OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: CINDA SANDIN, UNIT TEAM MANAGER, HALAWA CORRECTIONAL FACILITY, Petitionerv. DEMONT R. D. CONNER, ET AL.

CASE NO: No. 93-1911

PLACE: Washington, D.C.

DATE: Tuesday, February 28, 1995

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IN THE SUPREME COURT OF THE UNITED STATES

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CINDA SANDIN, UNIT TEAM :

MANAGER, HALAWA CORRECTIONAL :

FACILITY, :

Petitioner : No. 93-1911

v. :

DEMONT R. D. CONNER, ET AL. :

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Washington, D.C.

Tuesday, February 28, 1995

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:07 a.m.

APPEARANCES:

STEVEN SCOTT MICHAELS, ESQ., First Deputy Attorney General of Hawaii, Honolulu, Hawaii; on behalf of the Petitioner.

PAUL L. HOFFMAN, ESQ., Santa Monica, California; on behalf of the Respondents.

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PROCEEDINGS

(11:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 93-1911, Cinda Sandin v. Demont Connor.

Mr. Michaels.

ORAL ARGUMENT OF STEVEN SCOTT MICHAELS

ON BEHALF OF THE PETITIONER

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

This case comes to this Court from the Ninth Circuit's decision holding that Hawaii Administrative Rule 17-201-18(b), our burden-of-proof rule, creates a liberty interest entitling every inmate in the Hawaii penal system to a procedural due process review under the standards of Wolff v. McDonnell for every assignment to disciplinary segregation of 4 hours or more.

In so holding, the Ninth Circuit ignored nearly a half-dozen decisions of this Court that characterize the Wolff case as applying solely to regimes that threaten the loss of good-time credit. The State of Hawaii has no system of good-time credit, nor does even our parole system make a disciplinary finding a necessary impact on parole.

QUESTION: But it does make it a relevant finding.

MR. MICHAELS: It is relevant in the sense that a bad disciplinary record can be but need not be a basis for the denial of parole.

QUESTION: Right. They could say this person's record is terrible, he clearly is not a good candidate for a trouble-free life if released, so we're not going to parole, or they could say, this person's record is terrible, let's get him out of here as soon as we can. They've got that choice.

(Laughter.)

MR. MICHAELS: Yes, and Justice Souter, I would say that the driving force for parole decisions today in our State would be prison overcrowding. That would be another reason for granting early parole.

But it has no necessary impact, and inmates who have very good records in prison could be denied parole for any number of reasons, and inmates that have very bad records in prison could be granted parole for a number of reasons.

The Ninth Circuit also ignored a lengthy summary judgment record that tells us what Demont Connor's assignment to disciplinary segregation actually meant in real-world terms. He was assigned, before he was assigned in disciplinary segregation, to Module A, and Module A was the most restrictive general population module in the

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entire Hawaii penal system. As a result, his assignment to disciplinary segregation meant only the loss of certain privileges, and was not a major change in the conditions of his confinement.

We ask the Court, as it decides this case, to keep five things in mind. First, disciplinary confinement is only one stopping point along a continuum of penalogical responses, and is merely the combination of one set of privileges in lieu of another and we submit that, unless the court is prepared to federalize through the Due Process Clause all State-created privileges in prison, it must reverse the decision of the Ninth Circuit below.

QUESTION: Before you continue with that, would you just step back for a moment? You said the only difference was the loss of certain privileges. Could you be specific about what it was, what the loss consisted of?

MR. MICHAELS: Right, and Justice Ginsburg, I would refer Your Honor to the guidelines that begin on page 125 of the Joint Appendix. There are a number of provisions, and I'm prepared to discuss those.

When the inmate was in Module A, he was subject to lock-down already for 16 hours a day. When he went to disciplinary confinement, his amount of lock-down time increased, but the inmate was also entitled to out-of-

cell exercise time, shower five times a week, religious counseling, legal counseling, as well as a monthly visit with his family, non-contact visit.

The number of visits went down. It would have gone down from eight to one. He would have lost the one telephone call that he could make of a personal nature, although he would have had the right to make legal, official phone calls to counsel or to the State Ombudsman. In addition, the inmate would have lost, when he moved from Module A, the right to watch television and to receive certain newspapers, but he would be entitled to have both religious and nonreligious reading materials in the disciplinary holding unit.

QUESTION: Is there a third alternative for us? You spoke of federalizing everything, of limiting interests only to those that affect prison time, and so on. Is there a third alternative of devising some kind of a de minimis rule here?

MR. MICHAELS: Justice Souter, I suppose that because the concept of de minimis does exist in the law, that one could have that, but it would mean that a very large number of privileges that from a subjective sense to the prisoner would not be viewed as de minimis would be eligible for procedural due process protection.

QUESTION: Well, I presume we'd have an

objective de minimis rule.

MR. MICHAELS: Even then, in an objective test, I would think the category of de minimis, if the Court is going to treat it as it has been treated in the law, would mean that only a very small number of changes would be exempt from Federal judicial scrutiny.

QUESTION: It wouldn't be worth the trouble, from your standpoint, to have a de minimis rule?

MR. MICHAELS: We think that the longstanding theme of this Court's decisions dealing with prison management, that --

QUESTION: Well, would it -- just from your standpoint, from your client's standpoint, would it be worth your while to have such a rule?

MR. MICHAELS: It would be better than --

QUESTION: Would you rather have all or nothing, in effect, rather than have a de minimis rule?

MR. MICHAELS: We don't think that line is administrable, no, Your Honor.

QUESTION: Okay.

QUESTION: Well, what you're asking for is a form of de minimis rule, except it's not really de minimis. You're asking for a rule that says where there's no loss of good-time credit, and no necessary impact on parole, then you would not construe voluntarily adopted

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prison regulations as creating a liberty interest.

MR. MICHAELS: In that sense, Mr. Chief Justice, yes.

QUESTION: Yes. I dare say that's not what Justice Souter meant about a de minimis, and perhaps you wouldn't describe it as de minimis, but you're asking for some sort of a cut-off.

MR. MICHAELS: Yes. Our position is that the line for eligibility for due process protection should be drawn at good-time credits, or a finding that has a necessary impact on a parole date.

