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965 F.2d 1224

United States Court of Appeals,

Second Circuit.

LOCAL 1814, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL–CIO, Plaintiff–Appellant,

v.

NEW YORK SHIPPING ASSOCIATION, INC., Defendant–Appellee,

United STATES of America, Defendant–Intervenor–Appellee.

No. 1338, Docket 92–6018.

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Argued March 16, 1992.

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Decided June 1, 1992.

Synopsis

Local union brought suit against employers' organization, seeking a reverse *Boys Market* injunction to prohibit organization from taking any steps to finalize Racketeer Influenced and Corrupt Organizations Act (RICO) consent judgment with government pending final disposition of the case or final resolution of the matter through arbitration. Government intervened. The United States District Court for the Southern District of New York, Leonard B. Sand, J., granted the government permanent injunction of the arbitration, and dismissed complaint. Union appealed. The Court of Appeals, George C. Pratt, Circuit Judge, held that: (1) dispute was arbitrable; (2) dispute fell within Norris-LaGuardia Act's definition of "labor dispute"; and (3) district court had jurisdiction, under exception to jurisdiction-stripping provisions of Norris-LaGuardia Act, to issue injunction.

Affirmed.

West Headnotes (10)

[1] **Labor and Employment**
Arbitrability

Question of arbitrability is an issue for judicial determination.

Cases that cite this headnote

[2] **Labor and Employment**
Arbitration Agreements

Labor and Employment
Matters Subject to Arbitration Under Agreement

Arbitration is a contractual right, and party cannot be required to submit to arbitration a dispute which is not contemplated as arbitrable by the contract.

1 Cases that cite this headnote

[3] **Labor and Employment**
Arbitration favored; presumption of arbitrability

Where collective bargaining agreement contains arbitration clause, courts should indulge presumption in favor of arbitrability, which may only be overcome if it may be said with positive assurance that arbitration clause is not susceptible of interpretation that covers asserted dispute.

1 Cases that cite this headnote

[4] **Labor and Employment**
Discharge and layoff

Dispute between local union and employers' organization, arising out of organization's consent agreement with government whereby organization would be bound to do acts which, arguably, would violate collective bargaining agreement by creating three new grounds for discharge of union employee, was arbitrable under clause providing for arbitration of "[a]ny grievance, dispute, complaint or claim arising out of or relating to this agreement."

2 Cases that cite this headnote

[5] **Labor and Employment**
Particular Disputes or Purposes

Dispute between local union and employer organization, arising out of organization's consent agreement with government whereby organization would be bound to do acts which, arguably, would violate collective bargaining agreement by creating three new grounds for discharge of union employee, fell within Norris-LaGuardia Act's definition of "labor dispute," as it involved terms and conditions of employment. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

2 Cases that cite this headnote

[6] **Labor and Employment**
Disputes and Concerted Activities

Federal courts have jurisdiction to issue injunctions in "labor disputes" when necessary to accommodate Norris-LaGuardia Act's strong policy favoring arbitration, and when necessary to reconcile Norris-LaGuardia with mandates of specific federal statute. Norris-LaGuardia Act, § 13(c), 29 U.S.C.A. § 113(c).

5 Cases that cite this headnote

[7] **Labor and Employment**
Mediation, conciliation, and arbitration; attempt to settle dispute

District court had jurisdiction, under exception to jurisdiction-stripping provisions of Norris-LaGuardia Act, to issue injunction in labor dispute between local union and employers' organization in order to further remedial purposes of Racketeer Influenced and Corrupt Organizations Act (RICO) by enjoining arbitration of union's grievance that organization would violate its collective bargaining agreement by entering into proposed consent judgment with government. 18 U.S.C.A. §§ 1961–1968; Norris-LaGuardia Act, § 13, 29 U.S.C.A. § 113; 28 U.S.C.A. § 1651.

14 Cases that cite this headnote

[8] **Labor and Employment**
Nature and grounds of relief in general

When injunctive relief in what would otherwise be a "labor dispute" is properly sought to further remedial purposes of Racketeer Influenced and Corrupt Organizations Act (RICO), antiinjunction provisions of Norris-LaGuardia are inapplicable, and federal court has jurisdiction to grant injunctive relief. 18 U.S.C.A. §§ 1961–1968; Norris-LaGuardia Act, § 13, 29 U.S.C.A. § 113.

28 Cases that cite this headnote

[9] **Statutes**
Other Statutes

When two statutes are capable of coexistence, it is duty of courts, absent clearly expressed congressional intention to the contrary, to regard each as effective.

4 Cases that cite this headnote

[10] **Statutes**
General and specific statutes

Statutes
Earlier and later statutes

Where there is no clear intention otherwise, specific statute will not be controlled or nullified by general one, regardless of priority of enactment.

Cases that cite this headnote

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Before: MESKILL and PRATT, Circuit Judges, and EUGENE H. NICKERSON, District Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Opinion

GEORGE C. PRATT, Circuit Judge:

When two federal statutes apply to a situation, but are seemingly incompatible, which one must give way? That is the issue we are faced with on this appeal, which arises from the intersection of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961–1968, and the Norris–LaGuardia Act, 29 U.S.C. § 101–115. Plaintiff, **Local 1814**, International **Longshoremen's** Association, **AFL–CIO** ("**Local 1814**", or "the union") appeals from a judgment of the United States District Court for the Southern District of **New York**, Leonard B. Sand, *Judge,* which (1) dismissed the union's complaint seeking arbitration under its collective bargaining agreement with defendant **New York Shipping** Association, Inc. (NYSA), (2) denied the union's request for a "reverse *Boys Markets* injunction", and (3) permanently enjoined "any arbitration involving **Local 1814's** grievance" that by entering into a proposed consent judgment with the government, NYSA would violate its collective bargaining agreement with **Local 1814**.

On appeal, **Local 1814** contends that the Norris–LaGuardia Act, which divests federal courts of jurisdiction to enter injunctions in all "labor disputes", takes precedence over RICO, a criminal statute that gives district courts civil "jurisdiction to prevent and restrain violations of [the act] by issuing appropriate orders"; thus, the union argues, the district court's injunction was ***1226** in excess of its jurisdiction. We reject the argument and accordingly affirm the judgment of the district court.

FACTS AND BACKGROUND

Although disposition of this appeal turns on questions of law and involves largely undisputed facts, it is nevertheless necessary to review the events underlying this action in some detail before we can review the decisive legal issues.

A. *The government institutes a civil RICO action.*

In an effort to rid the Port of **New York** and New Jersey (the waterfront) of the influence of organized crime, the government instituted, on February 20, 1990, a civil RICO action (the waterfront case) against numerous defendants. *See* 18 U.S.C. § 1964. The complaint named as defendants purported members of the Genovese and Gambino organized crime families, purported members of the "Westies" organized crime group, six union **locals** (including **Local 1814**), two waterfront employers, and two waterfront employers' organizations (including NYSA). The employers and employers' organizations named as defendants were named not as RICO violators, but simply as "Representatives of Employers in Industries Affecting Waterfront Commerce" in order to effectuate complete relief.

The 125–page civil RICO complaint sought extensive equitable relief against the various defendants, not unlike the sweeping reforms sought by the government in the ubiquitous *Teamsters* litigation, which by now is well-chronicled in second circuit caselaw. *See, e.g.,* 905 **F.2d** 610 (**2d Cir**.1990); 907 **F.2d** 277 (**2d Cir**.1990); 931 **F.2d** 177 (**2d Cir**.1991). More specifically, the government sought in the waterfront case (1) to bar organized crime members and their associates from involvement with the International **Longshoremen's** Association (ILA), as well as (2) reforms of disciplinary and election procedures within the union **locals** in order to prevent future influence of organized crime. Four of the six **locals** have already entered into consent judgments with the government, each of which has been approved by Judge Sand.

B. *A RICO trial takes place.*

Local 1814, along with the remaining defendants in the waterfront case, went to trial. This trial began before Judge Sand on April 15, 1991, and consumed nine weeks over a period of seven months. On December 17, 1991, the day that the defense cases were to begin, **Local 1814** and its officers agreed to a proposed consent judgment, which settled the government's claims against **Local 1814**.

C. *Terms of the **Local 1814** consent judgment.*

This consent judgment provided for the appointment of a "monitor" to oversee certain operations of **Local 1814**; it stipulated **Local 1814's** acknowledgements (1) "that there should be no criminal element or organized crime corruption of any part of the ILA, including **Local 1814**", (2) that the United States District Court for the Southern District of **New York** "has jurisdiction over the subject matter of this action", and (3) "that this Consent Decree is a lawful exercise of the

Court's jurisdiction"; and further provided for a permanent injunction against racketeering activity by the union and its members, for specific amendments of its constitution and by-laws, and for the resignation of certain high-ranking officials of **Local 1814**. Judge Sand approved the consent judgment on December 17, 1991.

D. *NYSA and the government agree on a proposed consent judgment.*

On November 27, 1991, NYSA and the government also executed a stipulation of settlement in the form of a proposed consent judgment. The pertinent portion reads as follows:

> 3. *List of Individuals Barred From Waterfront Employment.* At any time after completion of litigation in the District Court in this case, [the government] may provide to NYSA a list, approved by this Court, of individuals prohibited from ***1227** seeking, obtaining, or remaining in employment on the Waterfront. The list, if so approved by the Court, may include and identify by name and social security number: (a) any individual defendant herein found to have engaged in a RICO violation in this case; (b) any individual determined by a United States District Court to be a member, as that term is used in the complaint, of any organized crime group, as that term is used in the complaint; or (c) any individual who has aided and abetted (within the meaning of 18 U.S.C. § 2) any individual described in subdivision (a) or (b) of this paragraph in committing a federal felony in the Port of **New York** and New Jersey.
>
> With respect to subdivisions (b) and (c) of this paragraph, the Government may seek entry of an order in accordance with 18 U.S.C. § 1964(a) and consistent with the terms of this Consent Judgment which shall state the standards and procedures to be utilized in determining whether an individual falls within subdivision (b) or (c) of this paragraph and thus should be prohibited from seeking, obtaining, or remaining in employment on the Waterfront. Plaintiff may apply to the Court to place any individual on the list described in subdivision (b) or (c) of this paragraph by giving notice to that individual, NYSA, and any known employer of said individual. Proceedings to place individuals on the list shall be conducted in accordance with the Federal Rules of Evidence. The prohibition pertaining to any individual shall remain in effect for so long as the authority issuing the prohibition maintains it in effect.

This proposed consent judgment contains two other terms relevant to **Local 1814's** challenge: (1) NYSA "will not knowingly employ in any capacity any individual whose name appears on the list described in paragraph 3 for so long as the Court's injunction against the individual remains in effect"; and (2) the district court shall retain exclusive jurisdiction to enforce the consent judgment "and to conduct any proceedings related thereto."

Judge Sand has not yet approved this consent judgment.

E. ***Local 1814*** *files a grievance.*

Local 1814 and NYSA, among others, were parties to a collective bargaining agreement which provided, *inter alia,* for arbitration of "[a]ny grievance, dispute, complaint or claim arising out of or relating to" the collective bargaining agreement. Believing that NYSA's consent judgment would (1) create new grounds for discharge not otherwise present in the collective bargaining agreement and (2) make a unilateral change in the terms of the collective bargaining agreement (in violation of a specific portion of the agreement prohibiting such unilateral changes), **Local 1814** filed a grievance embodying this claim and seeking to prevent NYSA from entering into the consent judgment. After the labor-management panels charged with reviewing grievances in the first three stages of the grievance machinery (processes provided for in the collective bargaining agreement) all deadlocked, the grievance was referred to the arbitration process, the fourth stage in the collective bargaining agreement's grievance machinery.

F. ***Local 1814*** *commences the instant action.*

On December 3, 1991, **Local 1814** learned that NYSA intended to conclude the consent judgment by reaching an agreement with the government no later than December 14, 1991. Noting that our decisions in *United States v. International Bhd. of Teamsters,* 954 **F.2d** 801 (**2d Cir.1992**) (*Star Market*) and *United States v. International Bhd. of Teamsters,* 948 **F.2d** 98 (**2d Cir**.1991) (*Yellow Freight*) stand for the proposition that court-ratified consent judgments create rights and duties that are binding on nonparties and that override provisions in a collective bargaining agreement, **Local 1814** commenced this action (the arbitration case) on December 4, 1991. The action was assigned to Judge Sand as a related case to the waterfront case.

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In its complaint, **Local 1814** sought a temporary restraining order, a preliminary injunction, and a permanent injunction against NYSA, all designed to prohibit ***1228** NYSA from taking any action "designed to complete and effectuate said consent judgment pending final disposition of this case or a final resolution of the matter through arbitration." Without opposition, the government was permitted to intervene in the arbitration case as a defendant. The application for a temporary restraining order was withdrawn, based upon the joint representation of NYSA and the government that pending an order of the district court they would take no further steps to finalize the consent judgment in the waterfront case. The motion for preliminary relief was set down for argument before Judge Sand on January 9, **1992**.

G. *The government applies for an injunction against arbitration.*

Local 1814 proceeded to move ahead with expedited arbitration. It agreed to one of the four arbitrators proposed by NYSA, and the arbitration was scheduled for December 19, 1991. However, on December 18, the government advised **Local 1814's** attorneys that it had obtained an *ex parte* temporary restraining order in the arbitration case which "stayed" the arbitration until Judge Sand could rule on the government's motion for a preliminary and permanent injunction of the arbitration.

On December 20, Judge Sand heard argument on the government's "application" to stay the arbitration until the district court could rule on (1) the government's pending motion to dismiss the union's complaint in the arbitration case, and (2) **Local 1814's** motion to enjoin the parties from completing the settlement and submitting the proposed consent judgment to the court. **Local 1814** argued to the district court that such a stay of arbitration would constitute an injunction in violation of §§ 1 and 4 of the Norris–LaGuardia Act, 29 U.S.C. §§ 101, 104, which divest United States courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute". The government, in turn, argued that an injunction of the arbitration proceeding was necessary under the All Writs Act, 28 U.S.C. § 1651, in order for the district court to preserve its RICO jurisdiction and its power to approve the proposed consent judgment.

H. *The district court preliminarily enjoins the arbitration.*

Judge Sand found **Local 1814's** jurisdictional argument unconvincing. Due to the time constraints inherent in the dispute, he read his decision from the bench. Since this decision is unpublished and not available in any electronic database, and since we recognize that there may well be more litigation in the future concerning the waterfront case, we reproduce the pertinent portions:

> The court is of the opinion that it has jurisdiction to entertain this application, and that the temporary relief which the government seeks is * * * carved out by the Norris[–]LaGuardia Act, contrary to the position espoused by counsel for **1814**.
>
> Having concluded that the court has jurisdiction, we examine the government's application by the traditional standards which govern consideration of an application for a temporary restraining order which are the same standards as those which govern a preliminary injunction, and the first inquiry is therefore whether the government will suffer irreparable injury.
>
> The court is of the opinion that for these purposes irreparable injury would be sustained by the government. It is clear that the purpose of holding an expedited arbitration, despite the absence of any truly exigent circumstances, and despite the timetable previously established, is to enable **Local 1814** and the International to place this dispute in the context of one which an [ ] arbitrable labor dispute has been submitted to an arbitrator so that all of the presumptions and deference normally accorded such an arbitration result will be operative at the time of the January 9 argument.

