segregation and loss of good time are sufficiently harmful to a substantial interest of the inmate to require specific procedural safeguards at proceedings where those interests are effected. The conclusions reached appear to be divergent.

In Nolan v. Scafati, the First Circuit Court of Appeals regarded the issue of procedural safeguards at prison disciplinary hearings to be difficult and relatively unexplored. The petitioner in the Nolan case had alleged that his segregated confinement and forfeiture of good time were imposed in violation of his Fourteenth Amendment rights. He complained of being denied the right of counsel at his hearing, of cross-examination of adverse witnesses, and of summoning witnesses in his own behalf. The district court dismissed the complaint, concluding that the need to preserve the executive authority of the warden and effective maintenance of prison discipline militated against the petitioner’s contentions. The district court did, however, indicate that the guarantee of procedural due process requires that at such a pro-

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67. 313 F. Supp. at 1249.
68. Supra, note 11.
69. 314 F. Supp 1014.
70. Supra, note 10.
71. Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970); Burns v. Swenson, 430 F.2d 771.
72. Supra, note 71.
73. 430 F.2d at 550.
75. Id. at 3, 4.
ceeding the disciplinary board advise the prisoner of the charged misconduct, inform him of the details of the evidence leading to the charge, allow him to be heard in his own defense, and base its conclusions on evidence adduced at the hearing.\textsuperscript{76}

On appeal, the First Circuit regarded the prisoners allegations to be, "[S]ufficiently serious. . . , that some determination of the underlying facts should have been undertaken before judgment was rendered."\textsuperscript{77} Remanding the case, the court of appeals ordered the district court to:

\begin{quote}
[A]scertain the cause, nature, and duration of petitioner's confinement; the consequent effect of, if any, on his earned good time credit; and the nature of the safeguards provided at any prison hearing which may have been accorded the petitioner.\textsuperscript{78}
\end{quote}

Once it had done this, the district court was to then decide whether the safeguards provided were sufficient to protect any substantial individual interest that was at stake.\textsuperscript{79} The court explicitly recognized that the alleged absence of procedures may have resulted in an unconstitutional violation of the inmate's right to procedural due process.\textsuperscript{80}

On the other hand, the Eighth Circuit Court of Appeals in \textit{Burns v. Swenson}\textsuperscript{81} held that notice of the charged misconduct, hearing by a committee of at least three persons, representation by a counsel or a counsel substitute, disclosure of evidence against the inmate, a written summary of the committee's decision, and provision for formal review were not required by the Fourteenth Amendment where an inmate faced punitive segregation and a loss of good time. The summary procedure alleged by petitioners did not, in the court's opinion, raise the possibility of a denial of procedural due process sufficient to warrant a hearing on the charges. The allegations that the First Circuit thought required a determination of whether the procedural safeguards employed by the state were sufficient to protect any substantial interest of the inmate that was at stake were not deemed legally sufficient by the Eighth Circuit.\textsuperscript{82} In fact, the Eighth Circuit placed controlling emphasis on the same considerations as the district court did in \textit{Nolan v. Scafati}.\textsuperscript{83} The responsibilities of the prison administrator were brought to the fore when the Eighth Circuit pointed out that: "[T]he exigencies of un-

\textsuperscript{76} \textit{Id.} at 3.
\textsuperscript{77} \textit{Id.} 430 F.2d at 550.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.}
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Supra}, note 32.
\textsuperscript{82} \textit{Nolan v. Scafati}, 430 F.2d at 550.
\textsuperscript{83} 306 F. Supp. at 3, 4.
usual or emergency situations dictate that an inmate be unilaterally segregated first, with a hearing provided later.\textsuperscript{84} The six month delay in holding the first hearing and the absence of any of the normal safeguards at that hearing were not considered to be violations of procedural due process. The mere fact that some hearing was held was sufficient to meet the requirements of procedural due process. The same fact was found to be insufficient in the eyes of the district court in \textit{Kritsky v. McGinnis}.\textsuperscript{85}

