

ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-638

TITLE LOWELL D. HEWITT ET AL. Petitioners
v.

AARON HELMS

PLACE Washington, D. C.

DATE November 8, 1982

PAGES 1 thru 42



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 LOWELL D. HEWITT ET AL. :

4 Petitioners :

5 v. : No. 81-638

6 AARON HELMS :

7 - - - - -x

8 Washington, D.C.

9 Monday, November 8, 1982

10 The above-entitled matter came on for oral argument
11 before the Supreme Court of the United States at
12 10:05 a.m.

13 APPEARANCES:

14 LEROY S. ZIMMERMAN, ESQ., Harrisburg, Pennsylvania;
 on behalf of Petitioners.

15
16 RICHARD G. FISHMAN, ESQ., State College, Pennsylvania;
 on behalf of Respondent.

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1 participants and attempted to restore order to the
2 institution.

3 The Respondent was one of 18 inmates suspected
4 of direct involvement in the riot and of assaulting
5 corrections officers. The following day, December 4,
6 1978, the Respondent was given a copy of a misconduct
7 report charging him with the assault on officers and
8 conspiracy to disrupt prison operations by attempting to
9 take over the institution's control center.

10 On December 8, 1978, he was given a hearing,
11 at which he appeared, and it was determined that the
12 investigation was incomplete, that he should remain in
13 administrative segregation pending the completion of the
14 investigation, and a further review of his status was
15 scheduled for January 2nd, 1979.

16 On that day, Respondent was present at a
17 hearing before the program review committee, where it
18 was decided that his status should remain unchanged
19 pending completion of the ongoing investigation by the
20 Pennsylvania State Police. On January 19, 1979, the
21 Respondent was charged specifically with a second
22 misdemeanor in connection with an assault upon Sergeant
23 Phillips, a corrections officer, on December 3rd, 1978.
24 Within three days, on January 22nd, 1979, he was given a
25 hearing, at which he was present, and determined to be

1 guilty of the second misconduct charge and thereby
2 confined to disciplinary segregation for a period of six
3 months.

4 The sources of a liberty interest are our
5 Fourteenth Amendment, which protects life, liberty and
6 property, and in this particular case we focus on
7 liberty. The cases of Meachum and Montanye support our
8 Pennsylvania position that administrative custody is
9 within the normal range of a lawful conviction and
10 sentence. The residue of liberty in the inmate after a
11 lawful conviction and a lawful sentence does not include
12 any right to remain in the general population of the
13 prison. The fact that changes are adverse to an inmate
14 does not give that inmate a right to due process.

15 A liberty interest can be created by statute
16 or by regulation. We focus on regulation in this
17 particular case. To create that liberty interest, there
18 must be a clear and explicit and direct mutual
19 expectation that a liberty interest is to be created,
20 and the state must be bound to do or to refrain from
21 doing something that can be determined by objective
22 standards.

23 Prison authorities must have the latitude to
24 exercise discretion in carrying out their duties and
25 responsibilities inside these prisons.

1 QUESTION: General Zimmerman, would you tell
2 us what section of the Pennsylvania Code, or sections,
3 you believe governed the proceedings in this instance
4 against the prisoner?

5 MR. ZIMMERMAN: Your Honor, the relevant
6 sections, we believe, are first Section 107 -- 107
7 appears at page 46 of our brief. 107 is a general
8 policy statement of when to use administrative custody.
9 In order that the prisons remain safe, the officials
10 must have the discretion and the latitude to segregate
11 inmates in order to maintain that security and safety.
12 There are times, and the list is contained in 95.107,
13 where an individual who poses a threat to other inmates
14 must be segregated, or a threat to staff, or to himself,
15 or he poses an escape risk, or he needs protection
16 himself from other inmates.

17 Now, I think that 107 is the first section
18 that's relevant here in our inquiry. But then, of
19 course, it's necessary to go to Section 95.104(b)(3),
20 which is page 43 of our brief. And that too represents
21 a policy statement for when to use administrative
22 custody, for investigations. And that was the focus in
23 this particular case. There was an investigation under
24 way.

25 The court said that prison society is

1 different from society at large --

2 QUESTION: Mr. Attorney General, while we're
3 speaking of regulations, your brief doesn't cite Hughes
4 Hughes against Rowe, a case that is made a good bit out
5 of by the opposing briefs. Do you feel that the
6 Illinois regulations at issue in Hughes against Rowe
7 were in any respect very different from the Pennsylvania
8 regulations at issue here?

9 MR. ZIMMERMAN: Your Honor, in Hughes v. Rowe,
10 in reading the case the key unclear point was the effect
11 of administrative segregation in those regulations in
12 that case. One opinion noted that the administrative
13 segregation appeared to result in a loss of good time,
14 which certainly we would then concede puts it within
15 Wolff.

16 However, if the record does not reflect any
17 serious security problem or if that administrative
18 segregation -- and this is Hughes, in my opinion --
19 administrative segregation was for investigative
20 purposes, we feel that it's in that sense similar to our
21 case.

22 QUESTION: General Zimmerman, when was the
23 first date the Respondent was given a hearing?

24 MR. ZIMMERMAN: Your Honor, the Respondent was
25 given a notice of his charge on December 4, 1978, the

1 next day, and a hearing on December 8, 1978, within six
2 days.