QUESTION: What is the underlying theory for that? That describes the test. It describes the line, but what is the theoretical justification for drawing the line there?

MR. MICHAELS: Your Honor, we ask the Court in this case to look at the structure of cases such as Wolff v. McDonnell, as well as the extensive progeny in this area.

The underlying theme of this Court's decisions is that prison managers need flexibility and discretion, and to the extent the Constitution intrudes upon that by weighing procedural due process requirements upon them, the Court has always been solicitous of categories of conduct that are meaningfully different from one another.

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For example, in the Wolff case itself, the Court distinguished between parole revocation, where the person is already out, and good-time credits where the person is in but has earned a certain expectation of getting out by a particular day.

We think that this case is categorically different from even that situation, the good-time credit case, and that the appropriate constitutional response is to say that this is not an area -- even where for management reasons we may have mandatory rules, that this is not an area, Justice Kennedy, where the Due Process Clause should be the constitutional protection.

One of the points that I make, and I make it now, is that we do submit that there will still be backstop constitutional protection against arbitrary assignments to disciplinary segregation, but the source of that right should not be the variegated and sometimes complex requirements of the procedural Due Process Clause, but it would be the requirement of minimum rationality under the Equal Protection Clause.

QUESTION: May I ask you to test your position on Equal Protection, or, I suppose, the Eighth Amendment, too. Supposing that there's no necessary consequence of impact on parole on a particular decision, but your opponent could prove that 99 percent of the time, people

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who received a particular kind of punishment were denied parole for an extra year, and also that the -- whenever they got this particular punishment, they were put in isolation for, say, 8 months, not cruel and unusual punishment, but a dramatically different situation.

Under your rule, I would suppose there's simply no review of the procedures that would precede that.

MR. MICHAELS: There would be review under the Equal Protection Clause --

QUESTION: Yes, but I'm assuming no --

MR. MICHAELS: -- for minimum rationality.

QUESTION: -- no racial charge, nothing like that, just the person who made the decision, the argument would be, he acted arbitrarily because the crime -- I mean, the offense was not nearly so -- you know, whatever the reason might be, but you have to assume total discretion on the warden to use the kind of punishment I suggest, even if 99 percent of the time, in fact, it would mean an extra year in prison.

MR. MICHAELS: Several answers, Your Honor. First, as to what the empirical result would be on parole, the Court has already held in cases like the Dumschat case, I believe, that that empirical evidence is not relevant to the procedural due process question.

QUESTION: You may be right as a matter -- all

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I'm asking you, am I not correctly describing the situation that your rule would tolerate?

MR. MICHAELS: Our rule would not tolerate it if this was a charge that was simply made up. Our position is that --

QUESTION: Why not?

MR. MICHAELS: Because, as even this Court's cases recognize, although the equal protection line of arguments, the rational basis test, is a very lenient test, it is not a toothless test, and that, for example, City of Cleburne v. Cleburne Living Center, the Court actually will require some evidence to show that there is a rational basis for the assignment.

QUESTION: So there would be judicial review of the sufficiency of the evidence, under your test?

MR. MICHAELS: Our position is that there would be only a minimal evidence requirement, but yes, there could be judicial review, so that --

QUESTION: But it would be a procedural requirement in my case, of minimum evidence? That's not the position I understood your brief to advocate.

MR. MICHAELS: I believe the -- in my discussion with you that we're at least clarifying our brief. I think that the brief was clear, but I'd like to clarify the brief in that regard.

Because of the way the equal protection works, in court we would obviously have to produce some evidence, under our theory, to justify the detention. The real-world consequence, though, for this case would be that other requirements of Wolff v. McDonnell, such as the contemporary statement of evidence and the particular problem we had with the Ninth Circuit in this case dealing with whether witnesses could be called or not, those would be eliminated, and those would be the consequence of adopting our opening argument in the case.

QUESTION: There's a lot less here than meets the eye. You're saying all of this litigation should continue, but it should be just a different standard -- minimal evidence. That's all you're -- I thought you wanted these cases out of the Federal courts.

MR. MICHAELS: Well, the Court --

QUESTION: But you want them in there just on different evidentiary standards.

MR. MICHAELS: Well, we certainly don't want -- as a client matter, I'm sure that my client would be thrilled if they were never there at all. I think in terms of offering the Court one way to solve the tensions in the case --

QUESTION: Well, it's a way to win the case, I suppose, but I just don't know how much you're winning.

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It's frankly news to me that the Equal Protection Clause is an evidentiary guarantee. Do you have any cases that --

MR. MICHAELS: Yes.

QUESTION: What's that?

MR. MICHAELS: I can understand Your Honor's concern that as a general matter, when reviewing legislation, the court will use the imagined rational basis standard, but even cases like -- but in cases where there are as-applied equal protection challenges, and these challenges could be brought now, but obviously the litigants don't do -- the plaintiffs don't do that, because they have a howitzer with the procedural Due Process Clause.

Under the Cleburne case, the Court actually required in an as-applied equal protection challenge some rational connection between a legitimate interest and what the Government was doing in that case.

QUESTION: Isn't there a good reason to think that the Cleburne case was something of a sport, in view of our subsequent equal protection jurisprudence?

MR. MICHAELS: Well, we do offer that as the support for what the constitutional backstop would be if the Court wanted to go in that way.

QUESTION: I don't think it's a backstop. I

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think you're asking us to jump out of the frying pan into the fire and create a whole new constitutional equal protection jurisprudence that allows all sorts of factual decisions by every State and locality to be reviewed on equal protection grounds. That's a whole new territory.

I mean, maybe Hawaii likes it, but I don't view it as a great assistance to the problem of overintrusiveness of the Federal Government into these matters.

MR. MICHAELS: Well, it would be a minimal test, and at the same time, Your Honor, we --

QUESTION: Yes, but may I interrupt you? You say it would be a minimal test. I don't see why it wouldn't be a much more complicated test than the one that you've got now, because the issue now is whether certain procedural options were provided to the prisoner. That seems to me something fairly simple to litigate, even though it may provoke a certain degree of nuisance litigation for you.