The positions of the federal cases discussed above present a fairly broad spectrum of approaches to the issue of whether prison disciplinary action may effect such substantial individual interests of the inmate that certain elements of procedural due process are required. At one end of the spectrum are the cases demonstrating the traditional approach that prison discipline is an executive function which requires flexible and unhampered executive action.\textsuperscript{86} The exigencies of prison existence have compelled those courts to find that the administrative decision to impose restrictions on the inmate should not be surrounded by procedures which would be present if the decision were rendered against a free citizen rather than a convicted felon. At the center of the spectrum is the position taken by the Circuit Court of Appeals for the First Circuit in \textit{Nolan v. Scafati}.\textsuperscript{87} This opinion demonstrates the possible need for procedural protection where a substantial interest of the inmate is found to be at stake. The other end of the judicial spectrum is characterized by the recent decisions of the federal district courts in New York State.\textsuperscript{88} These courts have found that solitary confinement and loss of good time effect interests substantial enough to outweigh the governmental interest in conserving administrative resources and preserving prison order and security. In analyzing all the cases of the spectrum, one cannot help but notice the developing trend. An exercise of administrative power prompted by suspected acts of the inmate will be nonetheless subject to current procedural due process standards on review. The peculiar nature of the environment may not serve as a factor wholly negating the usual effects of those standards, but only as a consideration weighed in evaluating the extent to which procedural protections are constitutionally necessary.

\textsuperscript{84} Burns v. Swenson, \textit{supra} note 32 at 779.
\textsuperscript{85} \textit{Supra}, note 10.
\textsuperscript{86} Cases cited \textit{supra}, note 18 and the district court opinion in Nolan v. Scafati, \textit{supra} note 82.
\textsuperscript{87} \textit{Supra}, note 82.
The cases of *Sostre v. Rockefeller*, 89 *Carothers v. Follette*, 90 and *Kritsky v. McGinnis* 91 each cited and relied on the recent Supreme Court opinion in *Goldberg v. Kelly*. 92 There it was held that New York could not terminate public assistance payments to an individual without first granting him the opportunity for an evidentiary hearing on his eligibility to receive the payments. The fairness of this hearing should be protected by both timely and adequate notice of the reasons for the proposed termination and an effective opportunity to defend. This opportunity to defend must include the right to cross examine adverse witnesses, to present oral evidence and arguments, to retain an attorney, and to have the hearing before an impartial decision maker. 93 The Supreme Court regarded the governmental interest in conserving the public fiscal and administrative resources not to be substantial enough to outweigh the claimant's need to sustain himself through the payments. A post termination hearing would not realistically protect the claimant's rights because his needs would not wait for the state to have the hearing.94

*Goldberg* presents the Supreme Court's concept of the procedural essentials of a fair hearing where governmental action is proposed which will effect the ability of the individual to fulfill his need for food and clothing. Before the government can terminate the welfare payments, it is required to afford the recipient adequate opportunity to substantiate his eligibility. If liberty is considered to be as basic a human need as food and clothing, then the threat of increased or prolonged restrictions on liberty in the form of solitary confinement or loss of good time would appear to be as grievous a threat to an individual's interest as the loss of public assistance payments. On the other hand, the effective control of the public fiscal and administrative resources would presumably not be as endangered by a procedurally created delay in determination of welfare payments as would the effective maintenance of prison security be endangered by an inability to quell violence swiftly. Although arguments against the position that hearing should precede any disciplinary action by the prison authority are quite compelling, *Goldberg* can reasonably be construed to support the position that while disciplinary action may precede a hearing where the need for celerity is apparent, the action must only restrict inmates' liberty to the ex-

89. *Supra*, note 11.
90. 314 F. Supp. 1014.
93. *Id*.
94. *Id*.
tent necessary to preserve immediate order in the prison. Unilateral action imposing a loss of good time or prolonged solitary confinement need not always be necessary to preserve order. The procedures listed in *Goldberg* would serve to protect the inmates interest in his own liberty while also allowing the correctional authority to make an accurate determination of facts which might effect that liberty. Where the suspicions on which the correctional authority acted are found at the hearing to be without basis in fact, the inmates could be returned to the general prison population having suffered no actual loss of good time credit and as little extra punitive confinement as was possible under the circumstances.

The *Goldberg* case was relied on by the Second Circuit Court of Appeals in *Escalera v. New York Housing Authority*. That court held that even if public housing could be considered a privilege, eviction by the Housing Authority must be preceded by the procedures set out in *Goldberg*. The interest of the individual in avoiding the grievous harm of eviction required that administrative action which could lead to that harm be surrounded by procedural safeguards to insure it reasonableness. The fact that public assistance might conceivably be considered a gratuity by the state did not detract from the degree of harm that could result from its revocation.

