In the

Supreme Court of the United States

LARRY MEACHUM, et al., Petitioners,	:	
v.	:	No. 75-252
ARTHUR FANO, et al., Respondents.	:	

Washington, D. C.
April 21, 1976

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ARTHUR FANO, et al.,

Respondents.

Washington, D. C.,

Wednesday, April 21, 1976.

The above-entitled matter came on for argument at 11:49 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MICHAEL C. DONAHUE, ESQ., Assistant Attorney General of Massachusetts, One Ashburton Place, Boston, Massachusetts 02108; on behalf of the Petitioners.

KEITH A. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae.

RICHARD SHAPIRO, ESQ., Prisoners' Rights Project, 294 Washington Street, Room 638, Boston, Massachusetts 02108; on behalf of the Respondents.

C O N T E N T S

[Afternoon Session - pg. 12]

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in 75-252, Meachum against Fano.

Mr. Donahue.

ORAL ARGUMENT OF MICHAEL D. DONAHUE, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. DONAHUE: Mr. Chief Justice, and may it please the Court:

My name is Michael Donahue, I am an Assistant Attorney General for the Commonwealth of Massachusetts.

This case is here on a writ of certiorari to the United States Court of Appeals for the First Circuit. The case presents a similar question to the case previously argued; it's somewhat different, but it broadly presents the question of whether and to what extent the procedural requirements of the Due Process Clause of the Fourteenth Amendment extend to the intrastate transfer of State prisoners.

QUESTION: Intrastate.

MR. DONAHUE: Intrastate, Your Honor.

This action was originally commenced by seventeen inmates confined to the Massachusetts Correctional Institute at Norfolk; MCI Norfolk is a medium security institution.

An amended complaint was later filed by six inmates, who are the respondents here. They sought declaratory and injunctive relief pursuant to Section 1983; sought money

damages against the Commissioner of Correction, the Superintendent of Norfolk, alleging that hearings that had been held transferring them from Norfolk to Walpole were unconstitutional as violative of the Due Process Clause.

The respondents asked the district court to enjoin any transfer to Walpole and to any of the other State institutions, and ordered -- it sought an order to the correction officials to place the inmates in the general population of Norfolk.

The chronology of the case is briefly as follows: In November the case was filed and the district judge denied a temporary restraining order.

On January 10, 1975, following argument, the district judge granted a preliminary injunction, and ordered that the department officials submit regulations to deal with the question of hearings to be applied at MCI Norfolk. The regulations were to be similar and to provide the same rights to inmates who were confined to MCI Walpole.

The district judge stayed part of the order pending appeal. the full panel of the First Circuit stayed the remainder of the order, pending full argument on the merits to the full bench of the First Circuit.

In June last year the Court of Appeals reached a decision affirming the district court. In so doing, they held that the loss suffered by inmates in transfer from Norfolk to

Walpole was sufficient to constitute a deprivation of liberty within the meaning of the Fourteenth Amendment.

It was a purely weight analysis, it did not reach it in the first instance by arguing whether or not there was a liberty or property interest involved. It said there was a cumulative approach, that the loss suffered by the inmates on the transfer from Norfolk to Walpole was sufficient to invoke the procedures required by the Fourteenth Amendment.

Judge Levin Campbell of the First Circuit dissented. Judge Campbell argued that inmates had no recognizable interest in the Fourteenth Amendment, they had no interest in liberty or property in remaining in any particular institution.

Judge Campbell said in his dissent that remaining in a correction institution in Massachusetts was no more than a unilateral expectation, conditioned by no Act of the State.

On December 8, 1975, this Court granted certiorari.

In the fall of 1974, the Massachusetts Correctional Institute at Norfolk was undergoing a series of significant disruptive incidents, a series of fires occurred, beginning in August 1974 and continued through October. There were nine fires that were serious enough to require the assistance of outside fire departments from the surrounding communities. At various points four of the surrounding towns sent fire-fighters in to engage in putting out the blaze.

From August to October, over $100,000 in damages had

occurred within the institution, two inmate living units were burned down; there was a partial loss of the laundry at the institution.

At some point in October, the record --

QUESTION: I'm having some trouble following you; you might speak just a little more slowly.

MR. DONAHUE: Okay. At some point in October 1974, the Superintendent of Norfolk, Mr. Larry Meachum, was informed by certain inmates at the institution that certain other inmates, among whom were the respondents here, were engaged in the disruptive incidents at the institution.

Meachum began to take action to cause them to be removed from the general population. On the 16th of October he removed the first of the respondents.

By the 24th of October, all of the other respondents were removed from the general population. By October 31st, there were no further fires in the institution.

By October 25th, each of the inmates had received a notice of a "discipline hearing", notice of a discipline charge, which stated in general terms that the Superintendent of the institution had received information through a reliable source that they were engaged in certain general conduct. In some of the respondents' cases, it was that they had engaged in setting the fires or participating in the fires. In other cases, it was alleged that they were trafficking in narcotics;

and in other cases it was alleged that they had possession of the ammunition or weapons within the institution.

The local District Attorney was informed at the same time, and the matter was referred to his office for investigation, because -- specifically because of the Massachusetts correctional procedures which were in force at that time, no disciplinary hearing was held, because the regulations barred holding a disciplinary hearing or barred imposing sanctions as a result of disciplinary punishment when the matter had been referred to the local District Attorney.

Those regulations are no longer in effect.

By early November, each of the respondents received notices of "classification" hearings. The classification hearings notified them in general terms of the same informant information that had been contained in the disciplinary notices, and it specifically informed the inmates that they would possibly be subjected to transfers to higher custody status as a result of the classification hearings which were to be scheduled.

Classification in Massachusetts determines custody level, it does not adjudicate the specific instances of misconduct. A Classification Board may review instances of misconduct or allegations of misconduct only insofar as they relate to the custody level at the institution. It does not determine guilt or innocence on specific disciplinary charges.

Classification hearings were scheduled and held for each one of the respondents through early November 1975 -- excuse me, 1974.

At the hearings each inmate was represented by counsel or represented by a law student. Each inmate was read a prepared statement by the Board as to the purpose of the hearing, the powers of the Classification Board, the possibility that transfer could result.

I might add -- interject at this point -- the hearings were not held on the same day, they were held over a one-week period during -- or approximately a one-week period during November.

Following the statement made by the Classification Board to the inmate, the inmate and counsel were asked to leave the room for the express purpose of allowing the Superintendent to come in and testify as to the informant information that he possessed.

The Superintendent came in the room, -- stated times not reflected by the record; the record does reflect, however, and the reports of the classification notices, beginning at page 68 of the Appendix, that the Board examined Meachum as to the sources of his information. They probed his information as to the credibility of the informants and the reliability of the information.

There are specific findings in the classification

reports that the Classification Board found the information to be reliable.

In one instance, one of the respondents was recommended by the Classification Board not to be transferred. And then, on a review by the Commissioner of Correct, who had the ultimate responsibility in Massachusetts, the Commissioner of Correction overruled that and ordered that he be transferred.

But I'm moving ahead of the game at this point.

Following Meachum's testimony, he was excused, the inmate was called back into the room, they were told that Meachum again had presented informant information. In no instance does it appear that the Board summarized the information for the inmate.

The position that was presented to the Court of Appeals and not to the district court, in an affidavit by Meachum, was that Meachum's judgment was that it would compromise the safety and security of the informant.