But if, in fact, a minimal sufficiency of evidence criterion is going to take its place, I would suppose that that was going to be rather more complicated to litigate, because you're going to have to establish what was there in the -- before the parole -- before the prison warden, or whatever the disciplinary committee is.

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It seems to me that you're asking for the substitution of a very complicated procedure in place of a comparatively simple one.

MR. MICHAELS: I'd respectfully disagree, Justice Souter, because the present system is not only as complicated as you make it, but even much more so, because under Superintendent v. Hill we do have to provide already some evidence, and so we already would have to meet that component under procedural due process analysis.

QUESTION: Well, is there any reason to believe things would be simpler on a sufficiency of -- minimal sufficiency of evidence test?

MR. MICHAELS: Yes, indeed, because there are at least several other aspects of procedural due process protections, namely the requirement of a contemporary statement, and there are all kinds of conflicts that arise as to what has to go in the statement, how specific the reference has to be to the evidence, and these provoke a great amount of litigation, and in this case particularly, the issue of witnesses. Those would disappear under our analysis.

QUESTION: Well, suppose the prison authorities transferred the prisoner to solitary confinement, and he says, there's no reason for doing this, and they said, oh, we've heard a rumor that you're a troublemaker. Does that

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suffice?

MR. MICHAELS: I would say that being a troublemaker per se is not governed by the specific rules that we have in our institution.

QUESTION: No, I mean in this hypothetical regime, where we don't have procedural due process protections to any degree, but we do have a minimum requirement of some rationality, would the case that I put fit within that requirement and meet that requirement?

MR. MICHAELS: I would have to answer that, Justice Kennedy, yes and no. Yes, if in the rational basis analysis one would be going outside of what -- the specific rules the prison has in terms of defining the legitimate State interest.

QUESTION: No, you don't have a rule. The rule is that the prison authorities can do what's for the best interests of the prison, of prison management.

MR. MICHAELS: Then the answer would be yes.

QUESTION: I'm trying to follow Justice Souter's point, which is to try to explore whether or not the regime we would be substituting is really much of an improvement, and so I put you the case of an assignment to solitary confinement based on a rumor that he's a troublemaker, and I want to know if that meets the minimum small core of rationality that's required for prison

officials to act.

MR. MICHAELS: Yes. We submit that that would suffice.

QUESTION: What would be the inquiry, whether the person was in fact a troublemaker, or whether there was a rumor that he was a troublemaker?

MR. MICHAELS: It would be whether the official genuinely believed that that rumor had basis.

QUESTION: But why is that? If your position is that there is no liberty interest at all, why does he even need to believe there's a rumor? Why doesn't he just say, I think I'll stick this guy in solitary for 6 months?

It seems to me that was the position you were advocating.

QUESTION: That's what I thought.

QUESTION: There's no liberty interest here, so why should there be any procedural protection? We think he'd be better off over on -- put him over on Molokai with the lepers, and that's okay.

(Laughter.)

QUESTION: I thought you were saying --

QUESTION: That's what I thought your position was.

QUESTION: -- Mr. Michaels, that essentially when you commit a crime and get placed in prison you

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become a ward of the State, and one of the punishments of being a ward, one of the bad things of being a ward is that you're subject to sometimes erroneous and even arbitrary decisions, just as a juvenile is when a father says, go up to your room, for something she didn't do. That's why it's the pits to be a ward, and it's one of the punishments that you're subjected to when you commit a crime. I thought that was your position.

MR. MICHAELS: Justice Scalia, the Court could certainly decide the case on that basis, and frankly my client would be thrilled if it did. We have always, in our --

QUESTION: Well, are you asking us to, or aren't you?

MR. MICHAELS: What we offered --

QUESTION: Is that the basis upon which you want us to decide this case?

MR. MICHAELS: We have offered to the Court --

QUESTION: Well, yes or no?

MR. MICHAELS: We would like that, but it is not necessary to decide it in that manner for us to prevail.

QUESTION: Mr. Michaels, can you spell out your equal protection theory, because I'm not sure I understand it. Who are the -- what are the groups that are being treated dissimilarly?

MR. MICHAELS: Well, our position is that the Equal Protection Clause requires a rational basis for the decision with respect to a legitimate State interest, and it would go beyond, Your Honor, the type of suspect class analysis, and this is the way we presented it in both the cert petition and in our brief.

QUESTION: And I take it that's based on the theory, but maybe I'm wrong, that the Government must always have some reason for what it does? I don't think we've ever said that, but that would be the underlying theoretical justification for this principle, that the Government must always have some minimum rationality for whatever action it takes.

Now, we've never said that, but if that's what you want us to say, I assume that would be the reason.

MR. MICHAELS: That may well be --

QUESTION: Other than that, it's because there is some kind of liberty interest, as Justice Stevens' question points out.

MR. MICHAELS: It is our position that, even in as-applied cases, that there has to be some rational basis. Litigants could bring these cases now, theoretically, under the Court's decisions.

QUESTION: Mr. Michaels, suppose we don't adopt your proposed new rule, do you think that application of

existing precedents requires affirmance of the judgment below in this case?

MR. MICHAELS: No, Justice O'Connor, we do not.

QUESTION: Are you going to talk about that at all --

MR. MICHAELS: Yes.

QUESTION: -- or not?

MR. MICHAELS: Yes.

One of the factors that this Court's existing precedents have focused upon is whether the constitutional rule that's been proposed by a litigant would be bad constitutional policy. The Ninth Circuit's decision in this case basically tells the States that we could eliminate all this litigation just by eliminating our rules.

In response to the concern of Justice Stevens, if we simply wiped out our rules and said that we can send you to disciplinary confinement whenever we want, we would not have this case before the Court.

QUESTION: Well, if you really could do that, why don't you go ahead and do it? That way, we wouldn't have to decide a new body of law and you and your client would get exactly where you want to go.

MR. MICHAELS: Because it would not get us exactly where we want to go, which is to have guidance to

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our lower level officials.

It is important for us as prison managers to have rules that are of a mandatory nature, and to have those be instructions to our lower level.

QUESTION: You could -- Hawaii could adopt all of those that it wants. We're not stopping Hawaii. Hawaii can have all the codes of guidance it wants. The only question is whether all of these things are going to be enforceable in Federal courts.