3 QUESTION: At that hearing did he have an
4 opportunity to speak for himself?

5 MR. ZIMMERMAN: Our regulations in
6 Pennsylvania provide that an inmate has the opportunity
7 to be present, to call witnesses on his behalf, and to
8 speak. He did speak.

9 QUESTION: Was he advised of the opportunity
10 to call witnesses on his behalf?

11 MR. ZIMMERMAN: The record does not -- yes, he
12 was. As a matter of fact, he had a witness present at
13 that hearing and he had the opportunity to speak, sir.

14 QUESTION: And on January 2nd, did he have the
15 same opportunity?

16 MR. ZIMMERMAN: January 2nd is a hearing
17 conducted by the program review committee. At that
18 hearing he had the same opportunity to speak. Our
19 regulations provide that he had the opportunity to call
20 a witness, to have a witness present, to have that
21 witness speak on his behalf, and that a determination is
22 made.

23 QUESTION: Is a transcript made of those
24 hearings?

25 MR. ZIMMERMAN: A written summary was made of

1 those hearings. A verbatim transcript is not made.

2 QUESTION: Meanwhile, Mr. Attorney General, I
3 gather he was in administrative custody and confined as
4 such, wasn't he?

5 MR. ZIMMERMAN: Yes, Your Honor, he was in
6 administrative custody.

7 QUESTION: For how long?

8 MR. ZIMMERMAN: From December 3rd, right after
9 the riot in the prison, until January 22nd, a total of
10 51 days.

11 QUESTION: And the January 22nd is what, after
12 the final hearing he had?

13 MR. ZIMMERMAN: January 22nd is the day that
14 he had a full-blown Wolff-type hearing, at which he had
15 the opportunity to speak, call witnesses, and be heard.

16 QUESTION: Now, was he changed after January
17 22nd from administrative custody to disciplinary
18 custody?

19 MR. ZIMMERMAN: At the conclusion, one of the
20 determinations, of course, at that January 22nd hearing
21 was that he was guilty of the second misconduct charge.
22 At that time it was determined that he should serve six
23 months in disciplinary custody.

24 QUESTION: Is there any difference between
25 disciplinary and administrative custody in terms of what

1 the prisoner experiences?

2 MR. ZIMMERMAN: Well, in Pennsylvania prisons,
3 Your Honor, the physical setup, disciplinary custody is
4 much the same as administrative custody and not at all
5 dissimilar to general population, either. The basic
6 difference, of course, is the purpose. Disciplinary is
7 punitive and administrative is that tool which we have
8 provided in Pennsylvania with these regulations.

9 QUESTION: Well, in either case he's treated
10 the same way, isn't he?

11 MR. ZIMMERMAN: Yes, he is. There is a basic
12 difference, and that goes to what the effect of that
13 custody is. In disciplinary custody there is no
14 question that it affects his parole and it would affect
15 his pre-release status. In administrative custody --

16 QUESTION: How about good time?

17 MR. ZIMMERMAN: Your Honor, we don't have good
18 time in Pennsylvania.

19 In administrative custody, there is no effect
20 on parole or on pre-release status.

21 QUESTION: Mr. Attorney General, when you
22 spoke of the January 22nd hearing, did that relate to
23 the offense of assaulting an officer, allegedly, while
24 he was in administrative custody?

25 MR. ZIMMERMAN: The January 22nd hearing dealt

1 with the two misconducts, in essence. However, the
2 first misconduct that he was charged with generally on
3 December 4th was withdrawn without conclusion at the
4 January 22nd hearing, and the finding of that hearing
5 committee was on the second misconduct charge, where he
6 was confined to disciplinary for six months at that
7 hearing.

8 QUESTION: The second one was assaulting one
9 of the guards, one of the officers?

10 MR. ZIMMERMAN: Yes. In both instances he was
11 accused of physically assaulting guards. The guards
12 suffered serious injuries, and he was one, as I said, of
13 18 inmates that were segregated on the night of December
14 3rd, 1978, as a result of this prison riot.

15 QUESTION: Could you explain, though, what's
16 the difference between the two charges? They're both
17 for assaulting. They were just different guards at the
18 same riot?

19 MR. ZIMMERMAN: They were different guards,
20 Your Honor.

21 QUESTION: At the same date?

22 MR. ZIMMERMAN: The first date -- the dates
23 are the same, December 3rd, 1978. In the first
24 misconduct charge, at that time this whole riot was in
25 operation. A charge was prepared and given to him the

1 next day, and there wasn't the specificity of the
2 particular guard at that time. This investigation was
3 continuing and was under way.

4 The second misconduct charge was specific.
5 They assaulted Sergeant Phillips, a corrections
6 officer. And that's the one he was ultimately
7 determined to be guilty of and confined on.

8 QUESTION: Is it reasonable to assume that it
9 really related to the same incident and the second one
10 was just merely more specific in identifying the
11 particular officer?

12 MR. ZIMMERMAN: The same incident, different
13 individuals, and more specificity in the second
14 misconduct.

15 QUESTION: So the first one related to a
16 different correctional officer?

17 MR. ZIMMERMAN: There's a reference to a
18 different corrections officer.

19 QUESTION: I see.

20 MR. ZIMMERMAN: Yes, sir.

21 QUESTION: Have the Pennsylvania courts
22 interpreted the Section 95.104(b)(3) to mean that
23 administrative custody may be maintained so long as
24 there has been no determination on the misconduct
25 charge?