There is other evidence in the record, in the classification reports, that the Classification Board felt that to reveal any more of the information from Meachum to the inmate, then the general charges would have compromised the safety and security of the informants.

The inmate was allowed to present any testimony he wished. He wasn't given a compulsory process. He was not allowed to compel the presence of correction officers. But he

was allowed to submit documentary evidence. The record reflects that certain of the respondents submitted documentary evidence from individuals they worked for at the institution. The record reflects that certain of the respondents were allowed -- request and were allowed and did present correction officers to testify.

The Board heard from the social workers in each case, who testified as to the institutional history of the respondents; they testified as to their criminal history. And the Board had a full view of what the inmates' conduct had been in the institution.

QUESTION: Mr. Donahue, in reciting this description of the procedures that were followed, are we to take it that you acknowledge that the Constitution required those procedures?

MR. DONAHUE: No, I don't, Your Honor. No, I don't.

I'm going into detail on the facts because I think they are crucial, and because it's not the --

QUESTION: Well, why are they crucial, if the Constitution didn't require them?

MR. DONAHUE: Because of the position of the Commonwealth, the position of my clients has been, throughout, that hearings may or may not be a good thing in correction practice. In this instance hearings were held because my clients regarded them as a useful tool in correction practice.

We do not, however, think that they are constitutionally required, because we do not think, in this instance, that there was any State-created interest sufficient to create a liberty or property interest within the meaning of the Fourteenth Amendment.

The existence of hearings and the provision for hearings is not necessarily a question which implicates the Fourteenth Amendment. I do not concede that the Fourteenth Amendment requires that hearings be held.

Following the hearings, the Board orally announced its recommendations to counsel and to the inmate. They informed them what their recommendations were to be, and informed them what the circulation would be.

...

MR. CHIEF JUSTICE BURGER: We'll resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Donahue, you may continue.

ORAL ARGUMENT OF MICHAEL C. DONAHUE, ESQ.,

ON BEHALF OF THE PETITIONERS - Resumed

MR. DONAHUE: Mr. Chief Justice, and may it please the Court:

When the Board's decision ultimately was made, they made only recommendations, there was no ultimate decision made by the Board. The power to transfer in Massachusetts is vested in the Commissioner of Correction.

At page 6a of the Respondents' brief, the Massachusetts statute is contained. There are no standards implied, it just indicates that the Commissioner may transfer an inmate in his discretion.

So what the Board did in this instance was to make factual findings and give recommendations to the Commissioner, who then proceeded to act.

Because there are no statutes, or because there are no regulations which give substantive standards to the transfer question, it is the -- the Petitioners' position is that there is no legitimate claim of entitlement for an inmate to remain in the correctional institution, and that any inmate's desire to remain in that institution is therefore

conditioned by no Act of the State. The desire to remain in the institution is nothing more than a unilateral expectation.

The Commissioner's decision is entirely discretionary. Moreover, it's important to focus, I think, on the question as to what this Board did, even if due process is found to apply.

What this Board did was not adjudicate misconduct. What the Board did was only to determine the question as to the appropriateness of these inmates remaining at Norfolk in a situation which, in the Superintendent's judgment was untenable.

If due process applies in the first instance, we suggest this is crucial, because they did not determine misconduct. These inmates were not punished, at least they weren't objectively punished. The gravity of the loss that the inmates suffered is, in our judgment, no more significant than the loss suffered by the teacher in Board of Regents vs. Roth. His subjective perception may have been lost, but there was nothing, not an objective standard which we suggest that the Court could base the decision, saying that there was a constitutional right.

These inmates were not committed to segregation at Walpole, they suffered no loss of goodtime, they were not branded as trouble-makers, as the Court of Appeals found. They were --- they did have notations entered in an institu-

tional record, but that was the only thing.

To derive injury from the mere entry of the notation is a very speculative type of approach of due process, and we think that this Court's opinion, at least recently, in Paul vs. Davis?, recognized that the stigma, unless there is an independent liberty or property interest, is not cognizable.

The quarrel that we have with the First Circuit's opinion exists because the Court of Appeals' decision would require us to give information which, in our judgment, would have revealed the identify of the informants. That's the crux of the matter before the Court on the question of whether the process was adequate; if, indeed, process is found.

A summary of the evidence could have revealed the names and the identity of informants, and it was the only procedure, in fact, that was abbreviated by my clients. We argued to the Court of Appeals that the procedures that were followed in the hearings were consistent with this Court's interpretation in Wolff, that when institutional security was implicated, there were certain matters that might be excluded from information given to the inmates.

The Court of Appeals rejected that idea, and they said that it was a -- that, quite frankly, the language that this Court had used was cryptic.

We didn't find anything cryptic about it. The

language in Wolff, we thought, gave the department the right to exclude summaries of evidence when, in their judgment, it would have compromised the safety and security of the informants.

The record, at least as to the finding of the Classification Board, is clear on that question. There was no question in the mind of the Superintendent, there appears to have been no question in the minds of the Classification Committee that to give the inmates a summary of the evidence would have compromised their safety.

If due process is to serve in this instance two purposes, it may very well have said "to accurately ascertain facts". We contend this was done. There was no procedure that this Board followed which would compromise the accurate identification of facts.

The procedures that the Board followed, insofar as the purpose was to accurately ascertain facts, was adequate. In terms of allowing the inmate to testify, to have an input in its decision, we believe that was also adequate. There is no doubt that the inmates in these cases, because they were represented by counsel, because they were allowed to call witnesses, because they were allowed to present documentary evidence, had anything but a full input into the factual considerations by the Board.

This may not necessarily have been the case if we

were adjudicating a specific instance of punishment, but we were not adjudicating specific instances of punishment. The Board was not to determine whether or not these individuals were involved in setting the fires. The only question before the Board was the propriety of these inmates, whom the Superintendent believed to have been involved -- the propriety of these inmates remaining at the institution in Norfolk.

This case, we suggest, really presents the question of where the balance ought to be struck in prison situations. A balance that was noted in Wolff vs. McDonnell between the need for institutional security and the right to protect individuals.

In this instance we believe what Judge Campbell, in his dissenting opinion, that the State's interest is paramount, the State's interest is so important in instances of this nature that the Court should properly strike the balance in our favor.

We're not trying to limit the right to hearing. In Massachusetts, hearings are held for virtually every conceivable administrative purpose. Prior to this Court's opinion in Wolff vs. McDonnell, the record reflects that Massachusetts had promulgated disciplinary procedures, which granted procedures in excess of what this Court said were constitutionally mandated in Wolff vs. McDonnell.

Classification regulations, in its full sense, were

issued later. Every procedure dealing with transfer, every procedure dealing with discipline is covered under Massachusetts regulations. There are no standards. We don't think that they create an entitlement by that, by the existence of the regulations.

But the procedures in Massachusetts, the Massachusetts prison system, were followed to allow a hearing in virtually every conceivable limitation.

So that's not a mandated question before the Court. The question is not an effort on the part of the government to limit the right of hearings and to take unilateral and arbitrary action, that's simply not presented by the case.

QUESTION: But I understood from your answer to an earlier question of mine that so far as the United States Constitution goes, Massachusetts could have taken unilateral and what you call arbitrary action.

MR. DONAHUE: To be consistent with the issue, Your Honor, that's true.

But, as I mentioned earlier, our judgment is that what is mandated by good correctional practice and what is mandated by sound administrative judgments aren't necessarily required by the Constitution.