MR. MICHAELS: Yes, and what we submit is that --

QUESTION: You want them to be. You want us to -- you can't do it yourself, you think. That's Hawaii's position.

MR. MICHAELS: Our position is that as a matter of constitutional doctrine this Court's decisions in Hewitt v. Helms have made statements that the Court should be sensitive to the State's incentives in this area, and --

QUESTION: Do you concede that Hawaii has created here a State-created liberty interest under the scheme you have here, under our existing precedents?

MR. MICHAELS: We disagree with that, Justice O'Connor, and with -- and I'll address that now.

QUESTION: And why do you disagree? Is it

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because it's discretionary, the imposition of sanctions under the Hawaiian scheme?

MR. MICHAELS: It's a two-part argument. First, we believe that our broader ground for reversal does respond to existing precedent, because we believe existing precedent asks the Court to take into account the incentives that are created.

But secondly, we also believe that the assignment is sufficiently discretionary that our case falls within the kinds of language in cases such as Kentucky v. Thompson and Olim v. Wakinekona, and I focus the Court on two of the aspects of discretion.

First, the Ninth Circuit just read our rule incorrectly in saying that we have a sufficiency, a substantial evidence requirement. The mandate of Rule 17-201-18(b) is a duty to convict if there is substantial evidence of misconduct. Our rule says that there must be more than mere silence in order to send a person to disciplinary confinement.

QUESTION: Well, doesn't that mean simply it's like an administrative Fifth Amendment? In other words, you can't find substantial evidence based on the silence of the prisoners. Isn't that all that means?

MR. MICHAELS: We respectfully disagree with that characterization. The purpose of the rule is to

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require disciplinary confinement if there is substantial evidence, but we can give disciplinary confinement if there is less.

QUESTION: Well, let me ask you a different question.

Your -- I take it there's nothing in your rules that expressly says, in the absence of substantial evidence you may still convict? There's nothing that says that?

MR. MICHAELS: Not explicitly.

QUESTION: Well, you say it explicitly or you don't, and I take it there's nothing that says that. You have all sorts of variations about punishment, but about conviction, there's nothing more that is said.

MR. MICHAELS: It's our position that the way the rule is structured, that the committee can convict on less.

QUESTION: No, but just tell me how the rule is structured, and on the question of conviction, as I understand, you say two things, the rule says two things: you shall convict on substantial evidence; silence is not enough. That's all it says, isn't it?

MR. MICHAELS: It says that you must convict on substantial evidence.

QUESTION: Well, must, shall, it's mandatory,

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but that's all it says, isn't it?

MR. MICHAELS: Right, and --

QUESTION: Okay. So the Ninth Circuit says, if it says you shall convict on substantial evidence, most people reading that would say, you better not convict if you don't have substantial evidence. Is that an unreasonable reading of the rule?

MR. MICHAELS: That's one possible reading of the rule.

QUESTION: Well, is it unreasonable?

MR. MICHAELS: In light of the overall purposes, we believe that it is, in light of the overall purposes of the regulation.

QUESTION: So is there a case somewhere -- I mean, how many instances have there been in which prisoners were, in fact, punished under this rule, though there was a finding there was not even substantial evidence, and they didn't admit guilt? How many such instances have there been?

MR. MICHAELS: I can't cite any to the Court.

The other aspect of discretion that we refer the Court to is the authority of the administrator in 17-201-20(b) to modify any and all findings of the hearing committee, and this is without -- this power is without limitation. It is there so that the warden can order

assignment to disciplinary segregation when there's been an acquittal that he feels is unjust.

QUESTION: What a weird system. They're very careful to make this finding, and then they say, and by the way, at the end of the day the warden can do whatever it wants. Do you really think that's what it means? I find that very strange.

MR. MICHAELS: It does vest --

QUESTION: Don't you think it means he can, you know, review and alter the findings for some good reason?

MR. MICHAELS: It does -- it vests greater discretion in the warden because that person has -- is at the top of the system and hopefully has a better perspective on these questions.

QUESTION: Isn't it an unusual interpretation of the word "modify"? That formula is used over and over again for appellate review. An appellate court can affirm or modify a decision below.

MR. MICHAELS: Justice Ginsburg, our -- the fact that our rule doesn't track all of the options that are available in the Federal statute governing appellate procedure is, in our judgment, not enough to say that that discretion is not just as unfettered as in cases such as Olim v. Wakinekona.

QUESTION: I don't think that you're answering

the question that I asked. I thought that -- you say "modify" means in the end the warden can do whatever the warden wants. I thought that that's what you -- your interpretation of "modify."

MR. MICHAELS: Yes, that is our interpretation.

QUESTION: But that word is constantly used to describe options for the appellate forum, court, and it doesn't mean that a court of appeals, for example, can do whatever it wants with regard to a district court decision just because it has authority to affirm, reverse, or modify.

MR. MICHAELS: What we respond to that concern is that that word has a different meaning in the prison context, and at least this Court's decisions have given prison administrators leeway in interpreting their rules, and if one looks at the Thompson case itself, the Court went quite far in defining discretion where, frankly, even the State of Kentucky did not believe that there was any.

QUESTION: May I ask -- I understand your interpretation in your brief, but has that interpretation been put forward in any judicial decision, or any interpretive bulletin, or anything like that?

MR. MICHAELS: No, Justice Stevens. In fact, the only --

QUESTION: Just plain language --

MR. MICHAELS: -- decision in this area by the supreme court of Hawaii that is important, or that has even touched on this, is State v. Alvey.

State v. Alvey says that the purpose of this system is not punishment, it is to regulate the good order of the institution. For that reason as well, and for other reasons --

QUESTION: Well, is there -- how many instances have there been in which the administrator overturned? Has there ever been an instance of that?

MR. MICHAELS: There has been an instance in which the --

QUESTION: Where they punished -- the administrator punished a person for the high misconduct, even though the board had found no substantial evidence and he didn't concede it?

MR. MICHAELS: Yes, and actually --

QUESTION: Do we have the cite? Is there --

MR. MICHAELS: I don't have a specific cite, because our administrative decisions are not reported, but I can represent to the Court that there was at least one instance, and because of intimidation at the hearing committee level that does occur, Your Honor.