1 MR. ZIMMERMAN: 104(b) -- to answer that
2 question, Justice O'Connor, there have been -- I have
3 been unable to find any Pennsylvania cases interpreting
4 that section.

5 Prison authorities must have this latitude
6 because the court has said prison society is different
7 from our society at large, and it's essential that our
8 administrators provide the safety and the security of
9 the inmates, the staff and the communities at large,
10 where there is always concern where prisons are
11 located.

12 The prisons are different in many ways. They
13 are places where there are large numbers of violent
14 people congregated. There's a great deal of resentment
15 and hostility in our prisons. Prisoners far outnumber
16 corrections officials.

17 And the signs of potential violence are
18 subjective. Administrators recognize those signs by
19 virtue of the amalgam of their experience, their
20 intuitive powers, and perhaps their sixth sense as
21 well.

22 For those policy reasons, it is essential that
23 the Court continue to permit prison administrators to
24 possess the latitude to exercise discretion unless,
25 unless the state through its regulations or statutes

1 binds itself to limit that discretion.

2 QUESTION: Mr. Attorney General, I'm sorry,
3 but I'd like to interrupt you, if I may, once more on
4 these two charges, because the Chief Justice's question
5 concerned me. The second one, I'm just looking at it,
6 says misconduct date, January 1979.

7 MR. ZIMMERMAN: The second charge, Justice
8 Stevens, was filed on January 19.

9 QUESTION: I understand. But the charge
10 itself says, misconduct date, 1/19/79.

11 MR. ZIMMERMAN: The misconduct date was not
12 the 19th.

13 QUESTION: That's what it says. Page 41A of
14 the record, of your appendix, joint appendix. Whereas
15 the earlier one says, misconduct date, 12/3/78, which
16 was the date of the riot. So I wonder if -- the Chief
17 Justice had suggested that it was while he was in
18 detention, and I guess that seems to be.

19 MR. ZIMMERMAN: That must be an error. The
20 incident occurred on December 3rd. All of the assaults
21 occurred on that night. However, he was not charged --
22 I think it's the wording there. He was not charged
23 until January with the second misconduct, the specific
24 one against Sergeant Phillips.

25 QUESTION: Well, the earlier one uses the term

1 "misconduct date" to refer to the date of the riot.

2 Look at 37A. Is it quite clear that this is the --

3 MR. ZIMMERMAN: The misconduct in the joint
4 appendix at 37A, misconduct 90908, he was give that
5 charge on December 4th, and the alleged misconduct --

6 QUESTION: See, he was given the charge on the
7 4th and it refers to the misconduct date as the 3rd.

8 MR. ZIMMERMAN: The 3rd was the date of the
9 incident, the riot, the day before.

10 QUESTION: And that's what made me think that
11 the later one, when it says misconduct date January 19,
12 probably meant what it said.

13 MR. ZIMMERMAN: Page 30A of the joint
14 appendix, the misconduct date is stated, December 3rd,
15 1978, 90986. And at 30A in the second paragraph,
16 Justice Stevens.

17 QUESTION: I see. I'm sorry to interrupt.
18 Thank you for clearing it up, because it's just
19 confusing.

20 QUESTION: Incidentally, Mr. Attorney General,
21 the formal criminal charges were dropped?

22 MR. ZIMMERMAN: Subsequent to the January 22nd
23 hearing --

24 QUESTION: They were dropped.

25 MR. ZIMMERMAN: Those were dismissed against

1 him, yes, sir.

2 The regulations here do not bind Pennsylvania
3 prison officials do no bind Pennsylvania prison
4 officials to do or to refrain from doing what can be
5 determined by objective standards. Section
6 95.107(a)(1), which is at page 46 of our brief, that is
7 the general policy statement of when to use
8 administrative segregation and the purposes I mentioned
9 a few moments ago -- protection of the prison society by
10 segregating inmates who pose a threat, who may be an
11 escape risk. All these factors are subjective and
12 require predictive judgments on the part of our prison
13 officials.

14 Also at issue, of course, is 95.104, which
15 I've argued -- is at page 43 of our brief -- which I
16 said is a similar policy statement for using
17 administrative custody. Because these factors are
18 subjective in nature, there is no liberty interest
19 created.

20 If this Court finds no liberty interest, then
21 it need go no further. If the Court finds a liberty
22 interest, I urge the Court to reject the Third Circuit
23 Court's conclusion that the full range of procedures
24 prescribed in Wolff must be provided.

25 Many of the same considerations which we

1 contend militate against a finding of a liberty interest
2 are also relevant to the issue of what process is due.
3 Specifically, the factors considered are subjective and
4 they are predictive as well. The government has an
5 overriding concern for the security in the
6 institutions. The consequences of administrative
7 custody are minimal. Thus, all of these reasons dictate
8 against requiring the full range of trial-like
9 procedures required by the court below.

10 In this case, the prisoner got as much as the
11 Constitution requires, if indeed the Constitution
12 requires anything.

13 Thank you.

14 QUESTION: Before you sit down, may I just
15 ask, is it your view that since there's no liberty
16 interest at all and since administrative custody is
17 physically the same as disciplinary custody, that
18 without giving any hearing whatsoever an inmate could be
19 put in administrative custody for the entire period of
20 his confinement?