We may, by virtue of --

QUESTION: And it's only the latter, of course, that's of any concern of ours.

MR. DONAHUE: Absolutely, Your Honor. Yes.

Our position is that while a hearing may be necessary, may be wise in specific instances, it's not necessarily mandated in this case.

If we create a system of regulations, which place substantive standards on the conduct of the individuals, we may create an entitlement. But this record does not reflect that any entitlement was created.

This record only reflects that inmates were transferred from one institution to another, and suffered some deprivation as a result of that. We do not think that that is sufficient to invoke the procedural requirements of due process.

If it is entitlement, if it is Board of Regents vs. --

QUESTION: In other words, if a regulation said that no inmate shall be transferred from a medium security institution to a maximum security institution, unless he is guilty of some kind of misconduct in the former institution, then you think he would have an entitlement to stay in the medium security institution, --

MR. DONAHUE: Yes, Your Honor.

QUESTION: -- and couldn't be transferred, except upon a finding that he was guilty of misconduct, and such a finding could be made only after according him some sort of a procedural due process?

MR. DONAHUE: Absolutely.

QUESTION: A determination.

MR. DONAHUE: Yes.

QUESTION: And you say there is no substantive regulation of any kind here.

MR. DONAHUE: No, Your Honor, there isn't.

QUESTION: In your view, does that right spring from the Constitution or from the regulation?

MR. DONAHUE: We believeit springs from the regulation, Your Honor; it's an entitlement, it's a State-created interest.

Whether it is a liberty type interest, such as was involved in the Nebraska procedures in Wolff, the statutory creation of goodtime, or whether it's the example that Mr. Justice Stewart pointed out as to transferring only for misconduct, then that is a different question that -- and we believe that the State has created the right rather than something that's inherent in the Fourteenth Amendment.

QUESTION: Mr. Donahue, I want to be sure I understand your position. Assume that within a given institution there's an inmate in the general population, to start with, there are no regulations applicable, just the day-to-day administration by the Warden, and he is transferred from the general population to solitary confinement for a six-month period. Does he have a liberty interest that's been affected?

MR. DONAHUE: I don't believe it's inherent in the Constitution, Your Honor. If regulations exist, so as to premise the --

QUESTION: I'm assuming no regulations, --

MR. DONAHUE: No regulations.

QUESTION: -- just a change in status from the general population in a medium security institution to solitary confinement for six months, living on bread and water during the entire six months.

But it's not cruel and unusual; I don't want to posit a case where you have an Eighth Amendment issue.

Would you say he had any liberty interests of which he'd been deprived?

MR. DONAHUE: No, Your Honor. No, Your Honor. I think there is no independent liberty interest springing from the Fourteenth Amendment in that type of situation. It may well implicate, as you say, the Eighth Amendment.

QUESTION: You would agree that constitutionally that's the same case as the transfer from a medium security institution to a separate facility which has that kind of conditions in it?

MR. DONAHUE: Yes, Your Honor.

QUESTION: Yes.

MR. DONAHUE: Yes, Your Honor.

The question of what the Fourteenth Amendment -- of

what we believe the Fourteenth Amendment does in this instance is -- well, excuse me; let me back up on that.

We believe that the Fourteenth Amendment -- there are very limited and inherent rights in the Fourteenth Amendment. What exists, we believe, from this Court's decision in Board of Regents vs. Roth, from Perry vs. Sinderman, from Wolff vs. McDonnell, and Goss vs. Lopez, is a recognition that certain due process rights are created and are conditioned by the State. But there are other due process rights which are inherent in the Constitution.

There are other rights that are inherent in the Constitution, such as the inmate's right in Procunier vs. Martinez, which is something that was inherent, rather than springing from the State's created interest.

The thrust of our position is that due process must have an objective reference point. It must contain some limiting principle.

Due process, in order to be understood and applied consistently, must mean more than what a particular district judge says it means at any particular moment. It must have a point of reference to which all individuals, all citizens, and all governmental agencies can say it applies.

It can't exist by virtue of a weight interest, or a weight analysis, where one single judge will say that because of this cumulation of deprivations, we believe that due process

has to apply. We think such an approach is inconsistent with this Court's analysis in Board of Regents vs. Roth, it's inconsistent with the Court's analysis in Wolff vs. McDonnell.

We strongly believe that that's what the Court of Appeals did here. They cumulated the deprivations that the inmate was to suffer upon transfer, and they said, therefore, due process applies.

We think that's an improper approach to defining whether a liberty or property interest exists; and for that basis we're asking that the Court of Appeals be reversed.

QUESTION: Now, suppose two inmates are charged with exactly the same violation, and one of them gets a hearing and is sent to solitary; the other one doesn't get a hearing and is transferred to a maximum security institution.

MR. DONAHUE: Well, there are two --

QUESTION: And the reason they give to them is that "you broke a rule". And he asks, "Are you punishing me?" And they say, "Well, yes, I guess so."

MR. DONAHUE: It can't happen in Massachusetts, Your Honor. The hypothetical you raise can't happen.

Disciplinary boards in Massachusetts can't transfer. Disciplinary boards can only recommend transfer to Classification Boards.

QUESTION: Well, a disciplinary board -- there wasn't any disciplinary board involved in my example; they

just transferred him.

MR. DONAHUE: And neither did the Board adjudicate the specific question of misconduct, they only determined whether or not the inmate could appropriately remain at the institution.

There's never been an adjudication of this in this case, of whether these inmates did what the informants said they were to do.

In my clients' judgment, that was not a crucial question. The crucial and the most overriding question from the State's point of view was to remove these people from the general population.

QUESTION: And it's in his file that he takes along with him to the other institution that said, "This fellow is being transferred because he burns things up." That wouldn't make any difference to you?

MR. DONAHUE: From a strict --

QUESTION: I suppose the transfer board puts something in his file, don't they?

MR. DONAHUE: There is. There was a stipulation of fact to the district court that a notation --

QUESTION: Well, in my example, what would they do -- isn't it possible that they would say this fellow burns things up, and we're transferring him?

MR. DONAHUE: It's conceivable. It's conceivable.

QUESTION: And you would say he still isn't entitled to a hearing?

MR. DONAHUE: No, Your Honor, I think that --

QUESTION: Even though his colleague, who was sent to solitary, was entitled to a hearing.

MR. DONAHUE: For breaking a rule.

Yes, I think there is, I think they are independent questions, Your Honor. I think that what is involved is an adjudication of misconduct in one instance, for which the inmate is punished, objectively punished: segregation; loss of goodtime.

In the other instance, if the department chooses not to punish him but rather to remove him from the source of his difficulty, I think it's a different question.

With the Court's permission, I'll reserve the rest of my time.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Jones.

ORAL ARGUMENT OF KEITH A. JONES, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

MR. JONES: Mr. Chief Justice, and may it please the Court:

I will address only the question of whether the transfer of a prisoner to a prison with a higher security classification implicates the procedural protections of due

process.

It is the position of the United States that such a trasnfer does not implicate due process.

By its terms, the Due Process Clause applies only where governmental action threatens to deprive an individual of life, liberty, or property.

In a case such as this, therefore, analysis necessarily begins with an inquiry into whether the substantive interest at stake, the substantive interest underlying the claim, are subsumed under either liberty or property.

As this Court stated in Board of Regents v. Roth, "To determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake."