I would reserve the balance of my time.

QUESTION: Very well, Mr. Michaels.

Mr. Hoffman, we'll hear from you.

ORAL ARGUMENT OF PAUL L. HOFFMAN

ON BEHALF OF THE RESPONDENT

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

We had thought this case was about the State of Hawaii's desire to be able to impose arbitrary punishment in the absence of Wolff procedures. We have three main arguments in response to the State's position.

The first really is that the case is quite a simple case under this Court's precedents, that under Wolff and Hewitt it seems clear that these regulations create a liberty interest because they require that there be a finding of guilt, a finding of misconduct before punishment can be imposed, and that starts from the very beginning of the regulations in 17-201-4, that says that these whole regulations are about tailoring punishment for misconduct.

QUESTION: What do you understand the test to have been laid down in Hewitt?

MR. HOFFMAN: Your Honor, the test that -- as I understand it in Hewitt, is that the State has to restrict administrative discretion in a way that would give a prisoner in these circumstances a legitimate expectation that the State is not going to act unless certain

specific, substantive predicates --

QUESTION: Well, Hewitt certainly doesn't say that in so many words.

MR. HOFFMAN: What Hewitt talks about is whether there are substantive predicates that are laid out, and particular standards that control administrative discretion.

QUESTION: But it ends up being something of an ipse dixit, doesn't it? It ends up talking about all the arguments pro and con, and then says, on these peculiar facts we find there was a liberty interest? Do you think that's much to go on?

MR. HOFFMAN: Well, Chief Justice Rehnquist, I think it says more than that.

The Court said that the substantive predicates were the need for control in those regulations and threat to security, and that unless there were findings along those lines, then administrative segregation in Hewitt could not be imposed, and that the Pennsylvania statute said that, and that if the Pennsylvania statute had said that administrators could impose administrative segregation for any reason, or if it left -- as in Thompson, if it left the ultimate decision to the administrator, free from a substantive predicate that had to be met, then there was the kind of discretion that

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would not create a liberty interest under this Court's doctrine.

QUESTION: What was the outcome in Hewitt?

MR. HOFFMAN: In Hewitt, there was a unanimous Court's finding that there was liberty interest created in those administrative segregation regulations.

QUESTION: And was that liberty interest violated? Was the finding --

MR. HOFFMAN: Well, in that case the prisoner lost, because the --

QUESTION: So you could really say, it really didn't matter whether they was a liberty interest or not.

MR. HOFFMAN: Well, I think it matters --

QUESTION: You could really say that was all dictum, in fact, couldn't you? You could say, assuming there was a liberty interest, it wasn't violated in Hewitt.

MR. HOFFMAN: Well, Justice Scalia, I think that the Court engaged in extensive analysis.

QUESTION: I know that, but we sometimes do that, and later we find out that we really didn't have to go into all that discussion, because you know, assuming there was a liberty interest, it wasn't violated.

MR. HOFFMAN: But in Thompson, after Hewitt, and in other cases that this Court has decided --

QUESTION: We did it again in Thompson, didn't we? What happened in Thompson?

MR. HOFFMAN: I think that it would be difficult, given the line of cases --

QUESTION: What was the result in Thompson?

MR. HOFFMAN: Well, in Thompson the Court went through the same analysis that --

QUESTION: And who won?

MR. HOFFMAN: The prisoner did not win --

QUESTION: He didn't win again.

MR. HOFFMAN: -- in Thompson.

QUESTION: He didn't win again. So you could really say we said assuming there was a liberty interest, it really wasn't violated here.

MR. HOFFMAN: Well, no. In Thompson the Court did not find a liberty interest because it found, after reviewing the regulations, that there was ultimate discretion left in the prison administration --

QUESTION: I find it very -- I don't know, I think it's good that States ought to adopt rules, just as I think it's good that parents ought to adopt rules, you know, for their wards. If you come in later than 12:00, you get grounded, and then the kid comes in late -- you know, a little earlier than 12:00, and an unreasonable parent says, makes a wrong decision and grounds the child.

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That's too bad, but that's not going to cause me to say that parents shouldn't make rules, or that courts are going to review what the parents do about it all the time, and it seems to me a sensible system for prisons, too.

MR. HOFFMAN: Well --

QUESTION: There ought to be those rules. Instead of Hawaii trying to run away from them and misdescribe them as really not saying you have to make such a finding, you ought to have to make a finding, but that's a matter for the --

MR. HOFFMAN: Justice Scalia --

QUESTION: -- for Hawaii to decide. They don't want to yank all that stuff up here.

MR. HOFFMAN: As a matter of empirical fact, all States that we can find, based on the regulations cited by petitioner, have adopted Wolff, more or less, and in fact there are regulations that are very similar to --

QUESTION: Well, maybe they won't. Maybe they'll repeal them if every case involving the provision of a sack lunch ends up as a due process violation.

I mean, is there no line that can be drawn? Does the Due Process Clause get invoked when the prison decides somebody's too much of a risk to have a tray with a hot lunch, and we're going to give them a sack lunch?

MR. HOFFMAN: Well, I think that that raises the

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question that was asked before about whether there's some de minimis exception with respect to the creation of State-created liberty interests, or --

QUESTION: Is there? Should there be?

MR. HOFFMAN: Well, I have two answers, really. One is, I'm not sure whether there should be under the jurisprudence of the Court that says that it's the weight -- the nature of the interest rather than the weight. It's Hawaii's decision to decide what's important enough to handle their prison in this way, because there clearly --

QUESTION: Well, a rule dealing with not allowing prisoners to watch violent television programs, or something of that sort, are we going to get all this stuff in the Federal courts?

MR. HOFFMAN: Justice O'Connor, what I'd say to that is it probably is the case that a de minimis line could be created. I believe that in this case we would not be covered by that kind of position.

I think from this Court's footnote 19 in Wolff v. McDonnell, this Court's recognized that putting someone into solitary confinement is a significant thing, and I would take issue a bit with Mr. Michaels' description of what happens. I mean, it is true that module -- that the module in which Mr. Connor was housed before was more

restrictive than some other housing units, but in fact he lost the ability to work, he lost educational opportunities, he was put in lock-down more.