21 MR. ZIMMERMAN: Yes, sir.

22 CHIEF JUSTICE BURGER: Mr. Fishman.

23 ORAL ARGUMENT OF RICHARD G. FISHMAN, ESQ.,

24 ON BEHALF OF RESPONDENT

25 MR. FISHMAN: Mr. Chief Justice and may it

1 please the Court:

2 This case is Wolff versus McDonnell revisited
3 with a slightly different twist. Whether the segregated
4 confinement in this case is legally or technically
5 administrative custody, these prison officials
6 considered it disciplinary in its nature from its
7 inception, based on a single triggering event, the
8 disturbance, and not based on the Respondent's general
9 background or record.

10 And I think some of the facts need to be
11 clarified for purpose of showing my point. On December
12 3rd, that same evening, the Respondent, Mr. Helms, was
13 taken from his cell in the general prison population and
14 placed in a disciplinary cell in segregation under
15 investigation for suspected involvement in the
16 disturbance that evening. He was charged with a
17 misconduct or disciplinary rule violation within 24
18 hours of his confinement on the 3rd.

19 Now, the December 8th, 1978, hearing committee
20 report, that's the disciplinary tribunal. It's in
21 dispute in this case. It's our position no hearing was
22 taken on that particular date, that his case was merely
23 continued due to insufficient information and pending
24 the results of a state police investigation. That is
25 what the Court of Appeals remanded for, on that issue.

1 The Petitioners in this case, in response to
2 paragraph 19 of the complaint, stated that the first
3 hearing on the misconduct, the first adjudication or
4 factfinding, did not take place until January 22nd of
5 1979, or 51 days later.

6 Now, it's important to note that on that
7 report of the hearing committee on December 8th it was
8 labeled at the top "misconduct report."

9 QUESTION: Mr. Fishman, what did the Court of
10 Appeals hold with respect to whether that first hearing
11 on December 8th had or had not taken place?

12 MR. FISHMAN: They remanded it for a
13 determination factually as to whether or not that was a
14 hearing in respect to the procedures that Mr. Helms
15 asked for.

16 QUESTION: So they didn't -- they made some
17 comment in their opinion, didn't they, about the fact
18 that your client had signed some sort of a statement?

19 MR. FISHMAN: Yes, there was some -- it had
20 been decided on summary judgment initially in the
21 district court and the court felt that there were some
22 contradictory statements, the answer to the complaint
23 that I just mentioned, the paragraph 19 stating that the
24 first adjudication was on the 22nd of January, and then
25 the statement that Mr. Helms signed on the 8th which

1 indicated the opposite, that he had a hearing on that
2 day. That's what the remand was, to clarify that
3 discrepancy.

4 Moving on, the status review of January 2nd,
5 1979, by the program review committee, which you've
6 heard mentioned, said "continue Helms in disciplinary
7 custody," even though he hadn't been convicted of
8 anything as of that date. And even the Petitioners at
9 page 14 --

10 QUESTION: You say convicted? Convicted.

11 MR. FISHMAN: Of a misconduct or a
12 disciplinary rule violation. He hadn't been found
13 guilty or responsible.

14 QUESTION: Are you suggesting that the action
15 must be supported by a conviction?

16 MR. FISHMAN: No, but I'm trying to show --

17 QUESTION: Do you mean a finding?

18 MR. FISHMAN: A finding. At this point there
19 had been no finding one way or the other, but it said
20 "continue in disciplinary custody."

21 The point that I'm trying to make is that the
22 prison officials considered this disciplinary from its
23 inception, regardless of whether technically or legally
24 it was administrative custody. And as I said in the
25 brief at page 14, they stated he was confined in

1 segregation because he was charged with a major
2 misconduct.

3 In addition, the Court of Appeals found that
4 the conditions of administrative custody were the
5 equivalent of punitive or disciplinary segregation. And
6 the conditions that Mr. Helms experienced until he had
7 this hearing on the 22nd of January involved sensory
8 deprivation in its true sense. He was confined in a
9 cell almost 24 hours a day. The only time he got out
10 was between five and ten minutes a day for exercise,
11 three or four days a week.

12 If he attempted to as much as talk in a normal
13 tone, he was threatened with an institutional
14 misconduct. In December and January, showers were
15 virtually nonexistent.

16 Studies have indicated, as I tried to show in
17 my brief, that this kind of confinement can and often
18 does lead to adverse mental effects upon the inmate.

19 QUESTION: Well, doesn't any kind of
20 confinement have some psychological reaction?

21 MR. FISHMAN: Yes, but I think in this case
22 it's a question of degree, and I don't think that the
23 confinement involved here that I've described is what
24 naturally inures as part of a Pennsylvania sentence.
25 And I believe that the potential of this kind of

1 confinement is one of the reasons that Pennsylvania
2 evolved from the 1700's and 1800's in Quaker thought of
3 segregated or solitary confinement to the congregate or
4 general population idea that we have today.

5 QUESTION: Are the only differences in the
6 administrative custody and the disciplinary custody the
7 effect on parole status and pre-release time?

8 MR. FISHMAN: No. We believe that the
9 collateral consequences are the same. Under
10 Pennsylvania law --

11 QUESTION: You assert that administrative
12 custody does affect the parole release?

13 MR. FISHMAN: Yes. Even the Petitioners in
14 their briefs said or conceded that it may result in a
15 delay in a parole hearing or delay of release on
16 parole. Pennsylvania law and policy, Justice O'Connor,
17 requires that his status be reported to the parole
18 board, the conduct involved.