The Court of Appeals bypassed this necessary inquiry into the nature of the affected interest, and formulated the issue solely in terms of the weight of those interests, by asking whether the detriment worked by the challenged transfer was serious enough to trigger the application of the due process.

The detriment alone, without more, is not sufficient to implicate due process. That much this Court settled in Roth.

QUESTION: Well, it settled it in Paul v. Davis, resettled it, didn't it?

MR. JONES: Yes, that's right. The interest and reputation in Paul v. Davis, or the interest and continued employment in Roth, was not sufficient to implicate due process, because those affected interests were neither liberty nor property.

QUESTION: No matter how grievous the damage --

MR. JONES: Yes.

QUESTION: -- it has, as you say, to be liberty or property or life.

MR. JONES: That's correct, Mr. Justice Stewart.

We believe that it is important that the Roth analysis be adhered to. The requirement that a liberty or a property interest be affected, a requirement that is imposed by the Constitution itself, is an appropriate and wise limitation on the applicability of due process.

A contrary rule would threaten to hamstring the government, hamstring the essential operations of the government, by requiring a hearing or other due process procedure at virtually every turn.

With regard to the governments of prisons, for example, the denial of a furlough, the termination of an educational program, change in work assignment might be deemed by some court to work a sufficient detriment to implicate due process, and require a hearing.

QUESTION: What about transfer to solitary confine-

ment?

MR. JONES: Transfer to solitary confinement raises a slightly different question. As we note, I think, in Footnote 15 at page 22 of our brief, there may be an issue of whether the conditions of solitary confinement are so different from those of other confinements as to possibly implicate a constitutional liberty.

We would say that, in answer to your question, there would be no liberty interest of nonconstitutional origin if the State could put a man in solitary confinement without a finding of misconduct.

But whether there's an interest of constitutional origin in that special circumstances is an issue that need not be reached in this case.

QUESTION: That's factual -- really it's largely or partly factual, isn't it? Whether or not something is liberty or property. I suppose if you -- if the Warden took somebody in the general prison population and put him in leg irons or a straitjacket, or handcuffs, that would be a deprivation of his liberty as a matter of fact, wouldn't it? Even though he had originally been inside the prison in the general population.

MR. JONES: Well, our answer to that would be that if there were no articulated standards in the rules governing his confinement, there would be no nonconstitutional origin

for a liberty interest, and the question would be whether there's a constitutional liberty involved. And that might, in some cases, be a factual question.

We don't think it's a factual question here.

QUESTION: Well, a constitutional origin --

MR. JONES: And the reason for that --

QUESTION: -- has a different reason, doesn't it? At least generally. I mean that's a liberty or freedom that is protected by the Constitution itself, i.e., the liberty of speech or the liberty of the free exercise of religion. That's one kind of a liberty.

But where -- that's not indicated in this case, that sort of constitutional liberty isn't indicated here at all, it's a matter of factual liberty; isn't it? Freedom.

MR. JONES: Well, I don't know --

QUESTION: Not constitutionally protected, but whether in fact the person was deprived of his freedom of movement; not his constitutional freedom.

MR. JONES: Well, if it's not a constitutional basis, I'm not sure what basis it is. I mean, I think -- I think that there are two arguments that --

QUESTION: Nobody has a constitutional right to be out of jail, he has a constitutional right to be --

MR. JONES: Well, he has a constitutional right --

QUESTION: -- released from jail only after he's

been accorded due process of law.

MR. JONES: And that is a different way of phrasing it, but I don't see the difference in substance.

QUESTION: Well, there's quite a difference. Don't you see the difference between the liberty that's embodied in the liberty in the First Amendment, on the one hand, which is a constitutionally protected liberty, from the factual liberty of whether somebody has got his arms free or whether he's in handcuffs? Aren't they two quite different concepts?

MR. JONES: Well, they're different in this sense: the First Amendment affirmatively grants certain liberties. The Fourteenth Amendment grants you a right not to be deprived of liberty without due process.

But I would not say that what liberty is is a factual question; my analysis would be that it's --

QUESTION: Well, it's a factual matter whether a person is free to walk the streets or in prison, isn't it?

MR. JONES: There's no doubt about that.

QUESTION: And that's a matter of fact.

MR. JONES: That's true.

Our argument -- or let me rephrase it.

As I understand the Respondents' argument about constitutional liberty, they say it is inherent in the concept of liberty, or physical freedom from the control of the State is at the heart of constitutional liberty.

QUESTION: Well, but you lost a good deal of that when you were committed to a correctional institution, haven't you?

MR. JONES: That's correct, Mr. Chief Justice.

I was just setting up a syllogism so that I could knock it down.

QUESTION: The point is that you lost part of it, but not all of it; isn't that it?

MR. JONES: Well, --

QUESTION: Isn't there some remaining concept of liberty with the inmate?

MR. JONES: Once a prisoner, or once a man has been convicted and sentenced, he is lawfully subject to whatever conditions of confinement that may be fairly said to be inherent within that sentence. An imprisonment within a maximum security institution is plainly within the range anticipated by his sentence.

Well, that's not --

QUESTION: Even if solitary is not?

MR. JONES: Even if solitary is not; that is correct.

Indeed, counsel for the State informs me that the respondents in this very case were actually sentenced to a maximum security institution; a fortiori, they have no constitutionally based interest in avoiding a re-transfer to

such an institution.

This is not to say that a man is deprived of all possible constitutional liberties when he is convicted and sentenced.

QUESTION: Well, just a moment, Mr. Jones. Supposing a man is out on parole and he was originally sentenced to a maximum security institution. Why does he have any constitutionally protected right to a hearing before his parole is revoked? Why is he different from a man who originally goes into maximum and then gets into minimum?

MR. JONES: In Morrissey v. Brewer, he was different for one of two reasons: First, under the statutes and regulations governing his parole, his parole could not be revoked unless and until it was proved that he had violated the conditions of that parole. That is, he had a nonconstitutional entitlement that amounted to a liberty interest.

Now, a second possibility was that he had a constitutionally based interest once he had been freed on parole. I mean, it may be that once a man is liberated on parole, he takes on some of the protected liberty interests that were deprived from him, taken away from him upon the conviction and sentence.

In this case, there's no right of constitutional origin, nor is there any of nonconstitutional origin, which I have tried to show.

QUESTION: Is that comparable to the right that was involved in the case of goodtime, good-behavior credit?

MR. JONES: That's true. In Wolff v. McDonnell, the predicate for the Court's opinion was that goodtime could not be forfeited unless and until it was shown that there had been misconduct. That is not the case here. There can be a transfer to a prison, even to a maximum security prison, without any showing by the State of misconduct. There's nothing in the statutes, regulations or rules governing the conditions of confinement that prevents the State from making that transfer, for any -- or no reason; but for any reason that the custodian deems appropriate.

QUESTION: If there were, it would be more like solitary, if -- where there's a rule about solitary?

MR. JONES: Footnote 19 in the Wolff opinion seemed to include a factual assumption that there was a statutory or regulatory predicate that a man could not be placed in solitary confinement unless the State had shown misconduct.

QUESTION: And if there were that kind of a predicate, you would agree there would be a --

MR. JONES: Then there would be an entitlement of nonconstitutional origin that would amount to a liberty interest.

QUESTION: And similarly if there were a rule about transfer?

MR. JONES: That's correct.