Good time credit being an incentive to good prisoner behavior could, like parole, also be considered as a gratuity or privilege. Although the inmate may have no vested right in keeping or earning good time credit, the revocation of any that he has earned and a denial of the opportunity to earn more compel him to remain incarcerated for a longer period. Once again, if liberty is considered to be as basic an interest as shelter, it would appear that present restrictions on future liberty should not be imposed without the presence of the *Goldberg* procedures.

Although not dealing specifically with administrative action, two other Supreme Court cases present analogies to the situation of an inmate facing disciplinary action in the form of punitive segregation and loss of good time.

In the case of *In re Gault*, the Supreme Court concluded that in respect to proceedings to determine delinquency, proceedings which may result in commitment of a juvenile to a state institution, the due process clause of the Fourteenth Amendment requires that the juvenile be given: (1) factual notice of the charges; (2) an opportunity to confront and

95. 425 F.2d 853 (2nd Cir. 1970).
96. 387 U.S. 1 (1967).
cross-examine adverse witnesses; (3) access to counsel; and (4) the privilege against self-incrimination. The particular juvenile court in this case possessed virtually unlimited discretion in conducting the hearing and determining whether commitment of the juvenile defendant was warranted. This discretion could not be allowed in view of the gravity of the possible consequences to the minor were it to be misused. The procedures serve to protect against arbitrary determinations.

Although the Court's attention was not focused on the post adjudicative or dispositional process, nor was the authority exercised that of an administrative body, a number of similarities exist between the minor defendant in *Gault* and the inmate facing a loss of good time or punitive segregation. Both are accused of acts warranting imposition of restrictions on liberty. Both face a governmental authority possessed of wide discretion in making its determinations. The minor is constitutionally entitled to procedures which the felon may not be.97 The need for swift action in the felon's case should not result in a total denial of procedural safeguards, for swift action need only be used to prevent further disruption while the loss of good time and punitive segregation have a punitive as well as a preventive character. The imposition of punishment may be surrounded by procedural safeguards more readily than immediate preventive action. Where the punishment takes the form of restrictions on liberty, *Gault* indicates that the restrictions per se require procedural protection in the decision to impose them.

The defendant in *Specht v. Patterson*98 had been convicted under a statute carrying a maximum sentence of ten years. State law provided that after a conviction the trial court was to find whether the convicted defendant either posed a threat to the community or was a mentally ill habitual offender. On the basis of this second finding the defendant could be given an indeterminate sentence of more than ten years. This finding was not an element of the original crime. The Supreme Court held that at this hearing the defendant was entitled to the assistance of counsel, to cross-examine adverse witnesses, to offer evidence, and to be furnished with a record sufficient to make an appeal meaningful.

It should be noted that this proceeding was not to determine guilt of a criminal character but was merely to find whether there were facts sufficient to justify restrictions on liberty not required by the conviction. When the *Specht* facts are compared to those of *Sostre v. Rockefeller*,99

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98. 386 U.S. 605 (1967).
Prison Disciplinary Actions

Carothers v. Follette,100 and Kritsky v. McGinnis101 in which each inmate was placed in punitive segregation and lost good time, it can be seen that in those cases, as in Specht, the individuals all faced restrictions on liberty greater than those required by their sentences.

The proposition that whenever governmental action of an adjudicative type may seriously injure a substantial interest of an individual the action must be surrounded by certain elements of procedural due process is undoubtedly too general to be effectively applied to prison disciplinary action. That proposition leaves unanswered the questions of what elements of procedural due process must be present and what effect exigencies of the situation may have on their application. The interests of the government in initiating the action and the effect of the procedural safeguards on those interests must also be considered. It could not be doubted that prison administrators are subject to the constitutional requirement of due process;102 however, the extent to which that concept effects their freedom in disposing of disciplinary matters requires reference to a number of opposing factors. In his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath,103 Mr. Justice Frankfurter enunciated some of the considerations that will determine the extent to which procedural due process is required.