* * * * * *

> Passing the issue of irreparable injury, therefore, we turn to the question of ***1229** likelihood of success on the merits. This court, having had but a few hours to address the question, believes that there are very serious questions which go to whether or not there is presently an arbitrable dispute or whether it is premature, and indeed a question whether it will ever be an arbitrable dispute.

* * * * * *

> It is the contention which **Local 1814** and the International wishes to be submitted to the arbitrator that this agreement provides a grounds for termination of employment of members of **Local 1814** not contained in the [collective bargaining agreement], and therefore is in violation of the collective bargaining agreement, and that it presents a presently arbitrable grievance.

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> The court believes that there are significant problems with that claim. The relevant provision of the collective bargaining agreement triggers the grievance and arbitration provisions on the discharge by a member of the NYSA of a member of 1814. Entering into the consent decree or submission of the consent decree for the approval of the court does not [constitute the] discharge of [an] employee. Indeed, it is clear that the consent decree will not impact on any individual member of Local 1814 or result in an order prohibiting his employment on the waterfront until there are significant other proceedings which may or may not * * * take place during the life of the collective bargaining agreement.
>
> First, the government must initiate the proceeding; second, the court must make the determination set forth in the consent decree, and [third,] the court must embody that determination in an order to the NYSA.

Judge Sand further stated that "the law is clear that arbitrability is a question to be determined by the court, not by the arbitrator, and I believe that there are serious questions with respect to whether the agreement is presently arbitrable." Noting that Local 1814 wanted arbitration "so that all of the presumptions and deference normally accorded such an arbitration result" would attach, Judge Sand issued a preliminary injunction against the NYSA–Local 1814 arbitration pending the arguments (scheduled for January 9, 1992) on Local 1814's motion for an injunction against finalization of the consent decree and on the government's cross-motion to dismiss Local 1814's complaint.

I. *The district court denies Local 1814's motion for an injunction, permanently enjoins arbitration, and dismisses Local 1814's complaint.*

After hearing argument at the January 9, 1992 hearing involving the arbitration case, Judge Sand denied Local 1814's motion for an injunction, granted the government a permanent injunction of the arbitration, and dismissed Local 1814's complaint. Again, since Judge Sand ruled from the bench, we reprint the pertinent parts of his oral opinion:

"[T]he Court has before it two motions.

"One is the application by the government to stay a proposed arbitration between Local 1814 and related unions and the New York Shipping Association.

"The other is the motion by the unions to preclude submission to this Court of the proposed consent decree between the government and the New York Shipping Association.

"That proposed consent decree would contain an agreement by the Shipping Association which would contain, among other things in the agreement, [a term that NYSA would not] continue in employment a member of Local 1814 who was the subject of a court order determining that he was a present member of organized crime.

"Now, the Court first addresses the claim that it lacks subject matter jurisdiction because an injunction would violate the provisions of the Norris–LaGuardia Act.

"The Court rejects that claim, believing that it has jurisdiction not only under the RICO statute but the All Writs Statute, and the inherent power of the court to preserve its jurisdiction.

***1230** "This last element is—that is, preservation of the Court's jurisdiction—is really the critical question.

"The relationship between a collective bargaining agreement and a consent decree between an employer and the government is a very delicate matter.

"The question which this Court finds to be the dispositive [one] is not how that relationship should be resolved, but whether consideration should be given by any tribunal to the competing interests espoused by the unions, on behalf of their members in preservation of employment, and that of the government, in rooting out from waterfront employment members who are present members of organized crime.

"This Court has yet to determine whether the proposed consent decree should be signed and will not make that determination until there is a full hearing on the issues presented by that consent decree, including the questions of whether its provisions would constitute an unwarranted, unnecessary, or inappropriate intrusion into the rights of union members, and the further question of whether there would be adequate procedural safeguards, consistent with due process, to protect the rights of individual union members alleged to be presently members of organized crime prior to an order that they no longer be continued in employment.

"Local 1814 and the associated unions have initiated an arbitration alleging that the New York Shipping Association's entry into the consent decree constitutes a

present violation of the terms of the Collective Bargaining Agreement, and the question is whether that arbitration should be allowed to proceed and be concluded prior to such time as this Court considers and determines whether or not to approve the consent decree.

"There is considerable reluctance on the part of any court to enjoin an arbitration, and there are many cases that have been and can be cited for that proposition. In the usual context, every presumption is engaged [in] favor of the arbitration.

"That is not the issue presented this afternoon.

"The question which would be before the arbitrator—and which he has assured the parties that he would determine immediately upon completion of their presentation—is the simple issue of whether, looking at the four corners of the Collective Bargaining Agreement, one can say whether it does or does not authorize the discharge of a **Local 1814** member because he is presently a member of organized crime.

"Counsel have acknowledged, as indeed the cases compel them to do, that it would be beyond the scope of the arbitrator's reference and authority to consider public-interest questions, to consider the RICO context out of which the proposed consent decree emerges, to consider the record adduced after 42 trial days in this case, in short, to consider anything other than the simple question to which I have made reference.

"It is only this Court that can make that determination. It is not an arbitrable determination.

"The significant issues which will be present when the merits of the consent decree are submitted to the Court are not arbitrable issues, and there is no arbitrable issue raised in the proposed arbitration.

"One might well say, 'Well, then, what difference does it make? Why not let the arbitration go forward because it would be a nullity?' And, indeed, that is a question that is giving the Court some pause, but then one has to ask, 'What is this really all about? Why has there been so much concern on the part of counsel as to the sequence of events?'

"It is clear that the reason why you are all here and why the matter has generated so much paper and discussion and analysis is that the parties, with some foundation in the law—the law which is currently under reexamination by the Second Circuit—attach significance to the sequence of events, and that once an arbitration determination has been made, a claim can be made that it has certain preclusive consequences.

"Because this Court believes that it would be a total distortion of the significant ***1231** issues raised by the proposed consent decree to consider the question whether it would constitute a violation of the Collective Bargaining Agreement apart from the RICO context of this case, and because the Court believes that the Federal District Court is the only tribunal which can engage in the balancing of the respective rights implicated by the consent decree, and believes that it should do so untrammeled by an arbitration decision that would be rendered on an issue which this Court has found to be a nonarbitrable issue, the Court makes permanent the restraint issued on December 20, and enjoins the conduct of the proposed arbitration, and denies the motion by the unions for a reverse *Boys' Market[s]* injunction to enjoin the submission of the proposed consent decree to the Court."

On January 16, **1992**, Judge Sand signed the order and judgment granting the government's requested injunction, denying **Local 1814's** requested injunction, and dismissing **Local 1814's** complaint. This expedited appeal followed.

DISCUSSION

On appeal, **Local 1814** has abandoned its request for a "reverse *Boys Markets* injunction" and relies on its argument that the Norris–LaGuardia Act, 47 Stat. 70 (1932) (codified at 29 U.S.C. §§ 101–115), strips the district court of jurisdiction to enjoin this labor arbitration. This jurisdictional argument necessarily embraces a number of sub-issues, each of which we address in turn.

A. *The Norris–LaGuardia Act: an overview.*

In the earliest part of the twentieth century, the injunction was a potent weapon wielded by management against labor groups. To defeat the organizational attempts of labor unions, management frequently charged the labor unions in federal court with conspiracy to violate the Sherman Act, 15 U.S.C. § 1. While congress had in 1914 sought by § 20 of the Clayton Act, 29 U.S.C. § 52, to limit the jurisdiction of federal courts in cases involving labor disputes, the efficacy of that section had been largely undermined by judicial decisions, *e.g., Duplex Printing Press Co. v. Deering,* 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921). *See generally Milk Wagon Drivers' Union, **Local** 753 v. Lake Valley Farm Products, Inc.,*

311 U.S. 91, 102, 61 S.Ct. 122, 127, 85 L.Ed. 63 (1940). "The result was a large number of sweeping decrees, often issued *ex parte,* drawn on an *ad hoc* basis without regard to any systematic elaboration of national labor policy." *Boys Markets, Inc. v. Retail Clerk's Union, **Local** 770,* 398 U.S. 235, 250, 90 S.Ct. 1583, 1592, 26 L.Ed.2d 199 (1970).

In order to "further * * * extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by federal courts and to obviate the results of the judicial construction of that Act," *New Negro Alliance v. Sanitary Grocery Co.,* 303 U.S. 552, 562, 58 S.Ct. 703, 707, 82 L.Ed. 1012 (1938), congress in 1932 passed the Norris–LaGuardia Act, "to bring some order out of the industrial chaos that had developed and to correct the abuses that had resulted from the interjection of the federal judiciary into union-management disputes on the behalf of management." *Boys Markets,* 398 U.S. at 251, 90 S.Ct. at 1592. The result was § 1 of the Norris–LaGuardia Act:

> No court of the United States * * * shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

29 U.S.C. § 101. The "public policy declared in this chapter" is set forth in section 2 of the act, 29 U.S.C. § 102, and is to be used "[i]n the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States":

> Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and ***1232** other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid and protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

29 U.S.C. § 102.

The Norris–LaGuardia Act is not to "be read in a spirit of mutilating narrowness", *United States v. Hutcheson,* 312 U.S. 219, 235, 61 S.Ct. 463, 467, 85 L.Ed. 788 (1941); rather, it is to be given "a broad interpretation". *Jacksonville Bulk Terminals, Inc. v. International **Longshoremen's Ass'n**,* 457 U.S. 702, 708, 102 S.Ct. 2672, 2678, 73 L.Ed.2d 327 (1982). *See also Jou–Jou Designs, Inc. v. International Ladies Garment Workers Union,* 643 **F.2d** 905, 911 (**2d Cir**.1981). Despite these general principles of broad application, the Supreme Court has recognized that a district court does have jurisdiction to grant injunctive relief under at least two decisional exceptions to the act: (1) when the Norris–LaGuardia Act must be reconciled with the mandates of a specific federal statute, *Boys Markets,* 398 U.S. at 251, 90 S.Ct. at 1592; *Jacksonville Bulk Terminals,* 457 U.S. at 717 n. 17, 102 S.Ct. at 2682 n. 17, and (2) when injunctive relief is necessary to accommodate Norris–LaGuardia's "strong policy favoring arbitration." *Id. See Boys Markets,* 398 U.S. at 252–53, 90 S.Ct. at 1593. *Cf. Buffalo Forge Co. v. United Steelworkers of America,* 428 U.S. 397, 412–23, 96 S.Ct. 3141, 3149–55, 49 L.Ed.2d 1022 (1976) (although the issue of whether a strike violated "no-strike clause" in collective bargaining agreement was arbitrable, an injunction of the strike itself not allowed by Norris–LaGuardia).

Local 1814 argues that since this case involves a "labor dispute" as defined in 29 U.S.C. § 113(c), and does not fall within any of the established exceptions to Norris–LaGuardia, Judge Sand acted in excess of his jurisdiction. In rejoinder, both NYSA and the government argue that there is no "labor dispute" here for two reasons. First, the "dispute" will not ripen into an arbitrable "dispute" until Judge Sand signs the consent decree. Second, any "dispute" there might be is not a "labor dispute", but rather a "RICO dispute". Both NYSA and the government additionally argue that RICO serves an important federal policy, to which the Norris–LaGuardia Act and its underlying policies should yield. We address each of these contentions below.

B. *Is the dispute arbitrable?*
A threshold issue is whether the dispute between Local 1814 and NYSA is arbitrable; if it is not, our inquiry ends, because any injunction that might issue would enjoin an arbitration which need not occur. *See Boys Markets,* 398 U.S. at 247–49, 90 S.Ct. at 1590–91.

[1] [2] The question of arbitrability "is undeniably an issue for judicial determination". *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 547, 84 S.Ct. 909, 912, 11 L.Ed.2d 898 (1964); *Woodcrest Nursing Home v. Local 144, Hotel, Hospital, Nursing Home & Allied Services Union,* 788 F.2d 894, 897 (2d Cir.1986) (*per curiam*). Arbitration is a contractual right, and a party cannot be required to submit to arbitration a dispute which is not contemplated as arbitrable by the contract. *AT & T,* 475 U.S. at 648, 106 S.Ct. at 1418; ***1233** *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 1352, 4 L.Ed.2d 1409 (1960); *McAllister Bros., Inc. v. A & S Transp. Co.,* 621 F.2d 519, 522 (2d Cir.1980).

[3] In deciding the contractual issue of arbitrability, courts must take pains not to rule on the merits of the underlying dispute:

> Whether 'arguable' or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator.

AT & T, 475 U.S. at 649–50, 106 S.Ct. at 1419. Finally, where the contract contains an arbitration clause, courts should indulge a presumption in favor of arbitrability, which may only be overcome if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Id.* at 650, 106 S.Ct. at 1419 (quoting *United Steelworkers of America v. Warrior & Gulf,* 363 U.S. at 582–83, 80 S.Ct. at 1352–53) (internal quotations omitted).

The collective bargaining agreement involved here provides for arbitration of "[a]ny grievance, dispute, complaint or claim arising out of or relating to this agreement". Local 1814 asks us to read this provision with breadth enough to encompass its disagreement with NYSA. The government and NYSA maintain that since consent judgments derive their authority from the imprimatur of the court, *see, e.g., Kozlowski v. Coughlin,* 871 F.2d 241, 245 (2d Cir.1989), and since the consent judgment sought here will require additional proceedings and could even be disapproved by the district court, it could not possibly create any conflict with the collective bargaining agreement at least until it is signed. Although the district court did not ground its holding on this issue, it did note the existence of "serious questions with respect to whether the agreement is presently arbitrable".

[4] Despite Judge Sand's reservations, we conclude that this dispute is ripe for arbitration under any fair reading of the arbitration clause. NYSA has already agreed to the terms of the consent judgment, and thereby has taken an affirmative step toward becoming bound by a judgment that will require it to do acts which, arguably, would violate the collective bargaining agreement by creating three new grounds for discharge of a union employee—(1) violating RICO, (2) being a member of an organized crime group, or (3) aiding or abetting a person in groups (1) or (2). None of these three grounds is mentioned in the collective bargaining agreement.

A contracting party has the right to expect that the other party will do nothing substantially to impair the expectation of performance, *see, e.g., Equitable Trust Co. v. Western Pac. Ry.,* 244 F. 485, 502 (S.D.N.Y.1917) (L. Hand, J.), *aff'd,* 250 F. 327 (2d Cir.), *cert. denied,* 246 U.S. 672,

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38 S.Ct. 423, 62 L.Ed. 932 (1918); *cf.* U.C.C. §§ 2–610, 2–611, and the settlement which NYSA has entered into with the government might have the effect of impairing NYSA's performance. Such an "anticipatory breach" (or, rather, breach by anticipatory repudiation) of a collective bargaining agreement would undoubtedly be ripe for judicial decision in a garden-variety breach of contract case. Taking into account the presumption in favor of arbitrability, we conclude that this contractual dispute, although by no means "garden variety", is a "grievance, dispute, complaint, or claim arising out of or relating to" the collective bargaining agreement between **Local 1814** and NYSA.

While the government and NYSA both cite cases holding disputes "unripe" for arbitration, each case is readily distinguishable on its facts. In *Chicago Typographical Union No. 16 v. Chicago Sun–Times, Inc.,* 860 **F.2d** 1420 (1988), the seventh circuit was called upon to interpret a clause requiring arbitration of "controversies" and "disagreements" over the proper interpretation and application of the contract, *id.* at 1425, and to apply that clause to the union's complaint that it had "reason to believe" the newspaper had interpreted a term in the collective bargaining agreement ***1234** in a fashion contrary to that espoused by the union. *Id.* at 1422.