There was a significant change in conditions because of an act of misconduct as to which there should be fair procedures to decide, so I think --

QUESTION: Although they were all conditions that he subjected himself to by committing the felony he committed.

MR. HOFFMAN: Well, Justice Scalia, I think that if the -- this Court has repeatedly stated over the years that a person does not lose all of his or her constitutional rights by being in prison, and --

QUESTION: Exactly, and we're talking about how many should be lost.

MR. HOFFMAN: And it could be -- it could be, as this Court said in Hewitt, that for reasons of institutional management or security, that administrative segregation conditions, which may even look a lot like disciplinary segregation, can be imposed without this kind of scrutiny under the Due Process Clause, if that's how the regulations are drafted.

But I think there's a significant distinction, and this Court's cases, I believe, have recognized that. Even in Hewitt, the Court distinguished between

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disciplinary punishment and administrative reasons, that there's a difference when the State seeks to impose additional punishment on someone because of the specific thing that they did. That's not part of the bargain of being in prison.

QUESTION: Mr. Hoffman, suppose the State had a rule that disciplinary sanctions are within the sound discretion of the warden, period. Would you have a due process claim, and what would be its nature?

MR. HOFFMAN: We would not, I believe, have a due process claim based on a State-created liberty interest. In other words, I think the State would be able to do that, but I think --

QUESTION: Isn't there something anomalous about saying if the State has nothing at all -- here are two people. They're both in prison. One is told, when you go to solitary is within the sound discretion of the warden, and the other is told that you have these procedural rights, and the one who has no rights at all is told, too bad you can't complain. There's something anomalous about that, isn't there?

MR. HOFFMAN: Well, I think the way that I would resolve the anomaly is to say that this Court would then be confronted with the question, or courts would be confronted with the question of whether the Due Process

Clause itself provides protection against that form of arbitrary punishment.

QUESTION: In Hewitt we said it didn't didn't we?

MR. HOFFMAN: I don't think so, Chief Justice Rehnquist. In Hewitt the Court said that administrative segregation was the kind of event that was in the normal range or limits of confinement, and this Court at the same time it was saying that, in fact I believe in either the next or the prior paragraph, said that disciplinary punishment was different, and that there's a big difference between subjecting someone to a particular classification or to administrative segregation within a prison environment and putting them into adverse conditions because they've done something wrong, arguably, and this Court has recognized in many contexts that punishment is different from measures that would be taken for a regulatory purpose.

QUESTION: I'm sure it is, but where is it writ that that isn't one of the things that you subject yourself to when you commit a crime? I mean, you don't subject yourself to being put in confinement because of your race or because of your color or because of your religion.

All those liberties remain, but one of the risks

you take when you get sent to jail is unreasonable and arbitrary masters. I mean, that's part of the bad part -- thing about being sent to jail. Now, why isn't that acceptable?

MR. HOFFMAN: I think that the --

QUESTION: You can't be tortured, you can't be discriminated against for all those liberty reasons that are set forth in the Constitution, but doggone it, one of the hard things about going to jail is sometimes you get a bad warden just like sometime children have unreasonable parents.

MR. HOFFMAN: Well --

QUESTION: It's part of the punishment.

MR. HOFFMAN: I think that it's inconsistent with the many statements that this Court has made that there's no iron curtain between the Constitution and prisoners, because if the Due Process Clause means anything, I think the touchstone is protection of the individual against arbitrary Government conduct.

QUESTION: Yes, but you say you -- in answer to my question you said, somebody could be treated much more arbitrarily and has no rights, if the State doesn't have a code of fair prison procedure. The fairer the State is, the greater the right of the individual. There is something anomalous about that.

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MR. HOFFMAN: Well, I think under this Court's State-created liberty interest doctrine, one of the things that the Due Process Clause protects, in addition to whatever it protects apart from what the State provides, is that when the State provides something that a person can reasonably rely on as an entitlement, that this Court protects that entitlement by fair procedures, and in this --

QUESTION: Well, in the supposition that Justice Ginsburg has put to you, where you have a State that says, in the sound discretion of the warden you can be put in solitary confinement, suppose that were the regime?

MR. HOFFMAN: Yes.

QUESTION: No rules. And the warden said, I think every fifth prisoner should know what it's like to be in solitary, and I put you all in solitary for the first 2 months of your confinements, one out of five. Is that within the sound discretion of the warden?

MR. HOFFMAN: Well, I think that if --

QUESTION: And it sounds to me like it might well be, but would there be an underlying due process claim that you could bring to show that this was not within sound discretion as that term is generally understood under the law?

MR. HOFFMAN: I believe that this Court left

open in Hewitt the question about whether there could be due process claims for that kind of arbitrary decision.

I'm not sure about that hypothetical. I think if it was done to punish someone, I believe it would be different, and that one of the reasons it would be different is that the consequences of punishment, as this Court also recognized in Hewitt -- in Hewitt, the Court distinguished between administrative segregation and disciplinary segregation in part because it found that the administrative segregation had no impact on parole, likely or otherwise.

In Hawaii, and I believe it's true in many States, if there's a finding of misconduct that accompanies the decision to put someone in solitary confinement, that has an additional impact beyond the physical change in conditions of confinement, which I believe is where your question is coming from.

If there's a decision made for other institutional interests that doesn't focus on a particular person that says one in five, or you start out your confinement in solitary confinement to see what it would be like if you break the rules, that was -- that presents a different question, I think.

QUESTION: But then it seems that even if there's a sound discretion standard there's going to be

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some litigation under the Due Process Clause. Is that what you're saying?

MR. HOFFMAN: Justice Kennedy, I believe that if, in fact, States gave unlimited discretion -- in fact, if we went back to the days of the hands-off rule before Wolff started, what would happen is, there would be a new generation of litigation about what the due process required in a variety of situations and I believe, and certainly I would be urging, that what the ultimate result of that would be, is something that looked a lot like Wolff v. McDonnell and, in fact, I think Wolff v. McDonnell layes out a set of procedures that are well understood in the prisons of this country that are applied every day in hundreds of different situations, that are accepted, and about which there's not a lot of controversy, and they are very deferential to the States.