19 QUESTION: Do the conditions of administrative
20 confinement differ from the conditions of disciplinary
21 confinement?

22 MR. FISHMAN: I would say yes. They're worse,
23 because it's indefinite in length.

24 QUESTION: Well, is that the only difference?
25 I mean, you've just been telling us that in disciplinary

1 confinement the prisoner may not even speak in a normal
2 tone of voice. Is that true if he were in
3 administrative confinement?

4 MR. FISHMAN: Well, yes. Here that's what
5 happened.

6 QUESTION: And if he's in administrative
7 confinement, he has only ten minutes a day for
8 exercise?

9 MR. FISHMAN: Yes.

10 QUESTION: And no showers available?

11 MR. FISHMAN: Virtually none, correct.

12 QUESTION: So there's just no difference in
13 that as to confinement?

14 MR. FISHMAN: Yes.

15 QUESTION: Whether administrative or
16 disciplinary, it's the same thing, is that it?

17 MR. FISHMAN: Yes.

18 QUESTION: Well, while they're investigating a
19 serious disruption -- well, a riot -- would it be proper
20 to have disciplinary -- not disciplinary, administrative
21 segregation of people charged?

22 MR. FISHMAN: Yes. I'd like to --

23 QUESTION: You have no question about that, do
24 you?

25 MR. FISHMAN: No. But in this case I do.

1 First of all, there's been discussion about the
2 regulation 95.104(b)(3). I believe Justice O'Connor
3 brought that up earlier. That regulation provides in
4 all cases the inmate must be released within ten days.
5 In addition --

6 QUESTION: Is there a qualifier there, that if
7 no behavior violation has occurred he is to be
8 released?

9 MR. FISHMAN: No, I believe the "but in all
10 cases" is afterwards, so that it would not be
11 conditioned on a behavior --

12 QUESTION: So it's your position that "if no
13 behavior violation has occurred" is not a predicate to
14 the release within ten days provision?

15 MR. FISHMAN: Yes.

16 QUESTION: There is no Pennsylvania case so
17 holding?

18 MR. FISHMAN: Well, there is a Pennsylvania
19 case, Hoss versus Cuyler, which I cited in my brief,
20 which interprets the same regulation as stating that it
21 creates a liberty interest in the freedom from the, and
22 the words are, "harsh conditions of administrative
23 custody" in Pennsylvania.

24 And one of the points I'd like to make is,
25 regardless of how one looks at the wording itself of

1 these regulations, these regulations came out of a
2 federal court consent decree called I.C.U. versus
3 Shapp. The state voluntarily entered a consent decree.
4 The regulations were issued as a result of it. So if
5 the standard for creating a liberty interest is the
6 mutual expectation, it's definitely present in this
7 case.

8 QUESTION: Mr. Fishman, what was the issue in
9 the case that led to the consent degree?

10 MR. FISHMAN: That was a general conditions
11 suit. There were many issues in that case, from
12 disciplinary confinement to access to law libraries and
13 so forth.

14 QUESTION: Mr. Fishman --

15 MR. FISHMAN: Yes.

16 QUESTION: -- did the Respondent serve the
17 entire six months to which he was sentenced on January
18 22nd?

19 MR. FISHMAN: Yes, he was, because the Court
20 of Appeals decision throwing out the misconduct
21 conviction did not take place until much afterwards.

22 QUESTION: And was his parole deferred as a
23 result of that?

24 MR. FISHMAN: Well, the record is unclear on
25 that. He did serve more than his minimum release date,

1 but --

2 QUESTION: But he was paroled?

3 MR. FISHMAN: Eventually, yes.

4 QUESTION: In June or May of --

5 MR. FISHMAN: 1980.

6 QUESTION: -- 1980. But the record does not
7 show whether there was any --

8 MR. FISHMAN: Direct connection.

9 QUESTION: -- deferment of parole?

10 MR. FISHMAN: No. I believe the record is
11 unclear on that, that particular point.

12 QUESTION: Would you clarify again how
13 administrative custody affects parole or pre-release? I
14 don't think I understood your statement.

15 MR. FISHMAN: Well, the Pennsylvania statutes,
16 as well as the policies of the Board of Probation and
17 Parole in Pennsylvania, require that the conduct of the
18 individual be reported by prison officials as well as
19 investigated by the parole board.

20 In addition, program involvement or lack of
21 it, in terms of rehabilitative program, is also reported
22 to the parole board. Here in this confinement -- I
23 don't think I mentioned this -- he lost his
24 institutional job. He was denied any access to the
25 program. So what I'm saying is, that starts with a

1 negative --

2 QUESTION: It has an indirect effect.

3 MR. FISHMAN: Yes, yes, an indirect effect.

4 Now, the Court of Appeals also found in this
5 case that the institution returned to normal within a
6 day of the disturbance of December 3rd. And I've
7 already mentioned about the 104(b)(3), that regulation
8 holding someone in investigative status. There was
9 another regulation, Administrative Directive 004, which
10 required the results of the state police investigation
11 to be communicated to the superintendent of the
12 institution prior to the criminal charges being filed.

13 Here they were filed on December 11th and, as
14 we heard earlier, they were dismissed. Yet still Helms
15 did not have his hearing until the 22nd of January.