The ninth circuit, in *Alpha Beta Co. v. Retail Store Employees Union, **Local** 428,* 671 **F.2d** 1247 (1982), also cited by the government and NYSA, was faced with a similar challenge. There, the union and the employer had entered into a settlement agreement regarding the proper interpretation of a clause in their contract. The settlement agreement itself, however, did not have an arbitration provision. The ninth circuit concluded that the "dispute" involved an interpretation of the settlement agreement, *i.e.,* an interpretation of the interpretation; thus, there was no dispute "involving or arising out of the meaning, interpretation, application or alleged violation of" the *contract,* and thus nothing in the contract to arbitrate. *Id.* at 1250.

In contrast to *Chicago Typographical Union,* **Local 1814** has much more than "reason to believe" that NYSA will enter into a consent judgment embracing certain terms; indeed, NYSA has gone as far as it can by agreeing to the proposed terms of the consent judgment. And, in contrast to *Alpha Beta,* the contract which is alleged to have been breached here *does* contain an arbitration provision—an extremely broad provision, at that. We thus conclude that the dispute between NYSA and **Local 1814** is arbitrable. We next consider the specific provisions of the Norris–LaGuardia Act.

C. *Is this a "labor dispute"?*

Does this dispute fall within the meaning of "labor dispute" under Norris–LaGuardia? This issue, too, is potentially dispositive of **Local 1814's** challenge. We start with the words of § 13 of the Norris–LaGuardia Act:

> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers and associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).
>
> (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.
>
> (c) The term "labor dispute" includes any controversy concerning terms and conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

29 U.S.C. § 113(a)–(c).

[5] **Local 1814** argues that its dispute with NYSA is a "controversy concerning terms and conditions of employment" since the consent judgment, if approved, will alter the provisions of the collective bargaining agreement relating to, *inter alia,* discharge. NYSA, bootstrapping onto its arbitrability argument, attacks **Local 1814's** contention by

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arguing that since no ripe "dispute" exists for arbitration, no "labor *dispute*" exists for purposes of the Norris–LaGuardia Act. Since we have already determined that a ripe "dispute" under general principles of arbitrability does in fact ***1235** exist, this major premise of NYSA's argument falls by the wayside.

The government, however, offers a different, largely semantic, analysis in support of the same conclusion. As intervenor-defendant, the government sees this case not as a "*labor* dispute", but as a "*RICO* dispute" to which the Norris–LaGuardia Act simply does not apply. The fundamental flaw with this argument, of course, is that many "RICO disputes" are also "labor disputes"—the categories are not mutually exclusive. We thus conclude that, on its face, the dispute between **Local** **1814** and NYSA falls within Norris–LaGuardia's definition of "labor dispute", as it involves "terms and conditions of employment".

1. "Labor dispute": the plain meaning.

The term "labor dispute" has a "broad meaning under the Norris–LaGuardia Act". *Corporate Printing Co. v.* ***New York*** *Typographical Union No. 6,* 555 **F**.**2d** 18, 21 (**2d** **Cir**.1977). *See Jacksonville Bulk Terminals,* 457 U.S. at 711, 102 S.Ct. at 2679 ("The Act merely requires that the case involve 'any' labor dispute."). Critical to whether a dispute is a "labor dispute" is whether "the employer-employee relationship [is] the matrix of the controversy." *Columbia River Packers* ***Ass'n****, Inc. v. Hinton,* 315 U.S. 143, 147, 62 S.Ct. 520, 522, 86 L.Ed. 750 (1942).

In the Norris–LaGuardia Act, congress defined "labor dispute" in terms that "no longer leave room for doubt." *United States v. Hutcheson,* 312 U.S. at 234, 61 S.Ct. at 467. Section 13 of Norris–LaGuardia was obviously written with bipolar (*i.e.,* employee-employer, employer-employer, and employee-employee) disputes in mind. *See* 29 U.S.C. § 113(a)(1)–(3). What we are presented with, however, is fairly characterized not as a bipolar, but as a triangular dispute, with a group of employees (**Local** **1814**), a group of employers (NYSA), and the government at the respective corners of the triangle. While the government urges that, in order to determine the nature of the dispute at issue, we should look only at one leg of the triangle, the one representing the RICO–born "dispute" between NYSA and the government, we cannot ignore the fact that this case focuses also upon another leg of that triangle, *i.e.,* the one representing the contractual dispute between **Local** **1814** and NYSA.

As we have noted above, **Local** **1814's** complaint alleges an anticipatory breach of the collective bargaining agreement between **Local** **1814** and NYSA; this is surely a "controversy concerning terms and conditions of employment," 29 U.S.C. § 113(c), in which "the employer-employee relationship is the matrix" of the dispute. *See Jacksonville Bulk Terminals,* 457 U.S. at 713, 102 S.Ct. at 2680; *Columbia River Packers,* 315 U.S. at 147, 62 S.Ct. at 522. The government's intervention does not, by itself, alter the essential character of this dispute, which is between an employers' group and an employees' group, *see* 29 U.S.C. § 113(a)(1) ("between one or more employers or associations of employers and one or more employees or associations of employees"), over the proper interpretation of their collective bargaining agreement.

Our reading hews close to recent Supreme Court decisions that command strict adherence to the literal definition of "labor dispute". *See Burlington Northern R.R. v. Brotherhood of Maintenance of Way Employees,* 481 U.S. 429, 441–42, 107 S.Ct. 1841, 1848–49, 95 L.Ed.2d 381 (1987); *Jacksonville Bulk Terminals,* 457 U.S. at 712–13, 102 S.Ct. at 2680. Although departures from strict adherence to statutory language are justified in "rare and exceptional circumstances", *see, e.g., Tennessee Valley Authority v. Hill,* 437 U.S. 153, 187 n. 33, 98 S.Ct. 2279, 2298 n. 33, 57 L.Ed.2d 117 (1978) (quoting *Crooks v. Harrelson,* 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930)), normally for this court to narrow the statutory definition of "labor dispute" would run contrary to congress's, as well as the Supreme Court's, commands. *See Marine Cooks & Stewards v. Panama S.S. Co.,* 362 U.S. 365, 369, 80 S.Ct. 779, 783, 4 L.Ed.2d 797 (1960). We thus conclude that the instant controversy falls within the class of cases defined by congress as "labor disputes" under the Norris–LaGuardia Act, since it concerns "terms and conditions ***1236** of employment". 29 U.S.C. § 113(c). We next consider whether this labor dispute falls into one of the established decisional exceptions to the act.

2. "Labor dispute": the decisional exceptions.

[6] As we have noted above, the Supreme Court has recognized two narrow decisional exceptions to the jurisdiction-stripping provisions of the Norris–LaGuardia Act. First, the federal courts have jurisdiction to issue injunctions in "labor disputes" when necessary to accommodate Norris–LaGuardia's "strong policy favoring arbitration". *Jacksonville Bulk Terminals,* 457 U.S. at 717 n. 17, 102 S.Ct. at 2682 n. 17; *Boys Markets,* 398 U.S. at 252–53, 90 S.Ct. at 1593. Second, the federal courts have such equity jurisdiction when necessary to reconcile Norris–LaGuardia

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with the mandates of a specific federal statute. *Jacksonville Bulk Terminals,* 457 U.S. at 717 n. 17, 102 S.Ct. at 2682 n. 17; *National Ass'n of Letter Carriers v. Sombrotto,* 449 F.2d 915, 919 (2d Cir.1971) (Friendly, J.).

[7] As an initial matter, it is noteworthy that Local 1814 commenced this case seeking a "reverse *Boys Markets* injunction"—*i.e.,* an injunction designed to further the Norris–LaGuardia Act's strong policies favoring arbitration, *see, e.g., Niagara Hooker Employees Union v. Occidental Chem. Corp.,* 935 F.2d 1370, 1376–77 (2d Cir.1991)—against NYSA, to keep it from undertaking further steps toward finalizing the consent judgment. However, the district court not only denied Local 1814 this relief; it also concluded that it had jurisdiction under the RICO statute (utilizing its concomitant powers to preserve its jurisdiction under the All Writs Act) to enjoin the arbitration because RICO—a specific federal statute designed to further an overriding congressional concern—falls within the second decisional exception "carved out" of the Norris–LaGuardia Act. Although Local 1814 has abandoned, on appeal, its request for a "reverse *Boys Markets* injunction", it nevertheless argues that in the circumstances presented by this case, only an injunction favoring arbitration, and not an injunction against arbitration, would properly be within the district court's jurisdiction. *See* Local 1814 brief at 18 (citing *Camping Const. Co. v. District Council of Iron Workers,* 915 F.2d 1333, 1348 (9th Cir.1990), *cert. denied,* 500 U.S. 905, 111 S.Ct. 1684, 114 L.Ed.2d 79 (1991); *In re Dist. No. 1—Pacific Coast Dist., Marine Engineers' Beneficial Ass'n,* 723 F.2d 70, 77–78 (D.C.Cir.1983); and *Jou–Jou Designs,* 643 F.2d at 911).

To properly address Local 1814's argument, we turn to the history of RICO, as well as to the statute itself. To begin with, Local 1814 ignores the important interrelationship between RICO and labor activities. RICO, which was adopted in 1970 (38 years after Norris–LaGuardia), establishes a strong congressional policy of purging society of the menace of organized crime. Indeed, the Organized Crime Control Act of 1970, Pub.L. No. 91–452, 84 Stat. 922 (Title IX of which is RICO, codified at 18 U.S.C. § 1961 *et seq.*), states the congressional finding that organized crime's "money and power are increasingly used to infiltrate and corrupt legitimate business *and labor unions* and to subvert and corrupt our democratic processes" (emphasis added); congress intended to eradicate organized crime "by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions *and new remedies* to deal with the unlawful activities of those engaged in organized crime." *Id.* (emphasis added). *See United States v. Turkette,* 452 U.S. 576, 586, 101 S.Ct. 2524, 2530, 69 L.Ed.2d 246 (1981) ("existing law, state and federal, was not adequate to address the problem" of organized crime).

Congress was aware that organized crime "quietly continues to infiltrate and corrupt organized labor." 116 Cong.Rec. 585 (1970) (statement of Senator McClellan). The purpose of the Organized Crime Control Act of 1970 was "to enable the Federal Government to address a large and seemingly neglected problem", which was "of national dimensions." *Turkette,* 452 U.S. at 586, 101 S.Ct. at 2530. "Trucking, construction, and *waterfront entrepreneurs* ***1237** have been persuaded for labor peace to countenance gambling, loan-sharking and pilferage. As the takeover of organized crime cannot be tolerated in legitimate business, so, too, it cannot be tolerated here." S.Rep. No. 617, 91st Cong., 1st Sess. at 78 (emphasis added). Indeed, four of the specifically-enumerated predicate acts of racketeering activity defined under RICO are: embezzlement of employee plan funds, employee benefit plan kickbacks, illegal labor payoffs, and embezzlement of union funds. *See* 18 U.S.C. § 1961(1)(B), (C) (citing, respectively, 18 U.S.C. §§ 664, 1954; 29 U.S.C. §§ 186, 501(c)). These predicate acts occur only when labor is involved.

In RICO, congress adopted special tools to aid in the eradication of organized crime. First, it provided for liberal construction, in derogation of the general principle that penal statutes are to be strictly construed, *see* Reed Dickerson, *The Interpretation and Application of Statutes* 206, 210 (1975), in order "to effectuate [RICO's] remedial purposes." Organized Crime Control Act of 1970, Pub.L. 91–452, § 904(a), 84 Stat. 922, 947. Second, congress gave the district courts "*jurisdiction* to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders". 18 U.S.C. § 1964(a) (emphasis added). Third, it included a special provision for the attorney general to bring civil actions such as the civil RICO action underlying this case. *See* 18 U.S.C. § 1964(b). Once the district court acquires jurisdiction over the subject matter of, and the parties to, the litigation, "the All Writs Act [28 U.S.C. § 1651] authorizes a federal court to protect that jurisdiction". *United States v. International Bhd. of Teamsters,* 907 F.2d 277, 281 (2d Cir.1990).

[8] We recognize that in all matters of statutory interpretation, we are ultimately looking for the intent of congress, *Farley v. Metro–North Commuter R.R.,* 865

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F.2d 33, 33 (2d Cir.1989), and when we are interpreting seemingly-contradictory statutes, this task is especially sensitive. The question we must answer here is: When it enacted the Organized Crime Control Act of 1970 in general, and RICO in particular, did congress intend that Norris–LaGuardia's 60–year–old, general prohibition against injunctions in "labor disputes" should bar relief of the type proposed in the case now before us? Our answer is "no".

[9] **[10]** We "are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari,* 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). *See also Romano v. Luther,* 816 F.2d 832, 840 (2d Cir.1987). We must give both Norris–LaGuardia and RICO full effect, "if we can do so while preserving their sense and purpose." *Watt v. Alaska,* 451 U.S. 259, 267, 101 S.Ct. 1673, 1678, 68 L.Ed.2d 80 (1981). But if we cannot, we must resort to other principles of statutory elucidation. Fundamental among these principles is that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari,* 417 U.S. at 550–51, 94 S.Ct. at 2483.

It is clear we cannot give full literal effect to both statutes. However, the labor-specific predicate racketeering acts specified in the RICO statute, the express grants of jurisdiction to district courts and of power to the attorney general in 18 U.S.C. § 1964, as well as legislative findings and history addressing the infiltration of labor unions by organized crime groups, all lead us to conclude that congress anticipated that RICO injunctions would extend to some "labor disputes". "Congress was well aware that it was entering a new domain of federal involvement through the enactment of [RICO]." *Turkette,* 452 U.S. at 586, 101 S.Ct. at 2530.

When an important federal policy would be "imperiled if equitable remedies were not available to implement it", the Norris–LaGuardia Act's "policy of nonintervention by the federal courts should yield to the successful implementation" of the important ***1238** federal policy. *Boys Markets,* 398 U.S. at 252, 90 S.Ct. at 1593. Granted, *Boys Markets* allowed an injunction in a "labor dispute" to accommodate policies *favoring* arbitration, *id.* at 252–53, 90 S.Ct. at 1593; but Norris–LaGuardia has also been read so as to "accommodate the competing demands of the [Railway Labor Act]", *see, e.g., Burlington Northern,* 481 U.S. at 445, 107 S.Ct. at 1851, as well as to accommodate § 301(a) of the Labor–Management Relations Act. *See, e.g., Local 2750, Lumber & Sawmill Workers Union v. Cole,* 663 F.2d 983, 987 (9th Cir.1981).

As a general rule, "[t]he prohibition of the [Norris–LaGuardia Act] must give way when necessary to enforce a duty imposed by another statute", *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n,* 491 U.S. 490, 514, 109 S.Ct. 2584, 2598, 105 L.Ed.2d 415 (1989); so must the general prohibitions on equity jurisdiction contained in the Norris–LaGuardia Act give way to the more specific grant of such jurisdiction under RICO. More specifically, the Norris–LaGuardia anti-injunction provision must give way to the compelling governmental interest of eliminating the hold of organized crime on labor unions as contemplated by RICO. Enforcement of RICO's policies through the All Writs Act is, therefore, both necessary and proper, even when it results in an injunction against arbitrating the "labor dispute" between Local 1814 and NYSA.