If the State adopted a rule about transfer, which said that a man may be transferred to a higher security institution only if it is shown that he is guilty of misconduct. Then the man has a protected right, whether that is a liberty interest or property interest, one need not inquire into. He has an entitlement that is safeguarded by the guarantee of due process.

QUESTION: You seem to say in your brief that independently of any rule it may be that the Constitution itself would require a hearing before a man is placed in solitary.

At least you concede that that's possible.

MR. JONES: Yes, that's a possibility.

QUESTION: And you say we don't need to decide it here.

But if you think that's possible, that is, that the Constitution itself might require a hearing, wholly aside from any State rule, then I suppose you should -- you must, in this case, which involves a transfer, you must face up to that possibility; at least this isn't, in kind, enough of a change of the condition to trigger a right to a hearing.

MR. JONES: Well, it's not that the detriment is serious enough, all we meant to suggest in our footnote with regard to solitary confinement was that there may be some

elements of personal freedom from physical control of the State that have not been wholly divested from the prisoner upon conviction and sentence. We don't concede that that's necessarily the case.

But we suggest that that may be a possibility.

QUESTION: Mr. Jones, what -- oh, excuse me.

QUESTION: Laying aside the Eighth Amendment, Mr. Jones, and laying aside all humanitarian considerations, is there anything to prevent a State from saying that every person convicted of homicide in the first or second degree will be confined in solitary confinement permanently? Laying aside the Eighth Amendment now, cruel and inhuman.

MR. JONES: Well, I take it, that other than the Eighth Amendment, nothing would prevent the State from imposing that as a crime for proven punishment -- I mean, as a punishment for a proven crime.

QUESTION: What about the Halfway House? Where a prisoner is allowed to be living out in the community, working in private industry, and retaining his money; he'd have a little bit of property, wouldn't he? Involved.

MR. JONES: Well, I don't try to distinguish between property interest and liberty interest. I think that liberty interest can emanate from statutes and regulations.

QUESTION: I see.

QUESTION: Isn't it likely that the Morrissey v.

Brewer standards would probably be thought to apply to the Halfway House situation that Justice Marshall poses?

MR. JONES: Well, I'm not sure I fully understand that hypothetical. If the man is released --

QUESTION: Out on a work release; on a work release, where he's out, either going to school or a job, or both, and provided he meets certain conditions, such -- must like the conditions of parole, he's allowed to stay at liberty.

Now, the termination of that, I think, Mr. Justice Marshall was posing to you.

MR. JONES: I see. Well, my answer to it -- and it's the answer I've been giving to the other questions, I think -- is that if there is a nonconstitutional origin for his interest, that is, if the statute or regulation or rule provides that his furlough, or whatever it is, cannot be revoked unless it's determined that he is guilty of something, then he has an interest that requires some kind of due process determination before it can be deprived.

QUESTION: What if Massachusetts passes a statute that says: Walpole is, from now on, not a penal institution, but we think it's just damn good experience for all our citizens to spend a year there; and so, from now on, by lottery, every child born after this date will be sent at a particular time to Walpole for a year?

MR. JONES: Oh, they couldn't do that, Mr. Justice

Rehnquist.

QUESTION: That's factual loss of liberty, isn't it?

MR. JONES: That's correct.

QUESTION: Even though the man had no expectancy of staying out of Walpole.

MR. JONES: Well, he had an expectancy that was of constitutional origin. His expectancy is that he has all of the rights and privileges of freedom from restraint, the physical restraint of the State that is enjoyed by all citizens. That is a, it seems to me, constitutionally based liberty. That is not founded in a specific nonconstitutional statute, but is of the essence of constitutional liberty.

QUESTION: What if the --

MR. JONES: That, however -- I'm sorry, Mr. Justice Stevens.

QUESTION: Mr. Jones, just to follow up Justice Rehnquist's thought, supposing the Walpole institution repealed all the existing regulations and said: Nobody goes into solitary except when the Warden decides it's a good idea.

Would there then be any constitutional right to have a hearing before you leave the general population to go into solitary?

MR. JONES: Mr. Justice Stevens, that --

QUESTION: Under your theory, I think the answer is no.

MR. JONES: Under my theory, there is no answer yet -- we do not take a position on that, Mr. Justice Stevens.

My theory is twofold:

One, if there is a statute, regulation or rule, which does not exist in your hypothetical, that creates entitlement, then due process attaches.

On the other hand, if there is an invasion of constitutional liberty greater than that inherent in the -- that can fairly be deemed to be inherent in his sentence, then, maybe. I don't think we have to reach that.

QUESTION: Then, of course, goodtime would never raise the question, because that's always less than the sentence the judge imposes. It seems to me your position --

MR. JONES: Well, if the goodtime, Mr. Justice Stevens, --

QUESTION: -- the logical -- no, the conclusion of your position would be that the institution would be better off to minimize the number of rules they have, to leave the things as discretionary and flexible as possible.

MR. JONES: They would be better off in a constitutional sense, --

QUESTION: Yes.

MR. JONES: -- because they would not have to afford elaborate hearings. They might not be better off in a penological sense.

QUESTION: Right.

MR. JONES: There are many questions I haven't covered, but if the Court has no further questions itself, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Jones.

Mr. Shapiro.

ORAL ARGUMENT OF RICHARD SHAPIRO, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SHAPIRO: Thank you, Your Honor.

Mr. Chief Justice, and may it please the Court:

The Petitioners' argument ignores the four critical facts which form the basis of the decisions of the district court and the Court of Appeals in upholding the prisoners' claims.

First of all, the close relationship of this case to Wolff vs. McDonnell is indicated by the fact that a disciplinary process was initiated in this case. This demonstrates that there was a recognition on the part of prison officials that there were historical facts at controversy, and that there was a violation of a regulation at stake.

In addition, transfer, as appears on page 117 of the Appendix, is a possible sanction for major misconduct in the Walpole prison system, -- in the Massachusetts prison system, pardon me.

Second, both the district court and the Court of Appeals noted that Massachusetts has deliberately differentiated the institutions within the State, and has provided graduated conditions of confinement in the various institutions.

This has a definite and real meaning to the legal conclusions reached by the Court of Appeals and the district court.

In Massachusetts, there's a system of prisons, ranging from maximum through medium, minimum, halfway houses, pre-release centers; a variety of institutions with different physical conditions of confinement, different custody controls, different restrictions on movement, and different opportunities for programs.

The purpose, as conceded by the Massachusetts Correctional Authorities, is to allow inmates whose conduct demonstrates that they are able to function in a responsible fashion to have fewer bodily restraints placed upon them, and to have a greater opportunity to participate in programs.

Similarly, by allowing fewer bodily restraints placed upon the inmates, by allowing them to have a greater opportunity to participate in programs, perhaps work in the community part of the day, perhaps go out into the community on furloughs, which are limited passes, it indicates to the Parole Board, when they consider this inmate for release on parole, that he or she has demonstrated responsibility in

their actions, and an ability to function in society, as determined by prison officials in the placement of this person within the prison system.

It suggests the converse is true when a person is placed in a more restrictive condition of confinement; that the same types of concerns are reflected by the Parole Board, if the prison officials have already made some judgment about the responsibility of this person and the ability to function in society.

Within the --

QUESTION: Do I interpret your argument, Mr. Shapiro, then, to be that there is some kind of a property or liberty interest in the anticipation of parole?