The precise nature of the interest that has been adversely effected, the manner in which it was done, the reason for doing it, the available alternatives to the procedures that were followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished . . . these are some of the considerations that must enter into the judicial judgment.104

A prison inmate’s interest in disciplinary action that could affect the conditions or duration of his confinement is similar to the interests of the petitioners in Goldberg v. Kelly,105 In re Gault,106 and Specht v. Patterson.107 The Goldberg petitioner faced a loss of welfare payments used to sustain himself. The Gault juvenile faced commitment to an institution. The Specht petitioner faced confinement for a period longer than the maximum sentence for the crime he committed. The prison inmate faces confinement in quarters, the conditions of which

100. Supra, note 90.
102. Supra, note 43.
104. Id. at 163.
105. Supra, note 92.
106. Supra, note 96.
107. Supra, note 98.
may be, "[P]hysically harsh, destructive of morale, dehumanizing in the sense that it is needlessly degrading, and dangerous to the maintenance of sanity when continued for more than a short period of time . . .".108 He may be deprived of the relative freedom enjoyed by the general prison population and of creature comforts normally allowed inmates. The prisoner may also be subject to a forfeiture of accumulated good time credit and may be prohibited from earning credit while confined in security quarters. This last possibility is particularly onerous since good time may reduce the minimum term of confinement by advancing consideration for parole and his minimum release date. The inmate’s living conditions and relative liberty are the interests at stake.

The manner in which the inmate’s interests may be adversely affected varies considerably. The action may be a summary, as it was in Sostre v. Rockefeller,109 or it may be surrounded by some procedural safeguards,110 though even these may be a sham.111 In any event, the action will have been taken because the administrative authority has determined that the particular inmate’s conduct warrants the imposition of punitive measures.

The reason for handling the prisoner in any particular manner will depend upon the circumstances. Where the prisoner has a record of misconduct and is suspected of violence or incitement to violence, as was the inmate in Burns v. Swenson,112 immediate removal from the general prison population would be appropriate. Then again, where a prisoner with a good conduct record is suspected of conduct prohibited by regulation, though not destructive or dangerous in character, as was the petitioner in Carothers v. Follette,113 there would be no need for summary procedures. Whatever the inmate’s conduct may be characterized as, it will always be least expensive and most convenient to the administrative authority to handle cases as expeditiously as they can.

The available alternatives to any procedures that are followed are evident from the practices employed by the various correctional authorities. Summary, unilateral action by the warden or a member of his staff is not the only effective method of dealing with alleged prisoner

109. Supra, note 11.
110. See, e.g., U.S. BUREAU OF PRISONS POLICY STATEMENT 7400.6 (1966); the procedures to be followed in prison disciplinary action promulgated in MISSOURI STATE PENITENTIARY PERSONNEL INFORMATION Pamphlet, RULES & PROCEDURES; the RULES OF THE RHODE ISLAND STATE PENITENTIARY set out in Morris v. Travisond, 310 F. Supp. 857 (D.R.I. 1970) at 871-874.
111. See Kritsky v. McGinnis, supra, note 10.
112. Supra, note 32.
113. Supra, note 90.
misconduct. The State of Missouri\textsuperscript{114} has enacted fairly extensive disciplinary procedures, as have the states of Wisconsin\textsuperscript{115} and Rhode Island.\textsuperscript{116} Presumably, these procedures were not felt to place an unwarranted or abusive burden on the fiscal and administrative resources of those states. Nor has the Federal Bureau of Prisons found representation, the right to present evidence in rebuttal, to call witnesses, and to cross-examine adverse witnesses to be too great a strain on the effective administration of prisons.\textsuperscript{117} Indeed, not only are procedural safeguards economically and administratively feasible but also are believed by penologists to be, "an essential ingredient in good discipline.\textsuperscript{118}

In addition to those factors indicating the possibility and desirability of disciplinary procedures involving traditional notions of procedural due process, there must also be considered the nature of the environment that must be administered. Both the Court of Appeals for the Eighth Circuit in \textit{Burns v. Swenson}\textsuperscript{119} and the District Court for the District of Rhode Island in \textit{Nolan v. Scafati}\textsuperscript{120} emphasized, as have many courts in the past,\textsuperscript{121} that the administrative body should be able to act to quell disobedience unhampered by judicial interference, thereby protecting both prison staff and inmates. However, as the Court of Appeals for the First Circuit pointed out in remanding \textit{Nolan v. Scafati},\textsuperscript{122} the need for speedy executive action in the prison need not necessarily result in a total absence of a fair hearing. The effect of the disciplinary action on the inmate may demand the presence of something more than a summary imposition of the inmate to solitary confinement and forfeiture of good time. This is not to say that there may be no summary action. An inmate could be confined under conditions intended merely to separate him from others until formal proceedings could be initiated. If, at a formal hearing, the authority determined that a rule infraction occurred, the