A similar approach was taken by Judge Friendly in *Letter Carriers,* where he sought to reconcile the tensions between a literal reading of the Norris–LaGuardia Act and certain provisions of the subsequently-enacted Landrum–Griffin Act. He concluded that by reading "the Norris–LaGuardia Act as *pro tanto* amended by the recent trusteeship provisions [of the Landrum–Griffin Act], we ensure the viability of the latter enactment" and create only a limited intrusion on Norris–LaGuardia's broad prohibition against injunctions; to hold otherwise "would be to render the trusteeship scheme established by Congress in large measure nugatory." *Letter Carriers,* 449 F.2d at 919. *Accord Drywall Tapers & Painters v. Operative Plasterers' & Cement Masons Int'l,* 537 F.2d 669, 673–74 (2d Cir.1976). These views apply equally to the interplay between Norris–LaGuardia and RICO. Were we to hold other than we do, RICO's broadly-construed remedial powers would have virtually no vitality in a labor setting. By holding as we do, we give full effect to the specific mandates and policies of the RICO statute while making only a minor intrusion into Norris–LaGuardia's broad prohibition against injunctions in "labor disputes". Congress intended this result.

Moreover, our recent *Star Market* decision supports this conclusion. There, we noted that

> collective bargaining agreements and [a RICO-grounded] Consent

> Decree address different problems and serve different purposes. The former governs the daily relations between particular employers and their employees, while the latter is an attempt to rebuild the infrastructure of an entire national labor organization [after eradicating the influence of organized crime].

Star Market, 954 **F.2d** at 810. *Star Market* stands for the proposition that, if presented with an attempted “RICO-reorganization” of a labor union, arbitrators (who have “narrowly circumscribed” professional skills) cannot properly consider the transcendent nature of the national public policy concerns presented by the dispute; thus, in those circumstances, the usual deference paid to an arbitration result does not attach. *Id.* at 809–10.

Even though we held in *Star Market* that an arbitration result would create no presumptions and would merit no deference by the district court, we nevertheless thought it prudent that the district court and the court-appointed officers should “remain free to complete their task unencumbered by collateral arbitration results.” *Id.* at 810. The need for the broad remedies authorized by the RICO statute merits similar freedom.

Our holding today is narrow. We do not hold that “mere unlawfulness under any law is enough to remove the strictures of ***1239** the Norris–LaGuardia Act”. *Order of R.R. Telegraphers v. Chicago & N.W. Ry. Co.,* 362 U.S. 330, 339 n. 15, 80 S.Ct. 761, 766 n. 15, 4 L.Ed.2d 774 (1960). We hold only that when injunctive relief in what would otherwise be a “labor dispute” is properly sought to further RICO's remedial purposes, the anti-injunction provisions of Norris–LaGuardia are inapplicable, and a federal court has jurisdiction to grant injunctive relief.

CONCLUSION

The judgment of the district court is affirmed.

All Citations

965 F.2d 1224, 140 L.R.R.M. (BNA) 2489, 60 USLW 2786, 122 Lab.Cas. P 10,224, RICO Bus.Disp.Guide 8023

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2008 WL 2944642
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
E.D. New York.

Anthony **PERRI**, Plaintiff,
v.
Michael **BLOOMBERG**, Mayor of the City of New York; Raymond Kelly, Commissioner of the New York City Police Department; Captain John Doe; Sergeant Barriteau, P.O. Susan Saviano, and P.O. Ditucci, in their individual as well as official capacities; and the City of New York, Defendants.

No. 06-CV-403 (CBA)(LB).
|
July **31**, **2008**.

Attorneys and Law Firms

Anthony **Perri**, Flushing, NY, pro se.

Johana Castro, Mary Theresa O'Flynn, Corporation Counsel of the City of New York, New York, NY, for Defendants.

MEMORANDUM AND ORDER

AMON, District Judge.

***1** Plaintiff Anthony **Perri** brought this *pro se* action pursuant to 42 U.S.C. § 1983 and state tort law alleging that the defendants violated his federal constitutional and state law rights by using excessive force during his detention, by exhibiting deliberate indifference to his medical needs, by intentionally inflicting emotional distress upon him, and by maintaining a custom, policy, and practice that resulted in the violation of these rights. The claims arise out of events taking place in the aftermath of his October 11, 2003 arrest for Assault in the Third Degree, Endangering the Welfare of a Child, and Harassment in the Second Degree. By motion filed on December 27, 2007, **Perri** seeks a preliminary injunction and/or temporary restraining order to enjoin what he refers to as the "illegal units" of the New York City Police Department from killing him or his **two** cats by "poison, gunshot, fire, [g]as, explosive device ... [o]r any other act of sabatoge, subterfuge, or, terrorism." (Mot. for Prelim. Injunction ("PI Mot.") at 1.) He also seeks to enjoin these "illegal units" from entering his apartment, eavesdropping on his phone calls, from using his neighbors and familiy for the purposes of threatening or harassing him, and from vandalizing his property. (PI Mot. at 1-**2**.) He also seeks a preliminary injunction "[t]o cut off Federal funding of these illegal units of N.Y.P.D. officers." (PI Mot. at **2**.) The Court referred **Perri's** motion to Magistrate Judge Lois Bloom for a Report and Recommendation (R & R), which she issued on May 27, **2008**, recommending that it be denied. **Perri** filed timely objections dated June 11, **2008**. For the reasons that follow, the Court hereby adopts Magistrate Judge Bloom's R & R.

I. Standard of Review

Magistrate Judge Bloom's recommendation that the Court deny **Perri's** motion for a preliminary injunction is reviewed *de novo. See* 28 U.S.C. § 636(b)(1).

II. Discussion

As Magistrate Judge Bloom correctly noted, " '[a] party seeking a preliminary injunction must establish irreparable harm and either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in its favor.' " (R & R at **2** (quoting *Green Party of New York State v. New York State Bd. of Elections,* 389 F.3d 411, 418 (2d Cir.2004) and citing Fed.R.Civ.P. 65).) She further noted that a movant must demonstrate irreparable harm before the other requirements are analyzed, and that, in order for harm to be irreparable, it must be non-compensable by an award of monetary damages. (R & R at **2** (citing *Kamerling v. Massanari,* 295 F.3d 206, 214 (2d Cir.2002) and *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.,* 339 F.3d 101, 113-14 (2d Cir.2003).) The R & R concludes that **Perri's** allegations-which consist of unsupported and bizarre allegations regarding the acts of the so-called "illegal units of the NYPD"-do not establish that he is in danger of irreparable harm. Moreover, Magistrate Judge Bloom concludes that although the allegations in the Third Amended Complaint were sufficient to survive the defendants' motion to dismiss, **Perri** has not demonstrated a likelihood of success on the merits. Accordingly, she concludes that he has not established that he is entitled to injunctive relief and recommends that the Court deny the motion.

***2** In his objections to the R & R, **Perri** fails to discuss the legal standards applicable to his motion. Instead, he continues to make allegations regarding the actions of the "illegal units" that are not only unsupported but also have nothing to do with

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the subject matter of this lawsuit. [1] Magistrate Judge Bloom was correct to conclude that these allegations do not suffice to establish irreparable harm.

Moreover, as Magistrate Judge Bloom pointed out, and **Perri** failed to dispute, although his Third Amended Complaint passed muster under the liberal pleading standards of Federal Rule of Civil Procedure 8(a), he has failed to establish a likelihood of success on the merits of his lawsuit. He has used this docket number to submit periodic filings he tends to call "The **Perri** Report," with content similar to that in his objections to the instant R & R. Those filings, like the instant objections, deal not with the merits of his lawsuit, but rather contain a litany of sensational allegations pertaining not only to the NYPD, but also to various arms of government, both state and federal. Accordingly, **Perri** has not established that he is entitled to a preliminary injunction, because his allegations of irreparable harm are unsupported and bizarre and because he has established neither a likelihood of success on the merits nor serious questions regarding the merits and a balance of hardships tipping decidedly in his favor.

I. Conclusion

Magistrate Judge Bloom's R & R is hereby adopted. **Perri's** motion for a preliminary injunction is denied.

SO ORDERED

REPORT AND RECOMMENDATION

BLOOM, United States Magistrate Judge.

Plaintiff, Anthony **Perri**, brings this *pro se* action pursuant to 42 U.S.C. § 1983 (" § 1983"), alleging that on or around October 11, 2003, defendants used excessive force during his detention and were deliberately indifferent to his medical needs, thereby violating his constitutional rights. Plaintiff also alleges that defendants intentionally inflicted emotional distress upon him. By motion filed December 28, 2007, plaintiff seeks a preliminary injunction and a temporary restraining order to enjoin various police officers from, among other things, killing him, entering his apartment, eavesdropping on his phone calls, using his neighbors, landlord, or landlord's family to threaten or harass him, and to cut off funding of such "illegal units of N.Y.P.D." *See* docket entry 104. The Honorable Carol B. Amon referred plaintiff's motion to me for a Report and Recommendation in accordance with 28 U.S.C. § 626(b). For the following reasons, plaintiff s motion should be denied.

DISCUSSION

A party seeking a preliminary injunction must establish irreparable harm and either (a) likelihood of success on the merits or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidely in its favor." *Green Party of New York State v. New York State Bd. of Elections,* 389 F.3d 411, 418 (2d Cir.2004); Fed.R.Civ.P. 65. A movant must show irreparable harm before the other requirements for a preliminary injunction will be considered. *Kamerling v. Massanari,* 295 F.3d 206, 214 (2d Cir.2002). The Second Circuit has defined "irreparable harm" as "certain and imminent harm for which a monetary award does not adequately compensate," noting that "only harm shown to be non-compensable in terms of money damages provides the basis for awarding injunctive relief." *Wisdom Import Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.,* 339 F.3d 101, 113-14 (2d Cir.2003); see also *Kamerling,* 295 F.3d at 214 ("To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." (internal quotation omitted)). The same standards govern consideration of an application for a temporary restraining order. *See Therrien v. Martin,* No. 3:07-cv-1285 (JCH), 2007 WL 3102181, at *5 (D.Conn. Oct. 19, 2007).

***3** In the underlying incident, which happened in October 2003, plaintiff was arrested, taken to the 109th precinct, had a panic attack, was taken to the hospital (after allegedly being dropped face-down as a test by the police and EMS workers of whether he was really suffering from an attack or was faking his symptoms), was taken back to the precinct, and ultimately was released. Plaintiff's third amended complaint alleges that he is an "emotionally disturbed person" ("EDP") and that the City has a policy, custom, or practice that constitutionally fails to afford proper treatment to EDPs when arrested.

Here, plaintiff seeks a "Praliminary [sic] injunction/ Temporary Restraining Order"

> A) To restrain the officers so named in the above-mentioned memorandum of law as John Doe No.1, and, No.2, and one Anthony R. Disalvio, and any other member

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> of the illegal units of the N.Y.P.D., including civilian employees, and, or, governmental employees, from causing the death to this plaintiff, so named Anthony Perri. Or, his two cats named Beauty, or, Picasso, By poison, gunshot, fire, Gas, explosive device. Or any other act of sabotage, subterfuge, or, terrorism.
>
> B) To restrain said officers from entering plaintiff s apartment, or from eavesdropping on my phone calls without a warrent [sic]. (Or from having their civilian employees enter said abode).
>
> C) To restrain said illegal units of the N.Y.P.D., from using my neighbors, my landlord, Anthony Tammero, or his family to threaten or harrass [sic] this plaintiff in his home, or general living area.
>
> D) To restrain said City of New York, and, The New York City Police Department, and the illegal units of the N.Y.P.D., from assaulting, stalking, or harrassing [sic] plaintiff. And to restrain said officers from vandalizing plaintiff's property. Or engaging in further acts of set-ups, sabotage, or terrorism. (Which acts are done in furtherance of a conspiricy [sic] to decline my redress to the court, and report these issues).
>
> E) To cut off Federal funding of these illegal units of N.Y.P.D., officers.

Docket entry 104 at 1(A)-(E).

These conclusory allegations do not meet the requirements for preliminary injunctive relief. *See Kamerling,* 295 F.3d at 214 (noting that preliminary relief cannot be founded on "remote or speculative" harms). Plaintiff's belief that he is being followed and is in constant danger does not demonstrate irreparable harm. Plaintiff's self-description that he is emotionally disturbed has led to his filing this motion as well as another case that was dismissed. *See Perri v. City of New York, et al.,* No. 08-cv-451 (ARR)(LB), slip op. at 6 (E.D.N.Y. Feb. 15, 2008) (denying injunctive relief and dismissing plaintiff's action against the "illegal units of the N.Y.P.D." as frivolous and on "the level of the irrational or the wholly incredible.") (quoting *Denton v. Hernandez,* 504 U.S. 25, 33, 112 S.Ct. 1728, 118 L.Ed.2d 340 (1992)). *See also Neitzke v. Williams,* 490 U.S. 319, 325-28, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (defining as factually frivolous and therefore dismissible *sua sponte* claims encompassing "fanciful," "fantastic," or "delusional" allegations); *Shoemaker v. U.S. Dept. of Justice,* 164 F.3d 619, 1998 WL 681274, at *2 (2d Cir.1998) ("A case is frivolous when it presents 'clearly baseless' factual contentions.") (quoting *Neitzke,* 490 U.S. at 327) (unpublished opinion).

***4** Plaintiff fails to connect defendants to the harm he alleges and makes only conclusory allegations. Although the Court denied the motion to dismiss the underlying complaint herein, it is respectfully recommended that plaintiff's motion for a preliminary injunction should be denied as he has not established irreparable harm and a likelihood of success on the merits. [1]

FILING OF OBJECTIONS TO THIS REPORT AND RECOMMENDATION

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.R.Civ.P. 6. Such objections (and any responses to objections) shall be filed with the Clerk of the Court. Any request for an extension of time to file objections must be made within the ten-day period. Failure to file a timely objection to this Report generally waives any further judicial review. *Marcella v. Capital Dist. Physician's Health Plan, Inc.,* 293 F.3d 42 (2d Cir.2002); *Small v. Sec'y of Health and Human Services,* 892 F.2d 15 F.2d Cir.1989): *see Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435(1985).

SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2008 WL 2944642

Footnotes

1 Above and beyond not being connected to the claims at issue in this lawsuit, it would seem that Perri would lack standing to seek redress for many of the atrocities that he claims have been committed by the "illegal units" of the NYPD against young women. *See generally Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

1 Plaintiff's motion filed on January 18, **2008** seeking similar injunctive relief is nearly identical to his motion filed on December 28, 2007. *See* docket entry 107. It is recommended that it should also be denied for the same reasons stated herein.

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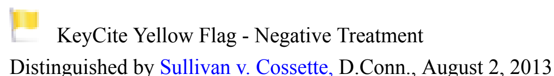
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409 F.3d 506
United States Court of Appeals,
Second Circuit.

Matricia **MOORE**, Plaintiff–Appellant,
v.
CONSOLIDATED **EDISON** COMPANY OF **NEW YORK**, INC. and John Morrill, Defendants–Appellees.

Docket No. 03–9281.
|
Argued: Feb. 14, **2005**.
|
Decided: June 2, **2005**.

Synopsis

Background: Female African-American employee filed discrimination lawsuits against employer and supervisor. The United States District Court for the Southern District of **New York**, Michael B. Mukasey, J., denied employee's motions for order to show cause and preliminary injunction, and for evidentiary hearing. Shortly after the court's denial of injunctive relief, employer terminated plaintiff's employment. Employee appealed.

Holdings: The Court of Appeals, Sotomayor, Circuit Judge, held that:

[1] addressing an issue of apparent first impression for the court, there is an exception to the rule that the occurrence of the action sought to be enjoined normally moots an appeal from the denial of a preliminary injunction, where, as here, the court has the ability to offer effective relief, and

[2] the district court did not abuse its discretion in holding that employee failed to demonstrate a threat of irreparable injury, as required for a preliminary injunction.