QUESTION: Well, counsel, after Wolff the Court decided a case called Vitek v. Jones in 1980, and this is what was said in that opinion: that changes in the conditions of confinement having a substantial adverse impact on the prisoner are not alone sufficient to invoke the protections of the Due Process Clause as long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed on him.

Now, that language sounds to me like it would go

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a long way toward ruling out these claims.

MR. HOFFMAN: But this Court also said in Wolff that solitary confinement should be treated in the same manner, and I think that -- and in this Court in Wright v. Enomoto summarily affirmed a case in which the issue of disciplinary segregation that was the only one that was involved.

QUESTION: Not just solitary, because you made a distinction between administrative segregation, so you could be in solitary and you wouldn't have this right, but one thing that puzzles me about this particular case, the 1983 action was begun at an interlocutory stage. The warden overturned the basic punishment. True, it's after the time was served, but there is no -- on this record there is no disciplinary segregation.

So it's just like -- in this particular case it's just like it had been an administrative segregation. The terms are virtually the same, the terms of incarceration, so why should we treat this like a disciplinary segregation when the warden's own determination has in effect changed its character?

MR. HOFFMAN: Well, I don't think that the warden's decision changed the character. What happened in terms of the procedure in the case was that this was a disciplinary punishment of 30 days that was made after the

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adjustment committee made its decision and found him guilty of misconduct under the rules.

QUESTION: But didn't the warden, who has review authority and did review this, say that was wrong? The discipline is out of it. Isn't that the effect of the warden's decision to X out the discipline part of it?

MR. HOFFMAN: Well, what happened is that after Mr. Connor filed a section 1983 claim in Federal District Court in March of 1988, the -- Deputy Administrator Pikini expunged as part of the administrative review the 30-day sentence involved in the case, in May of 1988.

QUESTION: So it's just like talking about a district court decision that's been vacated by the court of appeals.

MR. HOFFMAN: Well, what is still at issue, although not in the questions presented, is whether there is any damage claim relating -- for the wrongful 30-days in disciplinary punishment. That's what the remaining claim is -- when it -- if--

QUESTION: Would there be a damage claim for someone, let's say, who is incarcerated pending trial, and then that person is -- it's found on appeal that the evidence was insufficient? Would there be a 1983 claim for the incarceration in the interim?

MR. HOFFMAN: Not, I believe, on those facts.

QUESTION: Then why is this different? Here we have a disciplinary determination by the original board, and it's overturned by the warden.

MR. HOFFMAN: Well, I believe what -- the problem is that he served the time, and he served the time because the State violated its due process obligations under the law.

QUESTION: But there was an appeal right and it was taken, and was successful.

MR. HOFFMAN: But he still suffered the harm, and the harm -- I mean, I think he would have to show, as a matter of fact when it goes back down, that the harm was caused by that failure to afford him with due process, and his --

QUESTION: Well, you're saying that the essence of the harm is its disciplinary character. Your -- I understood your argument to be that if this had been imposed purely administratively for nondisciplinary purposes there would be no liberty interest and no due process claim, so once the disciplinary character has been expunged, and there is no -- presumably no chance of collateral consequences, e.g. in the parole decision, then what do you have left?

MR. HOFFMAN: Well, but I think that that -- the question, as I understood it, presented in the case was

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whether there was a liberty interest created by these regulations so that he would get those benefits.

I think --

QUESTION: I'm interested right now in Justice Ginsburg's question, and it seems to me that in answer to her question there is nothing left for you to complain about with respect to a due process violation once the disciplinary character has been taken away, because the mere -- the mere, minor increase in discomfort would not in and of itself present a liberty claim, had it been done administratively.

MR. HOFFMAN: Well, it's not -- first of all, it's not clear that it would have been done administratively. He was in the general population. He was working. He had a life within the prison of a certain kind. There's no basis in the record to believe that he would have been subjected to administrative segregation.

QUESTION: Your answer is that it was not done administratively.

MR. HOFFMAN: It wasn't.

QUESTION: You cannot retroactively make it done administratively. When it was done, it was done as a punishment.

MR. HOFFMAN: That's that.

QUESTION: And you can say later that was a

mistake, but in fact it was done as a punishment.

MR. HOFFMAN: Right. I mean, our position is that is what it was done for.

QUESTION: And there may be some question whether you can recover for that under 1983 or not, but that's not a standing question, it's a question of the merits.

MR. HOFFMAN: That's our position.

QUESTION: But it could be important, too, if the Court adopts some sort of calculus as to consequences for parole and that sort of thing. The fact that he served the 30 days can't be undone, but the fact that it may be treated much differently for parole purposes might make a difference in whether or not there's a State liberty interest.

MR. HOFFMAN: Well, I think that that's true, Chief Justice Rehnquist, and I think that one of the problems, if I may just address the bright line proposal that --

QUESTION: Isn't there something like a failure to -- the 1983 was at an interlocutory stage. You have to watch the entire State proceeding, and it ends up with the disciplinary sanction expunged.

MR. HOFFMAN: I think that -- as I understand it, after Patsy at least, there's no requirement to have

exhausted the remedy to begin with, and that the section 1983 action would not be changed simply because there was this particular action that was taken after the section 1983 --

QUESTION: But in fact he did appeal, and in fact was successful on appeal.

MR. HOFFMAN: He was successful on that one issue, but he still served the time and suffered the punishment for no good reason, because from his standpoint he had a staff --

QUESTION: He didn't suffer the punishment. It's the collateral consequences. You differentiated administrative and disciplinary because of the collateral consequences, and now there are no collateral consequences.

MR. HOFFMAN: Well, there are no collateral consequences at this point, given what the administrator did with respect to this finding of misconduct, but what I would urge is that with respect to deciding what process is due, one can't know that in advance. I mean when a prisoner is subjected to the potential of a misconduct finding, that's when a decision has to be made about what process is due.

He -- as in -- if the case -- if he had not had this punishment expunged, then it would have been possible

to consider it for parole.