MR. SHAPIRO: No, Your Honor, it flows independently from the -- any liberty interest in the anticipation of parole. The analogy that the Court of Appeals drew between this Court in Wolff vs. McDonnell is similar to the argument presented by the Respondents in this case.

That is, that Massachusetts had no obligation to create a system of confinement where there are deliberate differentiations among the institutions, where there are graduated conditions of confinement. But once having done so, and once having demonstrated, in this case, that the withdrawal of those conditions is related, and the additional restrictions upon liberty are related to allegations of

serious misconduct, then at least the liberty interest of the Due Process Clause, as recognized in Wolff, is implicated.

QUESTION: But that's quite a different basis for finding a liberty interest than Wolff found, where the statute conferred goodtime credits and the condition on which they should be taken away.

MR. SHAPIRO: Your Honor, there's an independent liberty interest that Petitioners -- that Respondents assert in this case. There's a liberty interest which flows from the constitutional concept of liberty, the factual restraints upon liberty, the closer controls.

In Wolff the Court recognized that even if liberty is State-created, that this liberty is protected by the Due Process Clause. The Court did not have to face the question that is precisely faced in this case, as to the physical, factual restrictions on bodily movements. That --

QUESTION: Well, okay. So, supposing the man stays at Walpole, but they've had a bad time at Walpole, so they decide that instead of getting one hour's exercise in the afternoon, you're only going to get half an hour, you're only going to get two meals a day, the whole population. Now, under your theory, I suppose they would be entitled to a hearing on that?

MR. SHAPIRO: If there's an adverse change in conditions of confinement, then they would be entitled to a

hearing; the liberty interest would be implicated.

The question would still remain as to what process is due.

QUESTION: Yes, but they would be entitled to some process, on my hypothesis.

MR. SHAPIRO: It would depend upon the particular circumstances as to why you --

QUESTION: But I've given you the particular circumstances; what's your answer?

MR. SHAPIRO: That there may be, in that case, if it's -- if there are not sufficient deprivations, it may fall into the range of lesser privileges that were discussed but not dealt with by this Court in Wolff vs. McDonnell.

That's not the case in this situation, it's not the case where there's a transfer --

QUESTION: Why?

MR. SHAPIRO: -- to more adverse conditions of confinement.

QUESTION: Why is a transfer, by itself, different from simply creating adverse -- more adverse conditions of confinement in the same institution?

MR. SHAPIRO: Because a transfer implicates the nature, severity, and possible length of incarceration. It operates as an immediate physical change in the restraints upon the inmate, inasmuch --

QUESTION: So does my hypothesis. It operates as an immediate physical change on the restraints.

MR. SHAPIRO: Your Honor, I'm not saying that in an appropriate case that that may not constitute adverse change in conditions of confinement. What I am saying is that this case is even more compelling, and you don't have to reach the issue faced by more limited restrictions on a person's liberty.

Within the scheme -- within the Massachusetts prison system scheme --

QUESTION: Mr. Shapiro, before you leave that point, isn't it rather fundamental that the deprivation that triggers the operation of the Due Process Clause must be of a sufficient magnitude to be called a "grievous loss"? And isn't the response to Mr. Justice Rehnquist that one may not necessarily conclude that that particular deprivation is sufficiently serious to require the procedure?

MR. SHAPIRO: Yes, Your Honor. I was suggesting that it may implicate liberty, but it may not be --

QUESTION: Still not be a sufficiently grievous loss to constitute a deprivation within the meaning of the Fourteenth Amendment.

MR. SHAPIRO: It may still be a de minimis loss, yes, Your Honor. And that's why an evaluation of the particular circumstances is necessary.

QUESTION: Now, would you consider a change from an eleven o'clock lights-out hour in the prison to nine o'clock a deprivation that required some process?

MR. SHAPIRO: Again, Your Honor, that question is not before the Court; but in the appropriate --

QUESTION: Most of the questions we're asking about aren't before the Court. But we're trying to probe just what you're driving at.

MR. SHAPIRO: What I'm suggesting is when there are changes in the actual physical fact of liberty, the actual movement, the actual bodily restraints, then the liberty interest may be implicated.

If, in your hypothetical, Your Honor, there would be none of those changes to begin with, that it would just function as a change in just the lighting, it may be that that would again fall within the category of de minimis losses. Although, if it restricts the movement of the inmate, the ability to --

QUESTION: Let's extend it, then: the lights out at nine instead of eleven; and cell doors locked at nine instead of eleven. That restricts a lot of movement now.

MR. SHAPIRO: That would --

QUESTION: What about that?

MR. SHAPIRO: That would implicate the liberty interest, and I would suggest that, in appropriate circumstances,

it may not be a de minimis loss, and it may still require some procedure.

QUESTION: What kind of a hearing? A sort of a rulemaking proceeding?

MR. SHAPIRO: Your Honor, it again --

QUESTION: Because it affects everybody in the institution.

MR. SHAPIRO: The crux of our argument is that when allegations of serious misconduct are at issue, and the liberty interest is implicated, there is a need for the minimal due process provided in Wolff vs. McDonnell.

QUESTION: Why don't you limit --

MR. SHAPIRO: But in a situation --

QUESTION: Why don't you limit it to the individual instead of the whole group? Because I would assume that if the State of Massachusetts said that because of all the trouble at Walpole, we're going to make it a maximum institution; there's nothing anybody could do about it. Could they?

MR. SHAPIRO: No, Your Honor, that's --

QUESTION: So why don't you stick to the individual involved, rather than the groups?

MR. SHAPIRO: What I was suggesting, Your Honor, is that even if the liberty interest of a group is implicated, there's still the question of what procedures are appropriate.

And beyond the question of allegations of misconduct, there may be lesser procedures than those required in Wolff vs. McDonnell. But those procedures are necessary to insure that the purposes of the Due Process Clause are fulfilled in the individual case.

In our case, though, we have situations where there were allegations of serious misconduct against individual prison inmates. There was no determination made with respect to any larger group. It focused on individual conduct.

Within the scheme, the general scheme that I've already discussed in Massachusetts, the district court and the Court of Appeals recognized this as a finding of fact of the district court, that they found that the conditions of confinement at Walpole and Bridgewater are substantially more adverse than those at Norfolk.

And the district -- the Court of Appeals and district court recognized that this implicated the basic values of liberty. The external restraints on bodily movement were increased as a result of a transfer from Norfolk to Walpole and Bridgewater. There was stricter security, closer custody, fewer programs; and it was more difficult to obtain furloughs, work release, educational release, and other rehabilitative opportunities.

This is fundamentally important because it demonstrates that the ability of the inmate to assert his

responsibility, to demonstrate his ability to function in society is minimized and reduced, as he is moved back into the system through -- into higher custody status levels, and that will affect all of the future decisions which are made about this inmate, and could follow the inmate throughout his entire term of incarceration.

This possibility is made more certain by the fact that in the present case the defendants have stipulated that there was a notation in the file, and that this notation did indicate the reason, the fact of the transfer, and the reasons for the transfer; and it was noted in the file and will be considered by future agencies within the Department of Corrections, and ultimately by the Parole Board.

Now, this --

QUESTION: Is there any reason why the Parole Board couldn't consider total hearsay when it decides whether or not to grant a man parole?