Affirmed.

West Headnotes (14)

[1] **Civil Rights**
Retaliation for Exercise of Rights

Retaliation claims are cognizable under § 1981 where the allegations provoking the retaliation involved racial discrimination. 42 U.S.C.A. § 1981.

4 Cases that cite this headnote

[2] **Federal Courts**
Timeliness issues

Federal court may not, by the exercise of the doctrine of hypothetical jurisdiction, decide a case on the merits before resolving whether the court has Article III jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

3 Cases that cite this headnote

[3] **Federal Courts**
Want of Actual Controversy; Mootness and Ripeness

In general, an appeal from the denial of a preliminary injunction is mooted by the occurrence of the action sought to be enjoined.

6 Cases that cite this headnote

[4] **Federal Courts**
Want of Actual Controversy; Mootness and Ripeness

There is an exception to the rule that the occurrence of the action sought to be enjoined normally moots an appeal from the denial of a preliminary injunction, where the appellate court has the ability to offer effective relief.

7 Cases that cite this headnote

[5] **Injunction**
Grounds in general; multiple factors

District courts may ordinarily grant preliminary injunctions when the party seeking the injunction

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demonstrates (1) that he or she will suffer irreparable harm absent injunctive relief, and (2) either (a) that he or she is likely to succeed on the merits, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party.

224 Cases that cite this headnote

[6] **Injunction**
Extraordinary or unusual nature of remedy
Injunction
Clear showing or proof

Preliminary injunctive relief is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.

193 Cases that cite this headnote

[7] **Injunction**
Recovery of damages

Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances.

58 Cases that cite this headnote

[8] **Federal Courts**
Preliminary injunction; temporary restraining order
Injunction
Discretionary Nature of Remedy

District court has wide discretion in determining whether to grant a preliminary injunction, and the Court of Appeals reviews the district court's determination only for abuse of discretion.

115 Cases that cite this headnote

[9] **Injunction**
Adverse employment actions

District court did not abuse its discretion in holding that employee failed to demonstrate a threat of irreparable injury, as required for a preliminary injunction enjoining her employer and supervisor from "seeking to intimidate" her as a witness in federal civil rights litigation "by unlawfully disciplining her and terminating her from employment"; employee's negative performance evaluation, which did not threaten termination, was insufficient to demonstrate irreparable harm, employee's claim of psychological harm was too speculative to warrant preliminary relief, and alleged harm to third parties did not provide employee a basis for relief, as, even if employee had standing to raise the rights of her co-workers, there was no evidence to support her allegation that she was being intimidated from testifying on their behalf.

16 Cases that cite this headnote

[10] **Injunction**
Injury, Hardship, Harm, or Effect

Claims of emotional and physical harm may, in some circumstances, justify preliminary injunctive relief.

11 Cases that cite this headnote

[11] **Federal Civil Procedure**
Rights of third parties or public

Third-party standing requirements, unlike mootness requirements, are prudential rather than constitutional in nature.

2 Cases that cite this headnote

[12] **Federal Courts**
Nature of dispute; concreteness

Bar on hypothetical jurisdiction applies only to questions of Article III jurisdiction. U.S.C.A. Const. Art. 3, § 1 et seq.

Cases that cite this headnote

[13] **Injunction**
Adverse employment actions

Retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under the law or from

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providing testimony for a plaintiff in his or her effort to protect his or her own rights, and these risks may be found to constitute irreparable injury, for purposes of granting a preliminary injunction.

6 Cases that cite this headnote

[14] Injunction
Public employees and officials

Court faced with a request for a preliminary injunction applies a particularly stringent standard for irreparable injury in government personnel cases.

Cases that cite this headnote

Attorneys and Law Firms

***507** Stephen T. Mitchell, New York, NY, for plaintiff-appellant.

Jonathan A. Fields (Mary Schuette and Eva Martinez, on the brief), New York, NY, for defendants-appellees.

Before: SOTOMAYOR and KATZMANN, Circuit Judges, and CEDARBAUM, District Judge. *

Opinion

SOTOMAYOR, Circuit Judge.

Plaintiff-appellant Matricia Moore ("plaintiff" or "Moore") appeals from a judgment entered in the United States District Court for the Southern District of New York (Michael B. Mukasey, J.) denying her motion for an order to show cause seeking a preliminary injunction pursuant to Federal Rule of Civil Procedure 65. ***508** Plaintiff also appeals the denial of an evidentiary hearing on her motion for preliminary relief. Because we agree with the district court that there is no evidence that defendants have intimidated plaintiff or other witnesses from participating in litigation, we hold that the court did not abuse its discretion in denying preliminary relief or the request for an evidentiary hearing. [1]

BACKGROUND

[1] Plaintiff, an African–American woman, filed a motion for preliminary injunctive relief in October 2003 in connection with two discrimination lawsuits before the United States District Court for the Southern District of New York. The first of these lawsuits, filed in September 2000 against Consolidated Edison Corp. ("Con Ed"), alleged violations of the Family and Medical Leave Act, *see* 29 U.S.C. § 2601 *et seq.,* and 42 U.S.C. § 1981, as well as violations of New York State Executive Law § 296. Plaintiff filed the second lawsuit in February 2003 against her supervisor at Con Ed, John Morrill (collectively with Con Ed, "defendants") alleging violations of 42 U.S.C. § 1981, New York Executive Law § 296 and New York City Administrative Code § 8–502. [2]

The alleged conduct underlying the complaints involved years of racially and sexually offensive misconduct. For example, according to plaintiff, her white male supervisor spoke to her about sexual fantasies involving plaintiff and told her on one occasion that "back in the old days you would be having my baby." Plaintiff further alleges that defendants attempted to derail her career at the company after she complained about unlawful discrimination by refusing to assist her professional development, sabotaging her work and giving her an unjustifiably poor performance review. In one performance evaluation in the record, the employer criticized plaintiff for "perpetuating her claims of harassment and discrimination," which in the employer's view evinced an objective "to undermine the morale of [the] department, and to cause division in the office." The report referred to the discrimination claims as "unsubstantiated" and warned that "[u]ntil [plaintiff's] attitude changes ... there will be no opportunity for future development in this organization." The evaluation also criticized plaintiff for being antagonistic at work, causing disruptions, disrespecting internal procedures, failing to respond ***509** promptly to requests from her managers and failing to complete projects assigned to her. The report described plaintiff's contributions to the department as "immaterial at best."

Shortly after receiving this negative evaluation, plaintiff sought a preliminary injunction enjoining defendants from "seeking to intimidate" her as a witness in federal civil rights litigation "by unlawfully disciplining her and terminating her from employment." She contended that defendants were threatening her and retaliating against her because she had agreed to serve as a witness in other cases against Con Ed. She alleged that the defendants sought to cause her "permanent harm" at a time when she suffered post-traumatic depression

—a condition for which Con Ed had allegedly been found responsible in a workers' compensation proceeding. As part of her effort to secure a preliminary injunction, plaintiff also requested a hearing so that the district court would be "presented with a full and fair account of the defendants' efforts to intimidate witnesses."

The district court denied plaintiff's motion on October 31, 2003. Chief Judge Michael B. Mukasey rejected the request for a preliminary injunction primarily on the ground that plaintiff did not demonstrate irreparable injury. He further rejected the request for a hearing, holding that "[a]bsent any issue to try, there is no occasion for a hearing." Shortly after the district court denied the preliminary injunction, defendants terminated plaintiff's employment. Plaintiff filed a timely appeal.

DISCUSSION

[2] **[3]** We address first an Article III jurisdictional issue. [3] Both parties agree that shortly after the district court denied the preliminary injunction, defendants terminated plaintiff's employment. This raises the issue of mootness, because " '[i]n general, an appeal from the denial of a preliminary injunction is mooted by the occurrence of the action sought to be enjoined.' " *Knaust v. City of Kingston,* 157 **F.3d** 86, 88 (**2d** **Cir**.1998) (quoting *Bank of **New** **York** Co. v. Northeast Bancorp, Inc.,* 9 **F.3d** 1065, 1067 (**2d** **Cir**.1993)); *see Altman v. Bedford Cent. Sch. Dist.,* 245 **F.3d** 49, 69 (**2d** **Cir**.2001) ("[I]f the plaintiff loses standing at any time during the pendency of the proceedings in the district court or in the appellate courts, the matter becomes moot, and the court loses jurisdiction.").

[4] A possible exception to this rule exists, however, where a court can feasibly *restore* the status quo. *See Garcia v. Lawn,* 805 F.2d 1400, 1402–04 (9th Cir.1986) (holding that appeal from the denial of preliminary injunction was not rendered moot by the termination of appellant's employment, because the court retained the power to reinstate the employment); *Bastian v. Lakefront Realty Corp.,* 581 F.2d 685, 691 (7th Cir.1978) (holding that appeal from denial of preliminary injunction is not rendered moot where district court has power to restore status quo); *see also Garcia,* 805 F.2d at 1403 ("[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be any effective relief."). This ***510** Court has reserved the question of whether to recognize such an exception to the mootness doctrine. *See Savoie v. Merchs. Bank,* 84 **F.3d** 52, 59 n. 5 (**2d** **Cir**.1996) (citing *Bank of **New** **York** Co.,* 9 **F.3d** at 1067); *see also Knaust,* 157 **F.3d** at 88 n. 1. We now hold that under the facts of the instant case, such an exception exists.

The occurrence of the action sought to be enjoined normally moots the request for preliminary injunctive relief because this Court has " 'no effective relief to offer' " once the action has occurred. *Id.* at 88 (quoting *CMM Cable Rep., Inc. v. Ocean Coast Props., Inc.,* 48 **F.3d** 618, 621 (1st Cir.1995)). In this case, however, we do not lack the ability to offer effective relief, because an order of injunctive relief requiring reinstatement of plaintiff could negate or at least substantially mitigate the adverse effects of one of the "irreparable harms" the plaintiff fears—the intimidation of witnesses in her ongoing litigation against defendants—by signaling to employees that defendants may not legally fire them for offering to testify in a discrimination suit. *See Holt v. Cont'l Group, Inc.,* 708 F.2d 87, 90–91 (**2d** **Cir**.1983) (holding that a district court may in some circumstances grant a preliminary injunction ordering that a defendant in a discrimination case reinstate a plaintiff employee who has already been fired if court finds that defendant's firing of plaintiff presents risk of intimidating other employees from testifying against defendant). Under these circumstances, the typical concerns requiring a dismissal on mootness grounds do not apply. *Compare, e. g., United States v. Ciccone,* 312 **F.3d** 535, 544 (**2d** **Cir**.2002) (dismissing an appeal as moot because "it would be *impossible* " for the Court "to grant *any* effectual relief whatever" to the appealing party (emphasis added) (citation and internal quotation marks omitted)). [4] We therefore hold that the instant appeal is not moot.

[5] **[6]** **[7]** **[8]** We turn next to the merits of plaintiff's request for preliminary injunctive relief. District courts may ordinarily grant preliminary injunctions when the party seeking the injunction demonstrates (1) that he or she will suffer irreparable harm absent injunctive relief, and (2) either (a) that he or she is likely to succeed on the merits, or (b) " 'that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party.' " *No Spray Coalition, Inc. v. City of **New** **York**,* 252 **F.3d** 148, 150 (**2d** **Cir**.2001) (per curiam) (quoting *Otokoyama Co. v. Wine of Japan Import, Inc.,* 175 **F.3d** 266, 270 (**2d** **Cir**.1999)). Such relief, however, " 'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the

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burden of persuasion.' " *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (emphasis and citation omitted). Where there is an adequate remedy at law, such as an award of money damages, injunctions are unavailable except in extraordinary circumstances. *See Morales v. Trans World Airlines, Inc.,* 504 U.S. 374, 381, 112 S.Ct. 2031, 119 L.Ed.2d 157 (1992); *see also Metro. Opera Ass'n, Inc. v. Local 100, Hotel Employees & Rest.* ***511** *Employees Int'l Union,* 239 **F.3d** 172, 177 (**2d Cir**.2001). The district court has wide discretion in determining whether to grant a preliminary injunction, and this Court reviews the district court's determination only for abuse of discretion. *See Green Party of N.Y. v. N.Y. State Bd. of Elections,* 389 **F.3d** 411, 418 (**2d Cir**.2004); *Columbia Pictures Indus., Inc. v. Am. Broad. Cos.,* 501 F.2d 894, 897 (**2d Cir**.1974).

The district court denied plaintiff's motion for a preliminary injunction on the ground that there was no showing of irreparable injury. Specifically, the court held that "the performance evaluation in question does not itself cause irreparable injury, nor does it threaten termination." The district court held in the alternative that even if termination did occur, "any resulting injury" would be "fully compensable in money damages." Finally, the court added that the "suggestion of irreparable psychological harm [was] sheer speculation," and that "even assuming *arguendo* that the threat of harm to third parties may be considered," plaintiff lacked third party standing to sue on others' behalf.

[9] [10] [11] [12] We affirm the district court's conclusions that the negative evaluation was insufficient to demonstrate irreparable harm and that the claim of psychological harm was too speculative to warrant preliminary relief. While claims of emotional and physical harm may in some circumstances justify preliminary injunctive relief, *see Shapiro v. Cadman Towers, Inc.,* 51 **F.3d** 328, 333 (**2d Cir**.1995), the district court did not abuse its discretion in rejecting such claims here. *See Kamerling v. Massanari,* 295 **F.3d** 206, 214 (**2d Cir**.2002) (noting that preliminary relief cannot be founded on "remote or speculative" harms); *see also Guitard v. United States Sec'y of Navy,* 967 F.2d 737, 742 (**2d Cir**.1992) ("[T]he injuries that generally attend a discharge from employment —loss of reputation, loss of income and difficulty in finding other employment—do not constitute the irreparable harm necessary to obtain a preliminary injunction." (citing *Sampson v. Murray,* 415 U.S. 61, 89–92, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974))). We also affirm the court's holding that the alleged harm to third parties did not provide plaintiff a basis for a preliminary injunction in this case. Even if **Moore** had standing to raise the rights of other employees, there was no evidence to support her allegation that she was being intimidated from testifying on her co-workers' behalf. [5] On the contrary, plaintiff had been an active participant in litigation against Con Ed for several years.

[13] [14] To the extent that the district court implied in its order that injuries resulting from retaliatory termination are always compensable in money damages, we disagree. As we held in *Holt,* "[a] retaliatory discharge carries with it the distinct risk that other employees may be deterred from protecting their rights under ***512** the [law] or from providing testimony for [a] plaintiff in [his or] her effort to protect [his or] her own rights. These risks may be found to constitute irreparable injury." [6] 708 F.2d at 91. The district court's suggestion to the contrary, however, does not provide a ground for reversal here, because plaintiff did not offer any evidence that witnesses in this case would be intimidated from testifying on plaintiff's behalf. *See id.* (holding that there was no *presumption* of irreparable injury in retaliatory discharge cases). Though the negative employment evaluation sharply criticizes plaintiff for her participation in the litigation, plaintiff did not allege that other employees were aware of this evaluation, much less intimidated by it. Nor did plaintiff allege that she herself was intimidated from participating in litigation against defendants. Thus, while a retaliatory discharge may in some cases intimidate witnesses and thereby inflict irreparable harm, *see id.,* the district court did not abuse its discretion in concluding that there was no risk of such irreparable harm presented here.