I would also say, in terms of the bright line rule, that I would certainly not concede for a minute that what happens in disciplinary punishment within Hawaii and within many States is not sufficiently important to fall within whatever bright line exists, and in Wolff, for example, this Court had passages that said that the fact that you could lose good time didn't have the necessary effect on the duration of your sentence. You might get the good time back, it might not affect your parole. The fact of being put in solitary confinement was viewed to be a fact of real substance, and I think within the context, if the issue is what kinds of rules can --

QUESTION: Mr. Hoffman, there's just one -- you said -- brought up the Patsy case, but that's going outside the prison setting.

Suppose a guard had thrown somebody into solitary and the prison code said you can go to a disciplinary committee and review that, and the prisoner doesn't, he just runs right into Federal court and says, the guard threw me into solitary, I don't have to exhaust anything under the prison regime --

MR. HOFFMAN: Well, but I don't think he -- at that point, he had not even tried to take advantage of the due process that was afforded -- he wouldn't have a

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violation at that point, because it's there.

QUESTION: Isn't part of the due process that you can go to the warden -- it's certainly in that code that you're relying on for other reasons that says you can apply to the warden for review.

MR. HOFFMAN: Well, but Wolff says that you also get a chance to call witnesses to prove your point, and so the due process violation that he's claiming is not that he didn't get something else that he could have gotten, but that he didn't get one thing that was central to his point, which was to try to prove that he didn't do what they said he did, and one of the things that Wolff does is say that unless there is some higher institutional interest in terms of institutional security, you get a right to call that witness in order to be able to prove your case.

QUESTION: Wolff didn't present this situation of a warden having overturned the denial of good time at an earlier stage.

MR. HOFFMAN: Well --

QUESTION: I mean, suppose that had happened in Wolff. Suppose the tribunal had said, we're taking away your good time, and then the warden reinstates it. Certainly there would be no due process claim.

MR. HOFFMAN: I think that there would still be

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a due process claim about whether you receive due process at the time.

I mean, one of the problems about the facts of this particular case is that it's not clear how Mr. Connor would know whether in fact there was ever going to be any action on this claim. The events -- this hearing was in August of 1987. He filed this case in March of 1988. The administrator's decision was in May of 1988.

It was not clear at the point he filed this case that there was ever going to be any action, and in fact he had served his entire time by that time, and so if it was wrongful for him to have done that because he had suffered a due process violation, then I think he still has --

QUESTION: So it's a bad procedural right. I mean, if you take it in the Wolff context the Warden, after the 1983 action begins, reviews the decision and says it was wrong to remove his good time. He's got it back, so he's going to get out just when he expected to. He would still have a Federal claim you say because of the process?

MR. HOFFMAN: Well, I think that in truth the amount of damages that you suffer in a case like that if you're not, for example, put into solitary confinement but you've lost good time alone would be very hard to establish very many damages, but I think at least

theoretically, if you've been denied the process due --

QUESTION: You could -- you'd have your claim, you could get declaratory relief, and you could get, what is it, $1 in damages, maybe.

MR. HOFFMAN: I mean, you might get nominal damages, you might not get nominal damages. I mean, I think that the --

QUESTION: But it wouldn't -- but the claim, you'd still have the claim, on your reasoning, right?

MR. HOFFMAN: Well, I think that the claim, if there's a State-created liberty interest, or a liberty interest under the Due Process Clause, you would have a claim if the proper procedures are denied you, yes. We -- that would be our position, that you do have that claim.

If I may on the, just to address the particular bright line that Hawaii has set forth, the line in this Court's cases has not really been about duration of confinement. I mean, they've tried -- this Court has tried to talk about things that are, I believe, things of real substance, including administrative segregation.

Where a State actually creates rules that limit the imposition of administrative segregation like Hewitt, this Court has found that that is certainly an important enough matter that the State can be held to its word, and it is an important matter and it may be that in some

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circumstances administrative segregation would also raise constitutional questions, but the line about duration of confinement would first of all not be a bright line, because in this case we should fall within it.

His duration of confinement, at least from the standpoint of what the potential punishment is, clearly makes this an important decision that's going to be made about misconduct, and there are many different interests in a prison about which prison authorities could create regulations that might or might not create a liberty interest, and I think --

QUESTION: What the Court has basically done, I guess in this area as in property, is that it's said that one way of looking to see if there's a liberty or property interest is to see if the discretion of the decisionmaker to remove the thing from the person is significantly confined or cabined by State rules or regulations, right?

MR. HOFFMAN: Yes.

QUESTION: And sometimes the problem is, that protects things that seem trivial, and sometimes it doesn't protect things that seem important. Now, have you a better way than that?

I mean, I guess the main argument for that, particularly in the trivial area, is it's hard to think of a better way, and do you have a suggestion, if this is

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being written for something that would in a better way distinguish the important from the trivial for purposes of the Due Process Clause?

MR. HOFFMAN: Well, I think it would be very difficult to draw the line. I mean, I've actually thought a lot about how you would draw that line.

QUESTION: Is there a better way, really?

MR. HOFFMAN: Well, I'm not sure that there is abetter way to draw the line. I think that one of the advantages of the Court's doctrine in the absence of the better way is that it essentially leaves it up to the States to make a certain decision.

For example, in almost every State regulation that we looked at, if there's minor punishment, relatively minor punishment, the procedures of Wolff are not applied. I mean, it's much more summary procedures that look a lot more like Hewitt, and it appears that there's not a lot of complaint about that, and so what we're talking about here is a significant punishment. It's significant both under this Court's cases, but also in Hawaii. Hawaii considers this to be an important punishment.

QUESTION: Well, why wouldn't it suffice if we held for those matters it's a denial of due process if the States do not provide State court review of the prison determinations?

MR. HOFFMAN: Well, I think that this Court's cases, certainly the Perat line of cases seem to indicate that when there's random and unauthorized State action, that post deprivation remedies would be appropriate, but I think that in a case where there's an established procedure like this one, that's been in existence for more than 20 years, that the issue is really what process is due as part of this determination, not at some later point in a State court hearing on damages.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hoffman.

The case is submitted.

(Whereupon, at 12:06 p.m., the case in the above-entitled matter was submitted.)

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CINDA SANDIN, UNIT TEAM MANAGER, HALAWA CORRECTIONAL FACILITY, Petitioner v. DEMONT R. D. CONNER, ET AL.

CASE NO.: 93-1911

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann Mari Federico

(REPORTER)