MR. SHAPIRO: No, Your Honor. We're not arguing that there's any liberty interest in parole; we're arguing that the liberty interest of an inmate who is transferred involves not only the possible impositions of sanctions as a result of a notation in the file, but also immediate disruptive, severe changes in the nature and seriousness and conditions of confinement.

QUESTION: But what do you add when you say it also

means a notation in the file? Assuming your other argument is valid.

MR. SHAPIRO: It recognizes, Your Honor, first of all, that within the prison system it's not just a question of reputation that's at issue, as was stated in Paul vs. Davis, it's a question of whether all the future decisions that will affect the quality, length and severity of an inmate's incarceration will be based on erroneous information. And that's a present interest, to the inmate.

QUESTION: Well, supposing the Parole Board at the time of its hearing takes a look at the man's entire file and finds a notation two years ago, made by the Warden, "This guy set fire to his bunk, December 2nd, 1973"; he never had a hearing on it, it was simply the Warden's observation -- maybe the Warden didn't even observe it.

Now, is the Parole Board prevented from considering that, because he didn't have a hearing?

MR. SHAPIRO: No, Your Honor.

QUESTION: Then why does your argument here about the file notation have any added weight to your liberty claim?

MR. SHAPIRO: It demonstrates the Court's concern in Wolff vs. McDonnell with the collateral consequences that could follow from a misunderstanding of the nature of the perceived charge in the prison system. It again -- it just emphasizes the seriousness of the effects of this determina-

tion upon the inmate, and therefore it demonstrates that there are collateral as well -- and future consequences, as well as immediate, direct consequences on the inmate's condition of the confinement and his liberty.

Now, with this factual background, which was duly noted by the district court and the Court of Appeals, there are two separate inquiries before the Court:

Whether the Due Process Clause is applicable in the instant circumstances; and what procedures are required.

The Court of Appeals, first of all, read Wolff as implicating liberty interests in two respects.

In one respect there are the external physical restraints upon bodily movement, which were not discussed in Wolff, but which are present in a transfer to more adverse conditions of confinement.

The Court recognized that this implicated the liberty interest, and then considered whether they were certain and serious enough to implicate the liberty clause of the Fourteenth Amendment.

The Court found that the adverse change in conditions of confinement, based on the factual record in this case, had severe, abrupt, immediate and comprehensive effects on the prisoner's limited liberty. There were additional bodily restraints placed on the inmate, and several other instances of transfer, which affected the nature, severity, and possibly

the length of his incarceration.

These direct and immediate losses are identical to, if not more serious than, those already recognized in Wolff. Goodtime, as the Court recognized in Wolff has a future effect, and may be restored. A transfer represents an immediate disruptive effect on all the conditions of confinement of the inmate.

QUESTION: Since you've said that several times, I'm interested. Suppose they have just built a new institution in Massachusetts, of the same level of security as the prisoners then confined, and they transfer the prisoner to that place without consulting him, he's just informed one day that, "Tomorrow morning, get your things ready", and he's taken.

Is a hearing required on that?

MR. SHAPIRO: Your Honor, in that situation, the liberty interest would be implicated if there is an adverse change in conditions of confinement. It's not --

QUESTION: Well, just take my hypothetical. It's a brand-new, modern, the most modern institution of its kind available.

MR. SHAPIRO: As the First Circuit has recognized, there are disruptions inherent in transfer. There's a discontinuation of programs, there are changes in the inmate's daily life which affect all aspects; so, in any case, --

QUESTION: But your answer is they must have a hearing in order to do that?

MR. SHAPIRO: No, Your Honor. I was suggesting that the liberty clause is implicated.

Now, the appropriate procedures that may be required in those circumstances depend on balancing the interest, and if there --

QUESTION: Who is going to do the balancing?

MR. SHAPIRO: Well, --

QUESTION: The district judge or the Warden?

MR. SHAPIRO: I would suggest that when allegations of serious misconduct are not at issue, Your Honor, the balancing can be left, in the first instance, as this Court recognized in Wolff, to the sound discretion of correctional officials. So long as they fulfill the purposes of the Due Process Clause, which are to protect the individual against arbitrary action of the government, and to insure that determinations are made on the basis of reliable information for imposition of the sanction; which, in this case, is a transfer.

QUESTION: Well, there's no sanction here; the Corrections Board, the over-all supervisory body, has built a new institution, and they decide that 650 from one institution must be moved into the new one to relieve crowding, 350 from another, and so on.

No invidious action, no discipline, they're just going to move 650 people. Is a hearing necessary?

MR. SHAPIRO: So long as the determination -- if the determinations are based on allegations of individual misconduct or misbehavior, a hearing is necessary.

QUESTION: You're not following my hypothetical question.

MR. SHAPIRO: In the situation where there is a selection of inmates, some lesser -- the liberty interest is still implicated; the question is still, What procedures are appropriate in those circumstances?

And it may be, based on those circumstances, that some lesser procedures are appropriate to fulfill the purposes of the Due Process Clause in those circumstances.

I would suggest that a checklist might be provided, informal consultation, other types of means of -- an opportunity for the inmate to submit facts to the correctional authorities.

QUESTION: Mr. Shapiro, let me try, with the Chief Justice's question.

If they build a brand-new institution to take care of all the prisoners in this existing institution, and this existing institution had been condemned and is falling down; they could move them then, couldn't they?

MR. SHAPIRO: Yes, Your Honor.

QUESTION: Mr. Shapiro, there was a hearing here; in what respects do you consider it deficient?

MR. SHAPIRO: Your Honor, as both the district court and Court of Appeals noted, there was inadequate notice under the standards in Wolff.

Once the liberty interest is implicated, as we suggested, Due Process procedures must be applied. In cases where the allegations are of serious misbehavior and are no different than those that were considered by the Court in Wolff, then the same minimal due process procedures are required.

In this case, the notice did not even state the time and place of the alleged offense. The --

QUESTION: Any question that they knew when the hearing would be held?

MR. SHAPIRO: The inmates knew when the hearing would be held, but they didn't know anything about the time or place of the conduct charged in the notices of the classification hearing. That was the failure to follow minimal due process that was recognized by the Court of Appeals.

The opportunity to be heard then became a hollow ritual, Your Honor, because the inmates did not know what they were supposed to defend themselves against, what charges; they appeared primarily with character witnesses, because

they had no idea how to deal with the allegations of misconduct.

I would only suggest that in these circumstances the hearing requirements to consider allegations of serious misconduct did not even provide the minimal due process requirements recognized by this Court in Wolff.

QUESTION: If the notices had complied with -- under requirements you just described, would the hearings otherwise have been adequate?

MR. SHAPIRO: Provided that a summary of the information, which gave the inmates some idea of the conduct that was charged; yes, the hearings would have been adequate, because then the inmate would have had an opportunity to be heard in response to the charges.

In this case, the opportunity to be heard was meaningless, because the inmate wasn't even aware of the charges.

QUESTION: Mr. Shapiro, Mr. Donahue told us that both sides agreed, as I recall it -- and I may have it wrong -- that if the summary of evidence had been disclosed to the inmates, that there would have been a threat of serious harm to people involved. Is that correct?

MR. SHAPIRO: Your Honor, that does not appear in the record. That was never presented as an evidentiary matter. It was never suggested even to the Classification

Board.

I would suggest, Your Honor, that the record reflects that the Classification Board never considered whether the release of any of the informant information would endanger the informants.

At the district court level there was no indication that the release of the time and place of the alleged offense, that minimal amount of information to allow the inmate an opportunity to be heard would in any way endanger the security of the institution.