Because the record is devoid of any evidence of witness intimidation, we also affirm the district court's denial of an evidentiary hearing on the motion for preliminary relief. *See Charette v. Town of Oyster Bay,* 159 **F.3d** 749, 755 (**2d Cir**.1998) (noting that an evidentiary hearing is not required when, *inter alia,* disputed facts are amenable to complete resolution on a paper record).

***513** In her brief on appeal, plaintiff also includes claims under 42 U.S.C. § 1985(2) and (3), as well as under 18 U.S.C. § 1512. Plaintiff did not include these claims in her complaint or in her motion for preliminary relief; nor did the district court discuss them. We therefore do not address them. *See Sniado v. Bank Austria AG,* 378 **F.3d** 210, 213 (**2d Cir**.2004).

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CONCLUSION

For the foregoing reasons, the judgment of the district court denying preliminary injunctive relief and an evidentiary hearing is AFFIRMED.

All Citations

409 F.3d 506, 95 Fair Empl.Prac.Cas. (BNA) 1441, 86 Empl. Prac. Dec. P 42,076, 10 Wage & Hour Cas.2d (BNA) 1096

Footnotes

* The Honorable Miriam Goldman Cedarbaum, United States District Judge for the Southern District of New York, sitting by designation.

1 We initially disposed of this appeal by a summary order issued on March 1, 2005. *See Moore v. Consolidated Edison Co. of N.Y.,* No. 03–9281, 2005 WL 481571 (2d Cir. Mar.1, 2005). In response to a request from appellant's counsel dated March 7, 2005, we now convert our original order into a published opinion. Though this opinion provides substantially more detail with respect to the reasoning underlying our original disposition of the case—particularly with regard to our jurisdiction to hear the appeal—we note that our holding on the merits is identical to that of the original order.

2 Though plaintiff contends in her brief that she also brought actions pursuant to Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000e *et seq.,* no such claim appears in either of the complaints. A Title VII claim does appear in an amended complaint in the plaintiff's appendix to her brief. We find no evidence, however, that the district court accepted this amended complaint. Defendants argue in their response brief that plaintiff never submitted the amended complaint to the district court, and plaintiff fails to respond to that allegation in her reply brief. The lack of a Title VII claim is not fatal to plaintiff's retaliation claim, however, because retaliation claims are also cognizable under § 1981 where the allegations provoking the retaliation involved racial discrimination. *See Hawkins v. 1115 Legal Serv. Care,* 163 F.3d 684, 693 (2d Cir.1998); *Choudhury v. Polytechnic Inst. of N.Y.,* 735 F.2d 38, 42–43 (2d Cir.1984).

3 We address the jurisdictional issue notwithstanding the fact that our opinion rejects Moore's appeal on the merits, because "a federal court may not, by the exercise of the doctrine of hypothetical jurisdiction, decide a case on the merits before resolving whether the court has Article III jurisdiction." *United States v. Miller,* 263 F.3d 1, 4 n. 2 (2d Cir.2001).

4 Our conclusion is a natural, if not inevitable, extension of the well established principle that "where a defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the status quo." *Porter v. Lee,* 328 U.S. 246, 251, 66 S.Ct. 1096, 90 L.Ed. 1199 (1946); *see Savoie,* 84 F.3d at 58–59 & n. 5 (citing *Porter,* 328 U.S. at 251, 66 S.Ct. 1096); *see also Paris v. United States Dep't of Hous. & Urban Dev.,* 713 F.2d 1341, 1344–45 (7th Cir.1983); *Humble Gas Transmission Co. v. Miss. Power & Light Co.,* 430 F.2d 1003, 1004 n. 2 (5th Cir.1970).

5 We may exercise hypothetical jurisdiction and rule on the merits of this question because third-party standing requirements—unlike mootness requirements—are prudential rather than constitutional in nature. *Kane v. Johns–Manville Corp.,* 843 F.2d 636, 643 (2d Cir.1988). The bar on hypothetical jurisdiction applies only to questions of Article III jurisdiction. *See In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz,* 311 F.3d 488, 497 (2d Cir.2002); *Grand Council of Crees v. Fed. Energy Regulatory Comm'n,* 198 F.3d 950, 959–60 (D.C.Cir.2000). We decline to address whether prudential third-party standing requirements apply to Moore's claims. *Cf. Leibovitz v. New York City Transit Auth.,* 252 F.3d 179, 186 (2d Cir.2001) (noting that it remains unresolved in this Circuit whether and to what extent prudential limits on standing apply to Title VII actions).

6 The holdings of *Savage v. Gorski,* 850 F.2d 64 (2d Cir.1988), and *American Postal Workers Union v. United States Postal Service,* 766 F.2d 715 (2d Cir.1985), relied upon by appellee, are not to the contrary. In both *Savage* and *American Postal,* we observed that preliminary injunctive relief would likely be ineffective, because the alleged irreparable harm—there, the chilling of speech protected by the First Amendment—stemmed " 'not from the interim discharge but from the threat of permanent discharge, which is not vitiated by an interim injunction.' " *Savage,* 850 F.2d at 68 (quoting *American Postal,* 766 F.2d at 722). Read out of context, this language may seem to suggest that preliminary relief is never warranted in retaliatory discharge cases, because preliminary relief can never fully extinguish the threat of permanent discharge. We do not, however, read *American Postal* or *Savage* as sweeping so broadly, or as overruling *Holt sub silentio. See In re Sokolowski,* 205 F.3d 532, 534–35 (2d Cir.2000) (explaining that a panel of this Court may not overrule the holding of an earlier panel unless the earlier panel's rationale is overruled, implicitly or expressly, by the Supreme Court or by this Court sitting *en banc*). When we expressed doubt in *Savage and American Postal* regarding the usefulness of preliminary injunctive relief as opposed to permanent relief, we did not confront the sort of circumstance present in

Holt, where immediate relief was the *only* form of relief that could mitigate the alleged harm of witness intimidation in the ongoing proceedings. Our precise holdings in *American Postal* and *Savage* were narrow, relying heavily on the fact that the plaintiffs had failed to allege a sufficiently severe or clear violation of First Amendment rights. *See Savage,* 850 F.2d at 67 (noting that while a preliminary injunction may be issued where employees are threatened with discharge for refusing to change their political affiliation, the appellees did not allege that degree of coercion); *American Postal,* 766 F.2d at 722 ("[A]ppellees herein have failed to allege a clearcut infringement of [F]irst [A]mendment rights which, absent preliminary injunctive relief, either has occurred or will occur ...."); *see also Savage,* 850 F.2d at 68 (holding that because "reinstatement and money damages could make appellees whole for any loss suffered during this period, their injury [wa]s plainly reparable"). We do not read these holdings as inconsistent with the case-by-case approach to requests for preliminary relief based on witness intimidation that we adopted in *Holt.* Finally, we note that *Savage* and *American Postal* are distinguishable because they involved retaliation claims brought by government employees; we apply "a particularly stringent standard for irreparable injury in government personnel cases." *American Postal,* 766 F.2d at 721.

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Disapproval Recognized by Anthony A. v. Commissioner of Correction, Conn., August 29, 2017

96 S.Ct. 2532
Supreme Court of the United States

Larry **MEACHUM** et al., Petitioners,
v.
Arthur **FANO** et al.

No. 75-252.
|
Argued April 21, 1976.
|
Decided June 25, 1976.
|
Rehearing Denied Oct. 4, 1976.
See 429 U.S. 873, 97 S.Ct. 191.

Synopsis

Action was brought by state prisoners, who alleged that their transfers to less favorable institution without adequate fact-finding hearing deprived them of liberty without due process of law, for injunction setting aside ordered transfers, declaratory relief and damages. The United States District Court for the District of Massachusetts, 387 F.Supp. 664, granted relief, and correction officials appealed. The Court of Appeals, 520 F.2d 374 affirmed, and the Supreme Court granted prison officials' petition for writ of certiorari. The Supreme Court, Mr. Justice White, held that due process clause of the Fourteenth Amendment does not entitle state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to prisoner absent state law or practice conditioning such transfers on proof of serious misconduct or occurrence of other events.

Reversed.

Mr. Justice Stevens filed dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

West Headnotes (10)

[1] Constitutional Law
Transfer

Transfer of state prisoners from medium to maximum security prisons did not infringe or implicate a "liberty" interest of prisoners within meaning of due process clause. U.S.C.A.Const. Amend. 14.

2344 Cases that cite this headnote

[2] Constitutional Law
Conditions of confinement in general

Given a valid conviction, a criminal defendant has been constitutionally deprived of his liberty to extent that state may confine him and subject him to rules of its prison system so long as conditions of confinement do not otherwise violate the Constitution.

395 Cases that cite this headnote

[3] Prisons
Establishment and maintenance

Prisons
Place or Mode of Confinement

Constitution does not require that state have more than one prison for convicted felons, nor does it guarantee that convicted prisoner will be placed in any particular prison if, as is likely, state has more than one correctional institution.

556 Cases that cite this headnote

[4] Constitutional Law
Conditions of confinement in general

Initial decision to assign convict to particular institution is not subject to audit under due process clause, although degree of confinement in one prison may be quite different from that in another; conviction has sufficiently extinguished defendant's liberty interest to empower state to confine him in any of its prisons. U.S.C.A.Const. Amend. 14.

1128 Cases that cite this headnote

[5] Constitutional Law
Transfer

Due process clause, in and of itself, does not protect duly convicted prisoner against transfer from one institution to another. U.S.C.A.Const. Amend. 14.

455 Cases that cite this headnote

[6] **Constitutional Law**
Transfer

That life in one state prison is much more disagreeable than in another does not in itself signify that Fourteenth Amendment liberty interest is implicated when prisoner is transferred to institution with more severe rules. U.S.C.A.Const. Amend. 14.

1254 Cases that cite this headnote

[7] **Constitutional Law**

To hold that any substantial deprivation imposed by state prison authorities triggers procedural protections of due process clause would subject to judicial review wide spectrum of discretionary actions that traditionally have been business of prison administrators rather than of federal courts. U.S.C.A.Const. Amend. 14.

638 Cases that cite this headnote

[8] **Constitutional Law**
Transfer

Whatever expectation prisoner may have in remaining at particular prison so long as he behaves himself is too ephemeral and insubstantial to trigger procedural due process protection as long as prison officials have discretion to transfer him for whatever reason or for no reason at all. U.S.C.A.Const. Amend. 14.

595 Cases that cite this headnote

[9] **Prisons**

Federal courts do not sit to supervise state prisons, administration of which is of acute interest to the states.

119 Cases that cite this headnote

[10] **Constitutional Law**
Transfer

Due process clause of the Fourteenth Amendment did not entitle state prisoners to hearing when they were transferred to a prison the conditions of which were substantially less favorable to prisoners absent state law or practice conditioning such transfers on proof of serious misconduct oroccurrence of other events. U.S.C.A.Const. Amend. 14; M.G.L.A. c. 127 §§ 20, 97.

399 Cases that cite this headnote

**2534 Syllabus [*]

*215 The Due Process Clause of the Fourteenth Amendment Held not to entitle a duly convicted state prisoner to a factfinding hearing when he is transferred to a prison the conditions of which are substantially less favorable to him, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specified events. Such a transfer does not infringe or implicate a "liberty" interest of the prisoner within the meaning of the Due Process Clause. Pp. 2537-2540.

(a) Given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. P. 2538.

(b) The Due Process Clause does not in and of itself protect a duly convicted prisoner against transfer from one institution to another, and that life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules. P. 2538.

(c) To hold that Any substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide

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spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts. Wolff v. McDonnell, 418 **U.S**. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935, distinguished. Pp. 2538-2539.

(d) Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for any reason whatsoever or for no reason at all. Pp. 2539-2540.

520 F.2d 374, reversed.

Attorneys and Law Firms

***216** Michael C. Donahue, Boston, Mass., for petitioners.

Keith A. Jones, Washington, D.C., for United States, as amicus curiae, by special leave of Court.

Richard E. Shapiro, Boston, Mass., for respondents.

Opinion

Mr. Justice WHITE delivered the opinion of the Court.

The question here is whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other events. We hold that it does not.

I

During a 2 ½-month period in 1974, there were nine serious fires at the Massachusetts Correctional Institution at Norfolk a medium-security institution. Based primarily on reports from informants, the six respondent inmates were removed from the general prison population and placed in the Receiving Building, an administrative detention area used to process new inmates. Proceedings were then had before the Norfolk prison ***217** Classification Board with respect to whether respondents were to be transferred to another institution possibly a maximum-security institution, the living conditions at which are substantially less ****2535** favorable than those at Norfolk. Each respondent was notified of the classification hearing and was informed that the authorities had information indicating that he had engaged in criminal conduct. [1]

Individual classification hearings were held, each respondent being represented by counsel. Each hearing began by the reading of a prepared statement by the Classification Board. The Board then heard, *in camera* and out of the respondents' presence, the testimony of petitioner **Meachum**, the Norfolk prison superintendent, ***218** who repeated the information that had been received from informants. Each respondent was then told that the edence supported the allegations contained in the notice but was not then or ever given transcripts or summaries of **Meachum's** testimony before the Board. Each respondent was allowed to present evidence in his own behalf; and each denied involvement in the particular infraction being investigated. Some respondents submitted supportive testimony or written statements from correction officers. A social worker also testified in the presence of each respondent, furnishing the respondent's criminal and custodial record, including prior rule infractions, if any, and other aspects of his performance and "general adjustment" at Norfolk.

The Board recommended that Royce be placed in administrative segregation for 30 days; that **Fano**, Dussault, and McPhearson be transferred to Walpole, a maximum-security institution where the the living conditions are substantially less favorable to the prisoners than those at Norfolk and that DeBrosky and Hathaway be transferred to Bridgewater which has both maximum- and medium-security facilities. The reasons for its actions were stated in the Board's reports, [2] which, however, ***219** were not ****2536** then available to respondents. Although respondents were aware of the general import of the informants' allegations and were told that the recommendations ***220** drew upon informant sources, the details of this information were not revealed to respondents and are not included in the Board's reports which are part of the record before **us**.

***221** The Board's recommendations were reviewed by the Acting Deputy Commissioner for Classification and Treatment and by the Commissioner of Corrections on the basis of the written report prepared by the Board. They accepted the recommendations of the Board with respect to **Fano**, Dussault, Hathaway, and McPhearson. DeBrosky and Royce were ordered transferred to Walpole. [3] The transfers were carried out, ****2537** with two exceptions. [4] No respondent was subjected to disciplinary ***222** punishment upon arrival at the transfer prison. None of the

transfers ordered entailed loss of good time or disciplinary confinement. [5]

Meanwhile respondents had brought this action under 42 U.S.C. s 1983 against petitioners **Meachum**, the prison superintendent; Hall, the State Commissioner of Corrections; and Dawber, the Acting Deputy for Classification and Treatment, alleging that respondents were being deprived of liberty without due process of law in that petitioners had ordered them transferred to a less favorable institution without an adequate factfinding hearing. They sought an injunction setting aside the ordered transfer, declaratory relief, and damages.