16 In addition, Lieutenant Kyler, who was the
17 charging officer and who had submitted two affidavits in
18 this case, the second one appearing at page 82 of the
19 joint appendix, indicated that he was informed to go
20 ahead regardless of the status of the criminal case, to
21 go ahead with the institutional disciplinary charges.
22 So my point being that the delay here I do not think was
23 justified.

24 Also, in terms of the question of burden, the
25 second set of admissions in this case indicates that

1 between December 3rd of 1978 and January 21st of '79 215
2 Wolff-type hearings were conducted in the institution,
3 19 of which went to individuals allegedly involved in
4 the disturbance. There's been no factual evidence
5 presented or even suggested that that in any way impeded
6 the operation of the institution or prevented them from
7 returning to normal. In addition, there was no evidence
8 presented or suggested that the process that Mr. Helms
9 claimed was due and which prison officials claimed that
10 they provided on December 8th would in any way impede
11 the operation of the facility.

12 Now, there has been a lot of discussion in the
13 briefs concerning prison officials in a riot or on the
14 even of an emergency should not be saddled with
15 disciplinary procedures or procedural due process. What
16 I think has become lost in that argument is that we're
17 not asking for procedures in that context. I think the
18 law is clear from this Court and through the Third
19 Circuit as well that in an emergency those procedures
20 can be done away with. It's afterwards that we're
21 asking for procedures.

22 Now, in terms of liberty interest, here we're
23 talking about the basic freedom to move about. We're
24 not talking about an individual who's seeking some
25 minimum security status, parole or some kind of

1 privilege. Mr. Helms sought what he had prior to
2 December 3rd, 1978, the freedom to move about in the
3 general prison population where he was located on that
4 date. And as I said earlier, I do not believe the
5 restrictions involved in here can in any way be
6 considered what naturally inures in a Pennsylvania
7 sentence.

8 I'd like to talk about the decisionmaking
9 process --

10 QUESTION: May I ask, he's now on parole?

11 MR. FISHMAN: Yes, Your Honor.

12 QUESTION: What do you contemplate would
13 happen in the further proceedings which the Court of
14 Appeals has directed?

15 MR. FISHMAN: There's a damage issue pending
16 in the case.

17 QUESTION: Oh. 1983?

18 MR. FISHMAN: Yes.

19 QUESTION: Any damage suits brought by the
20 injured guards against him?

21 MR. FISHMAN: No. He was -- the criminal
22 charges were dismissed.

23 QUESTION: I'm speaking of civil actions.

24 MR. FISHMAN: No, no civil actions. And I
25 would believe also the evidence in this case indicates

1 no legally sufficient evidence that he was even involved
2 in the disturbance, and that would be our position.

3 In terms of the decisionmaking, there's almost
4 always going to be a triggering event or series of
5 triggering events, as you had in this case. And I
6 believe that the decisionmaking is objective. In my
7 brief I attempted to explain how the Bureau of Prisons,
8 in dealing with incoming inmates in making custody or
9 security decisions, looks at --

10 QUESTION: May I ask another question Mr.
11 Justice Brennan's question raises in my mind? As I
12 remember the Court of Appeals opinion, there was some
13 discussion of the fact that the evidence adduced against
14 him was this anonymous witness, I mean, the officer
15 reported an anonymous report, and that's all there was,
16 and that that was not sufficient as a constitutional
17 matter. Didn't the Third Circuit so hold?

18 MR. FISHMAN: Yes.

19 QUESTION: And so isn't it true that your
20 damage proceeding is going to go forward on that issue
21 no matter what we do with this other issue? I just
22 wonder, how much bearing does this issue we're
23 discussing today have on the hearing that you
24 contemplate, which I gather will take place no matter
25 what we do?

1 MR. FISHMAN: Well, there would be two --
2 there would be a possibility that -- there was a remand
3 on the issue of good faith. If the lower court would
4 find that good faith -- that the legal issue on
5 informants was not clearly established at this time,
6 then we would receive no money damages assuming we
7 established liability.

8 That would then take us to the administrative
9 custody situation, and the lower court would have to
10 make a decision, assuming there was no hearing on the
11 8th, it's remanded and there was no hearing, there would
12 then have to be a good faith determination as to whether
13 or not the issue of right to procedural due process in
14 the administrative custody context was established.

15 So that we could theoretically get damages for
16 the period of time he was in administrative segregation
17 --

18 QUESTION: I see.

19 MR. FISHMAN: -- even if we didn't prevail for
20 the whole six months of the disciplinary.

21 QUESTION: That would be the 51 days, would
22 it?

23 MR. FISHMAN: Correct, 51 days.

24 Now, in terms of objective decisionmaking,
25 I've mentioned how the Bureau of Prisons looks at the

1 factors, assigns points to them, and then tries to turn
2 the professional impressions into objective
3 decisionmaking. In the disciplinary context, you take
4 the facts, you apply them to the elements of the charge,
5 and you come out with a determination of guilt or
6 innocence.

7 In the administrative context, you also apply
8 the facts to the elements. They may be different, but
9 you come out with a decision of a security risk or a
10 safety concern. That is in the situation where you
11 don't have a triggering event as here, and I believe the
12 thought processes are the same.

13 Even if you take the position, well, whatever
14 facts are involved still have to be filtered through the
15 subjective analysis of the decisionmaker, the nuances or
16 subtleties that might be involved here are certainly no
17 greater than what was involved in the psychiatric
18 diagnosis in Vitek versus Jones. And there this Court
19 found procedural due process was required, even though
20 the decisionmakers were some of society's most highly
21 trained professionals.