\textsuperscript{114} Missouri provides for a report by the officer observing the misconduct containing all details of the offense. The inmate and complaining officer are interviewed by the officer's supervisor who may dismiss the charge, reprimand the inmate or refer the case to the disciplinary board. If the case is referred, the inmate is allowed to present information at the hearing and the inmate is assisted by a member of the prison staff. A brief rationale of the board's decision is to be given. The decision is subject to administrative review by the warden and state director of corrections. 

\textsuperscript{115} See Comment, \textit{Administrative Fairness in Corrections}, supra, note 15.

\textsuperscript{116} See 310 F. Supp. at 871-874.

\textsuperscript{117} See \textit{BUREAU OF PRISONS POLICY STATEMENT} 7400.6 (1966).

\textsuperscript{118} Hirschkop and Millemann, \textit{The Unconstitutionality of Prison Life}, 55 Va. L. Rev. 795, 834 (1969). See also, the \textit{AMERICAN LAW INSTITUTE MODEL PENAL CODE} § 304.72(2) (Proposed Official Draft 1962); \textit{THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT; CORRECTIONS} pp. 82-83.

\textsuperscript{119} \textit{Supra}, note 32.

\textsuperscript{120} \textit{Supra}, note 74.

\textsuperscript{121} \textit{Burns v. Swenson}, \textit{supra} note 32 and cases cited in note 18, \textit{supra}.

\textsuperscript{122} 430 F.2d 548.
subsequent punitive segregation and loss of good time would have the same punitive effect as if they were immediately imposed. If it were determined that no rule infraction had been committed, the inmate could be restored to the general population.

Administrative problems will differ from one correctional system to another and from one situation to another. It does appear, by analogy to Goldberg,123 Gault,124 and Specht,125 that some hearing is constitutionally required before punitive action is taken. If that hearing is to be meaningful, it would have to entail the opportunity to defend against a charge of misconduct to the greatest extent possible without having the hearing itself become a danger to prison discipline. In order to insure the constitutionality of any hearing held, a summarized record of that determination must be kept for judicial review, for whether any procedural safeguards provided by the prison are sufficient to insure the reasonableness of determinations effecting good time and punitive segregation will depend on a judicial determination of how effectively those procedures protected the personal interests at stake.126

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123. Supra, note 92.
124. Supra, note 96.
125. Supra, note 98.
126. Judicial review of allegedly unconstitutional prison disciplinary actions may be obtained by either 42 U.S.C. § 1983, as in the cases decided by the federal district courts in New York, supra notes 10, 11, 45, or by federal habeas corpus. Where the prisoner seeks release from allegedly unconstitutional solitary confinement, as opposed to release from prison, the solitary confinement is "custody" for the purposes of habeas corpus. Johnson v. Avery, 252 F. Supp. 783 (M.D. Tenn. 1966), aff'd 393 U.S. 483 (1969). The district court in that case stated: [T]he relief sought in the present case is, in fact, to release petitioner from custody of solitary confinement which is, in a sense, a jail within a jail. 252 F. Supp. at 785.
Where the prisoner has not been placed in solitary confinement but has suffered a loss of good time, the decision in Peyton v. Rowe, 391 U.S. 5 (1968) would allow him to attack the administrative decision by federal habeas corpus despite the fact that he may not have begun to serve that period of incarceration he would not have had to have served but for the good time loss. Liberally construing the term "custody," the Supreme Court in Rowe allowed the prisoner to challenge the constitutionality of a sentence to be served upon completions of his present one. The court held that for purposes of federal habeas corpus, "custody comprehends . . . status for the entire duration of imprisonment" and that the term "custody" should include, "the aggregate of the sentences imposed . . ." 391 U.S. at 64. Apparently, where the prisoner must serve a longer period of incarceration than he would have had to had his good time not been impaired, he may attack the impairment by federal habeas corpus, his present custody fulfilling the traditional custody requirement.

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