The District Court understood Wolff v. McDonnell, 418 **U.S**. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), to entitle respondents to notice and hearing and held both constitutionally inadequate in this case. Respondents were ordered returned to the general prison population at Norfolk until transferred after proper notice and hearing. Petitioners were also ordered to promulgate regulations to establish procedures governing future transfer hearings involving informant testimony. A divided panel of the Court of Appeals affirmed, 520 F.2d 374, holding that the transfers from Norfolk to maximum-security institutions involved "a significant modification of the overall conditions of confinement" and that this change in circumstances was "serious enough to trigger the application of due process protections." Id., at 377-378. [6]

***223** We granted the prison officials' petition for writ of certiorari, 423 **U.S**. 1013, 96 S.Ct. 444, 46 L.Ed.2d 384 (1975), in order to determine whether the Constitution required petitioners to conduct a factfinding hearing in connection with the transfers in this case where state law does not condition the authority to transfer on the occurrence of specific acts of misconduct or other events and, if so, whether the hearings granted in ****2538** this case were adequate. In light of our resolution of the first issue, we do not reach the second.

II

[1] The Fourteenth Amendment prohibits any State from depriving a person of life, liberty, or property without due process of law. The initial inquiry is whether the transfer of respondents from Norfolk to Walpole and Bridgewater infringed or implicated a "liberty" interest ***224** of respondents within the meaning of the Due Process Clause. Contrary to the Court of Appeals, we hold that it did not. We reject at the outset the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause. In Board of Regents v. Roth, 408 **U.S**. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), a university professor was deprived of his job, a loss which was surely a matter of great substance, but because the professor had no property interest in his position, due process procedures were not required in connection with his dismissal. We there held that the determining factor is the nature of the interest involved rather than its weight. Id., at 570-571, 92 S.Ct., at 2705-06.

[2] **[3]** **[4]** Similarly, we cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause. The Due Process Clause by its own force forbids the State from convicting any person of crime and depriving him of his liberty without complying fully with the requirements of the Clause. But given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution. The Constitution does not require that the State have more than one prison for convicted felons; nor does it guarantee that the convicted prisoner will be placed in any particular prison, if, as is likely, the State has more than one correctional institution. The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty interest to empower the State to confine him in *any* of its prisons.

[5] **[6]** ***225** Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose. That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.

[7] Our cases hold that the convicted felon does not forfeit all constitutional protections by reason of his conviction and

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confinement in prison. He retains a variety of important rights that the courts must be alert to protect. See Wolff v. McDonnell, 418 **U.S**., at 556, 94 S.Ct., at 2974, and cases there cited. But none of these cases reaches this one; and to hold as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.

Transfers between institutions, for example, are made for a variety of reasons and often involve no more than informed predictions as to what would be best serve institutional security or the safety and welfare of the inmate. Yet under the approach urged here, any transfer, for whatever reason, would require a hearing as long as it could be said that the transfer ****2539** would place the prisoner in substantially more burdensome conditions that he had been experiencing. We are unwilling to go so far.

Wolff v. McDonnell, on which the Court of Appeals heavily relied, is not to the contrary. Under that case, the Due Process Clause entitles a state prisoner to certain ***226** procedural protections when he is deprived of good-time credits because of serious misconduct. But the liberty interest there identified dinot originate in the Constitution, which "itself does not guarantee good-time credit for satisfactory behavior while in prison." Id., at 557, 94 S.Ct., at 2975. The State itself, not the Constitution, had "not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior." Ibid. We concluded:

"(A) person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government, Dent v. West Virginia, 129 **U.S**. 114, 123, 9 S.Ct. 231, 233, 32 L.Ed. 623 (1889). Since prisoners in Nebraska can only lose good-time credits if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of procedural due process appropriate for the circumstances must be observed." Id., At 558, 94 S.Ct., at 2976.

The liberty interest protected in Wolff had its roots in state law, and the minimum procedures appropriated under the circumstances were held required by the Due Process Clause "to insure that the state-created right is not arbitrarily abrogated." Id., at 557, 94 S.Ct., at 2975. This is consistent with our approach in other due process cases such as Goss v. Lopez, 419 **U.S**. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); Board of Regents v. Roth, supra ; Perry v. Sindermann, 408 **U.S**. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Goldberg v. Kelly, 397 **U.S**. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct. Insofar as we are advised, transfers between Massachusetts prisons are not conditioned upon ***227** the occurrence of specified events. [7] On the contrary, transfer in a ****2540** wide variety of circumstances is vested in prison officials. The predicate for invoking the protection of the Fourteenth Amendment as construed and applied in *Wolff v. McDonnell* is totally nonexistt in this case.

***228** Even if Massachusetts has not represented that transfers will occur only on the occurrence of certain events, it is argued that charges of serious misbehavior, as in this case, often initiate and heavily influence the transfer decision and that because allegations of misconduct may be erroneous, hearings should be held before transfer to a more confining institution is to be suffered by the prisoner. That an inmate's conduct, in general or in specific instances, may often be a major factor in the decision of prison officials to transfer him is to be expected unless it be assumed that transfers are mindless events. A prisoner's past and anticipated future behavior will very likely be taken into account in selecting a prison in which he will be initially incarcerated or to which he will be transferred to best serve the State's penological goals.

[8] A prisoner's behavior may precipitate a transfer; and absent such behavior, perhaps transfer would not take place at all. But, as we have said, Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. As we understand it no legal interest or right of these respondents under Massachusetts law would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances. Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all.

[9] **[10]** Holding that arrangements like this are within reach of the procedural protections of the Due Process Clause

would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues ***229** and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is acute interest to the States. Preiser v. Rodriguez, 411 U.S. 475, 491-492, 93 S.Ct. 1827, 1837, 36 L.Ed.2d 439 (1973); Cruz v. Beto, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972); Johnson v. Avery, 393 U.S. 483, 486, 89 S.Ct. 747, 749, 21 L.Ed.2d 718 (1969). The individual States, of course, are free to follow another course, whether by statute, by rule or regulation, or by interpretation of their own constitutions. They may thus decide that prudent prison administration requires pretransfer hearings. Our holding is that the Due Process Clause does not impose a nationwide rule mandating transfer hearings. [8]

The judgment of the Court of Appeals accordingly is

Reversed.

Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

The Court's rationale is more disturbing than its narrow holding. If the Court had merely held that the transfer of a prisoner from one penal institution to another does not cause a sufficiently grievous loss to ****2541** amount to a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment, [1] ***230** I would disagree with the conclusion but not with the constitutional analysis. The Court's holding today, however, appears to rest on a conception of "liberty" which I consider fundamentally incorrect.

The Court indicates that a "liberty interest" may have either of two sources. According to the Court, a liberty interest may "originate in the Constitution," Supra, at 2539, or it may have "its roots in state law." Ibid. Apart from those two possible origins, the Court is unable to find that a person has a constitutionally protected interest in liberty.

If a man were a creature of the state, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.

A correct description of the source of the liberty protected by the Constitution does not, of course, decide this case. For, by hypothesis, we are dealing with persons who may be deprived of their liberty because they have been convicted of criminal conduct after a fair trial. We should therefore first ask whether the deprivation of liberty which follows conviction is total or partial.

***231** At one time the prevailing view was that deprivation was essentially total. The penitentiary inmate was considered "the slave of the State." See Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). Although the wording of the Thirteenth Amendment provided some support for that point of view, [2] "courts in recent years have moderated the harsh implications of the Thirteenth Amendment." [3]

The moderating trend culminated in this Court's landmark holding that notwithstanding the conditions of legal custody pursuant to a criminal conviction, a parolee has a measure of liberty that is entitled to constitutional protection.

"We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal." Morrissey v. Brewer, 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484.

Although the Court's opinion was narrowly written with careful emphasis on the permission given to the parolee to live outside the prison walls, the Court necessarily ***232** held that the individual possesses a residuum of constitutionally protected liberty while in legal custody pursuant to a valid ****2542** conviction. For release on pare is

merely conditional, and it does not interrupt the State's legal custody. I remain convinced that the Court of Appeals for the Seventh Circuit correctly analyzed the true significance of the *Morrissey* holding, when I wrote for that court in 1973:

"In view of the fact that physical confinement is merely one species of legal custody, we are persuaded that *Morrissey* actually portends a more basic conceptual holding: liberty protected by the due process clause may indeed must to some extent coexist with legal custody pursuant to conviction. The deprivation of liberty following an adjudication of guilt is partial, not total. A residuum of constitutionally protected rights remains.

"As we noted in Morales v. Schmidt, the view once held that an inmate is a mere slave is now totally rejected. The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. [21] 'Liberty' and 'custody' are not mutually exclusive concepts.

***233** "If the *Morrissey* Decision is not narrowly limited by the distinction between physical confinement and conditional liberty to live at large in society, [22] it requires that due process precede any substantial deprivation of the liberty of persons in custody. We believe a due regard for the interests of the individual inmate, as well as the interests of that substantial segment of our total society represented by inmates, [23] requires that *Morrissey* be so read." United States ex rel. Miller v. Twomey, 479 F.2d 701, 712-713.

It demeans the holding in *Morrissey* more importantly it demeans the concept of liberty itself to ascribe to that holding nothing more than a protection of an interest that the State has created through its own prison regulations. For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty at the very minimum the right to be treated with dignity which the Constitution may never ignore.

***234** This basic premise is not se is not inconsistent with recognition of the obvious fact that the State must have wide latitude in determining the conditions of confinement that will be imposed following conviction of crime. To supervise and control its prison population, the State must retain the power to change the conditions for individuals, or for groups of prisoners, quickly and without judicial review. In many respects the State's problems in governing its inmate population are comparable to those encountered in governing a military force. Prompt and unquestioning obedience by the ****2543** individual, even to commands he does not understand, may be essential to the preservation of order and discipline. Nevertheless, within the limits imposed by the basic restraints governing the controlled population, each individual retains his dignity and, in time, acquires a status that is entitled to respect.

Imprisonment is intended to accomplish more than the temporary removal of the the offender from society in order to prevent him from committing like offenses during the period of his incarceration. While custody denies the inmate the opportunity to offend, it also gives him an opportunity to improve himself and to acquire skills and habits that will help him to participate in an open society after his release. Within the prison community, if my basic hypothesis is correct, he has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society. It is unquestionably within the power of the State to change that status, abruptly and adversely; but if the change is sufficiently grievous, it may not be imposed arbitrarily. In such case due process must be afforded.

That does not mean, of course, that every adversity amounts to a deprivation within the meaning of the ***235** Fourteenth Amendment. [4] There must be grievous loss, and that term itself is somewhat flexible. I woulcertainly not consider every transfer within a prison system, even to more onerous conditions of confinement, such a loss. On the other hand, I am unable to identify a principled basis for differentiating between a transfer from the general prison population to solitary confinement and a transfer involving equally disparate conditions between one physical facility and another.

In view of the Court's basic holding, I merely note that I agree with the Court of Appeals that the transfer involved in this case was sufficiently serious to invoke the protection of the Constitution. [5]

I respectfully dissent.

All Citations

427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Respondents Fano, DeBrosky, and Dussault received the following notice:

"The department has received information through a reliable source that you were in possession of instruments that might be used as weapons and/or ammunition and that you had joined in plans to use these contraband items.

"These items and plans occurred during the period of serious unrest at MCI, Norfolk which included many fires that posed a significant threat to lives of persons at MCI, Norfolk as well as serious property damage."

Respondents Hathaway and McPhearson received the following notice:

"The department has received information through reliable sources that you were significantly involved in the planning and execution of one or more of the serious fires occurring within MCI, Norfolk in the past few weeks. These fires caused considerable property damage and posed a very real threat to personal safety."

Respondent Royce received the following notice:

"The department has received information through a reliable source that you were involved in the trafficking of contraband in MCI, Norfolk (narcotics, barbiturates and/or amphetamines).

"This occurred during a period of serious unrest at MCI, Norfolk which included many fires, that posed a significant threat to the lives of persons at MCI, Norfolk as well as serious property damage."

2 With respect to Dussault, the Board recorded:

"*Reasons for decision*:

"1. The 'reliable sources' were deemed acceptable as reliable because they had produced truthful and verifiable information prior to incidents, which were then avoided and serious harm prevented.

"2. Mr. Dussault has not made significant use of program facilities at MCI Norfolk. He has, in effect only been doing time.

"*To Mr. Dussault & Attorney:*

"There is sufficient & significant information that has been made available to the committee that indicates to us that you have placed yourself in a situation at MCI Norfolk so that adequate programming cannot be provided at this time."

The Board's statement of reasons for its decision with respect to Fano was:

"1. The inclosed summary of informant information was considered. The sources are considered quite reliable in this case and tend to corroborate each other. In addition, the number of times the subject was named in conjunction with the unrest at Norfolk adds weight in the judgment of this board to the reliability of this information.

"2. The seriousness of his involvements were considered extreme. The danger posed by weapons and materials used for violence weighs very heavily against remaining in this population. In addition, the type of involvement of this man as an organizer, leader and (e)nforcer was considered detrimental to the institution, and prohibitive to rehabilitative programming at MCI Norfolk at this time."

Similarly, with respect to McPhearson:

"*Basis for Recommendation*:

"1. Informant Information was judged sufficient in detail and reliability to be weighed seriously in the board(')s decision making. The information regarding the subject's attitude and motivation seemed adequately supported by the man's record and his attitude before the board. (He stated he had never received fair treatment at classification.) The reliability of the information was judged as quite reliable in that it came from three sources. When asked, Mr. Meachum provided details of the course of events on the night of Oct. 13th which substantiated in general terms the informant information presented (see attached letter).

"2. The sources themselves were considered reliable, especially in cases of sources C and D. (See attached statement concerning reliability of sources.)"

With respect to Hathaway, the Board stated:

"*Basis for Decision*:

"1. When Mr. Hathaway was questioned during interview re: the charges expressed on notice of Classification hearing 'serious fires occurring with MCI Norfolk . . . ,' he immediately went into long discussion of two specific fires denying his (guilt) Although he was not privy to informant information, and could not have known specifics that these were the two mentioned in the charges. The more he talked, the more he appeared involved.

"2. The 'reliable sources' were deemed acceptable as reliable because they had produced truthful information prior to incidents that were then avoided and serious harm prevented.

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"3. Mr. Hathaway, other than avocation has not made sufficiently of available programs at MCI Norfolk that might benefit him.

"*Decision as Presented to Mr. Hathaway*:

"The committee feels that you should be removed from this environment and associates and the current situation at MCI Norfolk. Because of this, the recommendation will be to MCI Bridgewater. There are programs, such as AA which will be available to you. There is also a new avocational center in which you can become active. It is a Medium Security institution, and this committee has tried to listen when you've said 'Trust me' Give me a chance. . . .'

"Mr. Stolzberger requested that his client be allowed to return to population to empty room and sell Avo equipment. Denied.

"A counter suggestion was made that he work with Mr. Jackson, social worker to accomplish these ends. Mr. Hathaway accepted."

The explanation as to Royce was:

"—*Basis for Recommendation*:

"1. Informant information was presented by Mr. Larry **Meachum**, Supt of MCI Norfolk, prior to the hearing. Although several sources contributed to the presenting information, the committee felt that the sources had not been proved reliable enough to become a decisive factor, indicating transfer. Both Mr. **Meachum's** report & Source reliability report to follow elsewhere in this report.

"2. Although Mr. Royce had an additional disciplinary report (see D reports 2-3). It was felt by the committee to be of serious emotional instability rather than resorting to earlier behavior of absolute violence.

"3. Mr. Royce appears to be making an effort to get himself together with help. His good relationship with Mrs. Lowenstein and Mr. Jackson has been supportive of these efforts. His indicated interest in poetry, avocation, and school would also reaffirm his intent for self improvement."