22 And some of the cases that I have cited in my
23 brief indicated that where there has been rampant
24 violence in an institution or situations of individual
25 rapes that the custody decisions are being made on the

1 basis of gut feelings or insufficient data, and that's
2 what I think the Petitioners are asking for here.

3 Procedural due process will guard or help
4 guard against the possibility of disciplinary custody
5 being labeled administrative, but without the procedural
6 protections -- exactly what happened in this case.

7 We've asked for, in addition to a Wolff-type
8 hearing, we've asked for written notice and a written
9 statement of the evidence relied upon and reasons for
10 the action taken. That has import for the inmate in
11 terms of helping him prepare or present a case, but also
12 for correctional administrators. It makes for a record
13 to help base subsequent decisions on. In addition, if
14 the prison official was not present at the initial
15 decision it becomes crucial to understand what has
16 happened in the case.

17 Now, in my brief I also ask for the
18 discretionary ability, the discretion being with the
19 chairman of the hearing, to allow questioning by the
20 inmate and compelling the attendance of witnesses.
21 Pennsylvania allows for that presently in its
22 disciplinary system, and I cited in my brief a survey
23 that shows that most jurisdictions or the majority of
24 jurisdictions have some type of framework set up in the
25 administrative custody --

1 QUESTION: Well, in this case he did have a
2 witness.

3 MR. FISHMAN: He did what?

4 QUESTION: He did have a witness, the
5 Respondent. Am I right?

6 MR. FISHMAN: No, I do not believe he did in
7 this particular case.

8 QUESTION: Well, the General said he did.
9 Who's right?

10 MR. FISHMAN: I think what he was referring
11 to, I think, was the correctional officer who testified
12 against him. But I'm not aware that there was a witness
13 presented in his case.

14 I believe that the burden involved, since most
15 of the jurisdictions have some type of framework set up,
16 is minimal. I also, in looking at the federal system in
17 the Bureau of Prisons, in what is known as control unit
18 cases, where an individual is considered a threat or is
19 unable to function in a less secure environment, an
20 escape risk or he presents some type of danger, that
21 individual presently gets what is in essence a Wolff
22 type hearing.

23 In weighing the factors and in helping to
24 reduce the risk of error and guard against abuse, I
25 think these procedures are absolutely necessary, and we

1 would request that the decision of the Court of Appeals
2 be affirmed.

3 QUESTION: Mr. Fishman, was there a written
4 summary of the hearing on December, what was it, 8th,
5 December 8th?

6 MR. FISHMAN: Yes. It stated --

7 QUESTION: Is that in the record?

8 MR. FISHMAN: Yes. It's page 39 and 40 of the
9 joint appendix.

10 QUESTION: Of the printed appendix?

11 MR. FISHMAN: Yes.

12 QUESTION: Okay. Thank you very much.

13 And is that same true of the January hearing?

14 MR. FISHMAN: Yes. That's in the record
15 also.

16 QUESTION: Right. I'll find it.

17 QUESTION: May I ask you this question. Is it
18 critical to your case that the physical conditions of
19 confinement for a person in administrative custody be
20 both as severe as those for a disciplinary confinement
21 and also significantly different from one in the general
22 population? The reason I ask that is, as I understand
23 the Government's brief, they say in the federal system
24 to which you just referred the administrative
25 confinement is very much like the general population.

1 Would you say you'd have the same claim in those
2 conditions?

3 MR. FISHMAN: Well, I think one thing. My
4 facts are a little bit different, because I say that
5 it's disciplinary custody also because of the
6 conditions. I think the conditions are worse than in
7 the federal situation. But also because of what the
8 prison officials thought it was. I think they thought
9 it was disciplinary in nature from the beginning. That
10 was the beginning of my argument.

11 QUESTION: I understand that. But as I
12 understand it, you also argue that, even if they changed
13 all the labels and made everything administrative and
14 gave you no hearings at all -- and your opponent, of
15 course, says they could do that. But your objection is
16 largely, as I understand it -- would also be based on
17 the fact that there's a significant physical difference
18 in the character of the custody.

19 MR. FISHMAN: Yes. I would say that the
20 custody here is so severe that it cannot in any way be
21 considered part of the normal Pennsylvania sentence that
22 one expects.

23 QUESTION: But you do not contend, if I
24 understand your argument correctly, that it amounted to
25 a violation of the Eighth Amendment?

1 MR. FISHMAN: I don't think this Court has to
2 reach that issue. But when you look at the question of
3 sanitation and virtually no showers for two months and
4 virtually no exercise and not being able to speak in a
5 normal tone, you might decide that way. But I don't
6 think that has to be decided in my case.

7 QUESTION: Mr. Fishman, I'm not entirely clear
8 as to the full scope of your claim. I do understand
9 that you are arguing that there was a denial of due
10 process to have held your client from December 3rd until
11 January 22nd without a full due process hearing, a
12 Wolff-type hearing.

13 MR. FISHMAN: Yes.

14 QUESTION: There was a hearing on the 22nd
15 that resulted in the six months of confinement. You're
16 not objecting to that hearing, are you, in terms of its
17 adequacy?