QUESTION: Assume, hypothetically, that the release of the information was stated by the director or Warden of the institution as something that would endanger the lives and safety of the informants; would you think they could withhold the details from the subjects?

MR. SHAPIRO: Your Honor, a heavy burden would be placed upon them in that case. I would say, no, they couldn't withhold basic information such as the time and place of the alleged offense, or else they would erode all of the minimal due process procedures recognized in Wolff. But --

QUESTION: Well, the time and place might enable the subject to identify the informant very readily; probably would.

MR. SHAPIRO: If -- at that point, Your Honor, the heavy burden would be placed upon the correctional officials

to demonstrate why minimal due process procedures in Wolff should be eroded in the instant circumstances.

That's not the situation in our case, because in our case there was a regulation in effect at Walpole, which was a maximum security prison, which indicated that a release of summary of informant information was appropriate and consistent with correctional goals, and would not -- and this reflects the sound discretion of correctional administrators that a release in Massachusetts wuld not be inconsistent with legitimate correctional goals, absent any demonstration on the record by the prison officials in this case why that regulation should not have been followed, or why the minimal due process procedures in Wolff shouldn't have been followed, they failed to meet their burden.

In another case they would still have that burden, but perhaps they could meet it.

QUESTION: Mr. Shapiro, may I ask an unrelated question, while you're interrupted.

In some of the briefs there is reference to the large number of transfers, I think the government brief tells us there are 14 or 15 thousand a year, something like that, in that system. I don't recall what the number is in Massachusetts; but is there anything in the record that you're aware of that tells us how many of those transfers, or what the proportion of transfers are from a higher security classifica-

tion to a lower, as opposed to from a lower to a higher?

MR. SHAPIRO: No. There's nothing that I'm aware of, either in Massachusetts or in the federal system that provides that information, or provides information about how many higher-custody transfers may have been voluntary transfers, and may not have involved any disputes of allegations of misconduct or any disputed facts, and the inmate just merely wanted a transfer.

QUESTION: I would suppose the normal change would be from higher to lower classification, just as one works toward parole; right?

MR. SHAPIRO: Yes, Your Honor. But in an exceptional case there may be movement to higher classification, to be closer to relatives or closer to family; and the statistics don't reveal any of that information at all.

QUESTION: Thank you.

MR. SHAPIRO: In summary, with respect to the interests implicated, the prisoners maintain that there's a liberty interest which flows because -- from the Constitution, which resulted from the external bodily restraints upon the prisoners and the closer custody and conditions of confinement; that, secondarily, within Massachusetts, because of the deliberate differentiation of conditions of confinement, because of the graduated conditions of confinement, there's a liberty interest, in effect State-created, as in Wolff, and

very similar to the creation of goodtime credits in Wolff, which is implicated by a transfer.

And, as we've argued in our brief, there's also a property interest which is implicated in this case, and because of the particular statutes and administrative regulations in Massachusetts.

There are two points that deserve emphasis, Your Honor, in conclusion:

One is that a hearing in these circumstances is necessary to insure that there's a reliable determination of the disputed facts. Minimal due process procedures in this case will not impinge at all on the appropriate good-faith exercise of administrative discretion.

Once the facts have been reliably found, then the correction officials will be free to exercise their discretion.

In the case where allegations of serious misconduct are at issue, this Court has already recognized that the need for minimal due process procedures is evident, and that in similar situations, when transfer results in the same deprivations, the need is no less.

Petitioners, the prison officials, in addition, concede in their argument that they, the prison officials, have no interest in acting arbitrary and capriciously. And a hearing in these circumstances would insure that their

discretion is exercised appropriately and on the basis of facts reliably found.

The Petitioners -- the prison officials -- the prisoners' claims -- pardon me, Your Honors -- is grounded in considerations already reflected in Wolff. The prisoners do retain a residuum of liberty, a limited liberty. When this is interfered with, the Due Process Clause is implicated.

When allegations of misconduct are at issue, minimal due process procedures are necessary to insure reliable determination of fact. Other circumstances, not presented by allegations of misconduct, and not presented in the instant case, other transfer circumstances, where liberty interests are implicated, may be left to the sound discretion of prison officials to forge appropriate procedures, based on the individual circumstances. So long as these procedures insure that the lofty purposes of the Due Process Clause are maintained in the prisons of this country.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Shapiro.

Mr. Donahue, do you have anything further?

REBUTTAL ARGUMENT OF MICHAEL C. DONAHUE, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. DONAHUE: Yes, Mr. Chief Justice.

May it please the Court:

Just two brief points. The possibility of a transfer

occurring for disciplinary measures is somewhat invidious in the record. The sanctions that may be imposed by the disciplinary regulations which appear in this record include transfer as a possible sanction.

That is not the practice in Massachusetts. First of all, because those regulations are no longer in effect; and, second of all, it was never the practice of the disciplinary board to transfer; it only recommended transfers to the Classification Board.

I'd like to address the point that Mr. Shapiro raised concerning the inmate's interest in remaining in the institution.

As Mr. Jones pointed out, all of these inmates, in this instance, were sentenced to MCI Walpole, prior to being transferred, for whatever reason, to MCI Norfolk. No reason is apparent in the record why any of these inmates were ever sent to Norfolk.

Transfers occur in Massachusetts for a myriad of reasons. They may occur because of population control. They may occur simply because of program availability. They may -- for certain matters in Massachusetts, they may occur because of the hospital at Norfolk, which is regarded as significantly better than the hospital at Walpole. Inmates who have medical problems may be sent to Norfolk.

It does not depend on their behavior. It is not

predicated upon their behavior. There may be general instances where an inmate will be transferred to Norfolk for behavior, but there is no indication in the record of this case that any of these inmates were sent to Norfolk because they were better behaved than other inmates who remained at Walpole.

QUESTION: Did you mention, or did someone mention earlier in the argument, a figure of the total number of transfers in one year in Massachusetts? Or was that in the other case?

MR. DONAHUE: I believe it might have been in the other case, Your Honor.

QUESTION: But you don't know what the figure is?

MR. DONAHUE: I don't think such statistics are available.

In any event, I think it would be significantly less, because there are approximately 2700 inmates in Massachusetts. The institutions at Norfolk and Walpole are only approximately one mile apart, so there wouldn't probably be any significant disruption of the administrative process. We do not contend that that would be the case here.

QUESTION: What is the total prison population in Massachusetts?

MR. DONAHUE: Approximately 2700, Your Honor.

QUESTION: That's the total?

MR. DONAHUE: Yes, Your Honor.

QUESTION: Mr. Donahue, would you care to comment on the adequacy of the notice here? I know you suggest that no hearing at all was necessary; but, assuming a hearing was necessary, what do you say about the notice?

MR. DONAHUE: Your Honor, the district court and the Court of Appeals said that the notice was inadequate because it did not state the time and place of the hearings [sic]. My brother said that was not presented.

The district court's rulings include a reference to the defendants asserting that to give such notice would have compromised the safety of the informants. It was my clients' position that any further notice, any further detail would have seriously compromised the safety of the informants.

As the Chief Justice pointed out earlier in a question, in Norfolk, which is an open institution, where inmates roam generally at will, there would have been a great deal of probability that giving the time and place of the offense that they were charging, the informant could have been identified.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:01 p.m., the case in the above-entitled matter was submitted.]