18 MR. FISHMAN: Not in a general sense. In this
19 specific case --

20 QUESTION: Your complaint doesn't include
21 that, as I read it.

22 MR. FISHMAN: Well, it did, because we
23 challenged the basis of the conviction on the
24 informant's testimony, and the Court of Appeals -- that
25 issue isn't before this Court, but the Court of Appeals

1 agreed with my position that the January 22nd hearing
2 was defective.

3 QUESTION: But is the adequacy of the due
4 process at the January 22nd hearing before this Court in
5 this case?

6 MR. FISHMAN: No.

7 QUESTION: All right.

8 QUESTION: But that's because the state hasn't
9 challenged the holding that it was insufficient.

10 MR. FISHMAN: Correct.

11 CHIEF JUSTICE BURGER: Mr. Attorney General,
12 do you have something further?

13 REBUTTAL ARGUMENT OF LEROY S. ZIMMERMAN, ESQ.

14 ON BEHALF OF PETITIONERS

15 MR. ZIMMERMAN: Briefly. My opponent referred
16 to the Hoss case and to the I.C.U. consent decree. The
17 Hoss case is a district court in 1978 that dealt with a
18 single prisoner in confinement for five years. And we
19 feel that that decision relating to one prisoner has no
20 precedential impact or binding effect, and we urge this
21 Court to reject that reasoning in the Hoss case.

22 And in connection with the reference to the
23 I.C.U. consent decree, the consent decree was in the
24 nature of a class action, styled as a class action and a
25 general challenge to prison conditions, and it was

1 settled by the Commonwealth of Pennsylvania in a consent
2 decree. Now, it's our position that the genesis of the
3 regulation is not relevant. It's the clear and precise
4 language of the regulation in Pennsylvania examined that
5 does not create the mutual expectation that is necessary
6 for a liberty interest. The regulation in place, in
7 question here, was in effect before the decision in that
8 consent decree.

9 One point I would like to address myself to.
10 I said our regulations in Pennsylvania require --
11 provide for a person to have a hearing and to call a
12 witness. And in answer to a question, Justice Marshall,
13 I answered your question that our regulations provide
14 for that and that I made, as Attorney General I made, an
15 inquiry into our staff to determine whether in fact a
16 witness was present. That is not in the record. I
17 believe I answered the question that way. I want to
18 make sure I did at this time.

19 QUESTION: No, you said he was there.

20 MR. ZIMMERMAN: That he was there.

21 QUESTION: I misunderstood you. You're now
22 talking hearsay, am I right?

23 MR. ZIMMERMAN: I made an inquiry, Justice
24 Marshall, to determine that a witness was there at that
25 hearing, sir. I wanted to clarify my position.

1 QUESTION: But do we know whether it was a
2 corrections officer? Your opponent said there was a
3 corrections officer testified.

4 MR. ZIMMERMAN: There was also a witness on
5 behalf of the inmate at that hearing. That was the
6 question I believe that was asked. That is not in the
7 record.

8 QUESTION: Well then, am I correct, there is
9 no record of what transpired at that hearing?

10 MR. ZIMMERMAN: Yes, there is a record.

11 QUESTION: Well, where is it?

12 QUESTION: Well, it doesn't mention the -- it
13 doesn't mention anything about witnesses.

14 MR. ZIMMERMAN: Yes, sir. It does not mention
15 that there was a witness there on behalf of the inmate.

16 QUESTION: Or on behalf of anybody else.

17 QUESTION: Oh, yes it does.

18 MR. ZIMMERMAN: At page 39A of the joint
19 appendix and 40A, the reference to the action on that
20 date, the misconduct and the hearing committee's action,
21 you'll see the block there, the inmate entered a plea of
22 not guilty to the December 8th --

23 QUESTION: This is what you call a report of a
24 hearing?

25 MR. ZIMMERMAN: These are findings of the

1 hearing.

2 QUESTION: Oh, these are findings.

3 MR. ZIMMERMAN: Yes, sir.

4 QUESTION: Where would we find out what

5 transpired at the hearing, who testified as to what?

6 MR. ZIMMERMAN: The report -- there is a --

7 however you characterize it, this is the evidence of

8 what transpired at the December 8th hearing.

9 QUESTION: Well, where do I find who said what

10 about what?

11 MR. ZIMMERMAN: There were no -- at none of

12 these hearings are there verbatim transcripts made.

13 They are summary findings that are provided for by our

14 regulations.

15 QUESTION: My final question: This is all?

16 MR. ZIMMERMAN: Yes, sir.

17 QUESTION: There's nothing else?

18 MR. ZIMMERMAN: No, sir.

19 QUESTION: May I clarify? Which hearing was

20 it that the inmate had the witness testify at?

21 MR. ZIMMERMAN: December 8th.

22 QUESTION: The December 8th. Because the

23 January 22nd hearing, as I understand it, the Court of

24 Appeals found that one insufficient. And I'm correct in

25 recalling, you don't challenge that determination?

1 MR. ZIMMERMAN: We concede the point that a
2 liberty interest was created there in disciplinary
3 custody.

4 The January 22nd hearing at page 44A of our
5 appendix is the same kind of report that appeared in
6 connection with the December 8th hearing, a summary.

7 Thank you.

8 CHIEF JUSTICE BURGER: Thank you, gentlemen.

9 The case is submitted.

10 (Whereupon, at 10:55 a.m., the case in the
11 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:
LOWELL D. HEWITT ET AL v. AARON HELMS #81-638

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