As to Debrosky, the record shows only:

"*Basis for Recommendation*:

"Summary of Informant Information and Conclusions:

"*Informant Information Excised.*"

3 The Commissioner's action was reported to DeBrosky's attorney as follows:

"As you are aware, the recommendation of the Board was for placement at MCI-Bridgewater. However, after a thorough review of the facts, with considerable concern being given to the intelligence information that connected Mr. DeBrosky with involvement with a weapon, the Commissioner has decided to place Mr. DeBrosky at MCI-Walpole. The intelligence information referred to above was judged to be reliable. Your request that the subject be placed back into the population at MCI-Norfolk is being denied."

The Commissioner also explained his action with respect to Royce:

"Upon careful examination of all related materials and information, I have reached the following decision:

"Placement: MCI, Walpole.

"Reasons: I disagree with the recommendation of the Board and I am assigning you to MCI, Walpole because I feel that you have demonstrated that you are unwilling and/or unable to accept the responsibility that is commensurate with assignment to MCI, Norfolk, a medium security facility. Your actions of Nov. 1, 1974 whereby you destroyed state property and displayed disrespect to a Correctional Officer have played a part in this decision."

4 At the time of the District Court hearing, DeBrosky was hospitalized at Norfolk, and Hathaway had not yet been transferred.

5 In addition to notice of the classification hearing, each respondent had been furnished with a copy of a disciplinary report specifying the instances of alleged misconduct. Under the applicable regulation, however, disciplinary proceedings were not held because the alleged misconduct had been referred to the local district attorney for investigation and action.

6 The Court of Appeals did not distinguish between disciplinary and administrative transfers:

"We attach no significance for present purposes to the fact that these proceedings were for 'classification' rather than 'discipline.' Defendants assert that 'there are in the instant case as many administrative overtones as disciplinary ones,' but we have already indicated that in our view the motive of prison officials, as such, is not properly a part of the due process calculus. Gomes v. Travisono, 510 F.2d 537, 541 (1st Cir. 1974). Whether the transfer is thought of as punishment or as a way of preserving institutional order, the effects on the inmate are the same and the appropriateness of the action depends upon the accuracy of the official allegation of misconduct." 520 F.2d, at 376 n. 2.

See also Gomes v. Travisono, 510 F.2d 537 (CA 1 1974) modifying and affirming, 490 F.2d 1209 (1973).

Other Courts of Appeals, including the Court of Appeals for the Second Circuit, see Montanye v. Haymes, **427 U.S**. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466, have held that minimum procedures must accompany only disciplinary transfers. Aikens

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v. Lash, 514 F.2d 55 (C.A.7 1975); Carroll v. Sielaff, 514 F.2d 415 (C.A.7 1975); Ault v. Holmes, 506 F.2d 288 (C.A.6 1974); Stone v. Egeler, 506 F.2d 287 (C.A.6 1974). See also Bryant v. Hardy, 488 F.2d 72 (C.A.4 1973). Still others have indicated that transfers of inmates do not call for due process hearings. Gray v. Creamer, 465 F.2d 179, 187 (C.A.3 1972); Hillen v. Director, 455 F.2d 510 (C.A.9 1972); cf. Fajeriak v. McGinnis, 493 F.2d 468 (C.A.9 1974).

7 At the time the transfers in this case occurred, Massachusetts General Laws Annotated, c. 127, ss 20 and 97 (1974) provided as follows:

"s 20. Classification of prisoners; approval

"There shall be established by the commissioner, with the approval of the governor and council, a reception center for all male prisoners, except those sentenced to the Massachusetts Correctional Institution, Bridgewater. Any male convict who is sentenced to any correctional institution of the commonwealth, except the Massachusetts Correctional Institution, Bridgewater, shall be delivered by the sheriff or other officer authorized to execute sentence to said center for the purpose of proper classification of the prisoner. Classification of female prisoners shall be made at the Massachusetts Correctional Institution, Framingham, under the supervision of the deputy commissioner for classification and treatment.

"The deputy commissioner for classification and treatment, under the general supervision of the commissioner, shall direct the professional staff assigned to said reception center, and shall be responsible for grading and classifying all prisoners sentenced to any of the correctional institutions of the commonwealth, and shall in addition have general charge of the reception center."

"s 97. Transfers from and to correctional institutions; approval

"The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth."

8 Nor do we think the situation is substantially different because a record will be made of the transfer and the reasons which underlay it, thus perhaps affecting the future conditions of confinement, including the possibilities of parole. The granting of parole has itself not yet been deemed a function to which due process requirements are applicable. See Scott v. Kentucky Parole Board, No. 74-6438, cert. granted, 423 **U.S**. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975). If such holding eventuates, it will be time enough to consider respondents' contentions that there is unfounded information contained in their files.

1 "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S.Const., Amdt. 14, s 1.

2 Section 1 provides: "Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted,* shall exist within the United States, or any place subject to their jurisdiction." U.S.Const., Amdt. 13, s 1 (emphasis added).

3 Morales v. Schmidt, 489 F.2d 1335, 1338 (C.A.7 1973), modified on rehearing en banc, 494 F.2d 85 (1974).

21 "In his dissenting opinion in Morrissey v. Brewer, Circuit Judge Lay quoted the following excerpt from the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 83 (1967) (hereinafter cited as Task Force Report):

"A first tenet of our governmental, religious, and ethical tradition is the intrinsic worth of every individual, no matter how degenerate. It is a radical departure from that tradition to subject a defined class of persons, even criminals, to a regime in which their right to liberty is determined by officials wholly unaccountable in the exercise of their power. . . ." 443 F.2d (942), at 952 no. 1.

22 "See Task Force Report, at 6-12. See especially the discussion of " Blurring Lines Between Institution and Community," at 10-11.

23 "A substantial portion of our population is affected by the law in this area. Approximately 1.3 million people are at any one time subject to correctional authority; untold millions have criminal records. There is increasing doubt as to the propriety of treating this large group of persons as, in varying degrees, outcasts from society. And there is increasing recognition that such treatment is not in the ultimate interests of society. Denying offenders any chance to challenge arbitrary assertions of power by correctional officials, and barring them from legitimate opportunities such as employment, are inconsistent with the correctional goal of rehabilitation, which emphasizes the need to instill respect for and willingness to cooperate with society and to help the offender assume the role of a normal citizen." Task Force Report at 82."

4 "This does not mean, however, that every decision by prison officials should be subject to judicial review or that the courts rather than experienced administrators should write prison regulations. Morrissey Reminds **us** that due process is a

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flexible concept which takes account of the importance of the interests at stake; thus, it is abundantly clear that a myriad of problems of prison administration must remain beyond the scope of proper judicial concern. Only significant deprivations of liberty raise constitutional issues under Morrissey. Moreover, in determining whether to require due process, we need not choose between the 'full panoply' of rights accorded a defendant in a criminal prosecution, on the one hand, and no safeguards whatsoever, on the other. Rather, as Morrissey Aptly illustrates, the requirements of due process may be shaped to fit the needs of a particular situation." United States ex rel. Miller v. Twomey, 479 F.2d, at 713.

5 There is no question that respondents in this case suffered loss because of the transfer. Hathaway lost his laundry business a source of income which he had been running at Norfolk; Dussault lost his job as a plumber, in which he had been performing "a difficult job especially well"; Royce was separated from counselors with whom he had a "good relationship" which had helped him in his effort "to get himself together." These losses were in addition to the generally more restrictive conditions inherent in a maximum-security institution as compared to a medium-security institution.

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Abrogation Recognized by Jordan v. Fisher, 5th Cir.(Miss.), February 10, 2016

103 S.Ct. 1741
Supreme Court of the United States

Antone **OLIM**, et al., Petitioners
v.
Delbert Kaahanui **WAKINEKONA**.

No. 81–1581.
|
Argued Jan. 19, **1983**.
|
Decided April 26, **1983**.

Synopsis

Hawaii prisoner, who had been transferred to prison in California, brought action on claim of denial of due process rights arising out of reclassification proceedings. The United States District Court for the District of Hawaii, 459 F.Supp. 473, Dick Yin Wong, J., dismissed the complaint, and prisoner appealed. The Court of Appeals for the Ninth Circuit, 664 F.2d 708, reversed and remanded. Certiorari was granted. The Supreme Court, Justice Blackmun, held that: (1) the interstate prison transfer did not deprive the inmate of any liberty interest protected by the due process clause in and of itself, even though the transfer covered a substantial distance, and (2) Hawaii's prison regulations did not create a constitutionally protected liberty interest.

Reversed.

Justice Marshall filed a dissenting opinion in which Justice Brennan joined and in which Justice Stevens joined in part.

West Headnotes (10)

[1] Prisons
Inter-System Issues

Just as inmate has no justifiable expectation that he will be incarcerated in any particular prison within any state, he has no justifiable expectation that he will be incarcerated in any particular state. U.S.C.A. Const.Amend. 14.

814 Cases that cite this headnote

[2] Prisons
Interstate and State-Federal Transfer

Given statutes and interstate agreements which recognize that, from time to time, it is necessary to transfer inmate to prison in other states, it is neither unreasonable nor unusual for inmate to serve practically his entire sentence in a state other than the one in which he was convicted and sentenced, or to be transferred to out-of-state prison after serving portion of his sentence in his home state. 18 U.S.C.A. §§ 4002, 5003(a); U.S.C.A. Const.Amend. 14.

110 Cases that cite this headnote

[3] Prisons
Inter-System Issues

Confinement in another state, unlike confinement in a mental institution, is within the normal limits or range of custody which a conviction has authorized state to impose. U.S.C.A. Const.Amend. 14.

185 Cases that cite this headnote

[4] Prisons
Interstate and State-Federal Transfer

Even when interstate prison transfer involves long distances and an ocean crossing, confinement remains within constitutional limits. U.S.C.A. Const.Amend. 14.

53 Cases that cite this headnote

[5] Constitutional Law
Transfer

Interstate prison transfer, including one from Hawaii to California, does not deprive inmate of any liberty interest protected by due process clause in and of itself. U.S.C.A. Const.Amend. 14.

1489 Cases that cite this headnote

[6] **Constitutional Law**
Imprisonment and Incidents Thereof

Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under due process clause. U.S.C.A. Const.Amend. 14.

1497 Cases that cite this headnote

[7] **Prisons**
Particular Issues and Applications

Where Hawaii prison regulations prescribed no substantive standards to guide committee whose task it was to advise administrator in deciding whether to transfer inmate, no significance attached to fact that prison regulations required a particular kind of hearing before administrator could exercise his unfettered discretion. U.S.C.A. Const.Amend. 14.

117 Cases that cite this headnote

[8] **Constitutional Law**
Rights, Interests, Benefits, or Privileges Involved in General

Process is not an end in itself, its constitutional purpose is to protect substantive interest to which individual has legitimate claim of entitlement. U.S.C.A. Const.Amend. 14.

439 Cases that cite this headnote

[9] **Constitutional Law**
Transfer

If prison officials may transfer prisoner for whatever reason or for no reason at all, there is no substantive interest for process to protect. U.S.C.A. Const.Amend. 14.

311 Cases that cite this headnote

[10] **Prisons**
Transfer

Although state may choose to require procedures governing transfers of prisoners for reasons other than protection against deprivation of substantive rights, in making that choice state does not create independent substantive right. U.S.C.A. Const.Amend. 14.

341 Cases that cite this headnote

****1742** *Syllabus* [*]

***238** Petitioner members of a prison "Program Committee," after investigating a breakdown in discipline and the failure of certain programs within the maximum control unit of the Hawaii State Prison outside Honolulu, singled out respondent and another inmate as troublemakers. After a hearing—respondent having been notified thereof and having retained counsel to represent him—the same Committee recommended that respondent's classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. Petitioner administrator of the Hawaii prison accepted the Committee's recommendation, and respondent was transferred to a California state prison. Respondent then filed suit against petitioners in Federal District Court, alleging that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing, contrary to a Hawaii prison regulation, and because the Committee was biased against him. The District Court dismissed the complaint, holding that the Hawaii regulations governing prison transfers did not create a substantive liberty interest protected by the Due Process Clause of the Fourteenth Amendment. The Court of Appeals reversed.

Held:

1. An interstate prison transfer does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself. Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State so as to implicate the Due Process Clause directly when an intrastate prison transfer is made, *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451; *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466, he has no justifiable expectation that he will be incarcerated in any particular State. Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States. Confinement in another State is within the normal limits or range of custody which the conviction has authorized the transferring State to impose. Even when, as here, the

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transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. Pp. 1745–1747.

2. Nor do Hawaii's prison regulations create a constitutionally protected liberty interest. Although a State creates a protected liberty interest ***239** by placing substantive limitations on official discretion, Hawaii's prison regulations place no substantive limitations on the prison administrator's discretion to transfer an inmate. For that matter, the regulations prescribe no substantive standards to guide the Program Committee whose task is to advise the administrator. Thus no significance attaches to the fact that the prison regulations require a particular kind of hearing before the administrator can exercise his unfettered discretion. Pp. 1747–1748.

664 F.2d 708 (CA9 1981), reversed.

Attorneys and Law Firms

Michael A. Lilly, First Deputy Attorney General of Hawaii, argued the cause for petitioners. With him on the brief was *James H. Dannenberg,* Deputy Attorney General.

Robert Gilbert Johnston argued the cause for respondent. With him on the brief was *Clayton C. Ikei.**

* Briefs of *amici curiae* urging reversal were filed for the State of Alaska et al. by *Paul L. Douglas,* Attorney General of Nebraska, *J. Kirk Brown,* Assistant Attorney General, *Judith W. Rogers,* Corporation Counsel of the District of Columbia, and the Attorneys General for their respective jurisdictions as follows: *Wilson L. Condon* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Jim Smith* of Florida, *David H. Leroy* of Idaho, *William J. Guste, Jr.,* of Louisiana, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Richard H. Bryan* of Nevada, *Irwin I. Kimmelman* of New Jersey, *Jeff Bingaman* of New Mexico, *Rufus L. Edmisten* of North Carolina, *Robert Wefald* of North Dakota, *William J. Brown* of Ohio, *Dennis J. Roberts II* of Rhode Island, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.,* of Tennessee, *John J. Easton* of Vermont, *Gerald L. Baliles* of Virginia, *Kenneth O. Eikenberry* of Washington, *Chauncey H. Browning* of West Virginia, *Bronson C. La Follette* of Wisconsin, and *Steven F. Freudenthal* of Wyoming; and for the Commonwealth of Massachusetts et al. by *Francis X. Bellotti,* Attorney General of Massachusetts, *Stephen R. Delinsky, Barbara A.H. Smith,* and *Leo J. Cushing,* Assistant Attorneys General, *Anthony Ching,* Solicitor General of Arizona, and the Attorneys General for their respective jurisdictions as follows: *Wilson L. Condon* of Alaska, *Aviata F. Fa'alevao* of American Samoa, *Robert K. Corbin* of Arizona, *Jim Smith* of Florida, *David H. Leroy* of Idaho, *William A. Allain* of Mississippi, *Michael T. Greely* of Montana, *Irwin I. Kimmelman* of New Jersey, *Jeff Bingaman* of New Mexico, *Rufus L. Edmisten* of North Carolina, *Robert O. Wefald* of North Dakota, *William J. Brown* of Ohio, *Dennis J. Roberts II* of Rhode Island, *Mark V. Meierhenry* of South Dakota, *William M. Leech, Jr.,* of Tennessee, *John J. Easton* of Vermont, *Chauncey H. Browning* of West Virginia, and *Bronson C. La Follette* of Wisconsin.

Opinion

***240** Justice BLACKMUN delivered the opinion of the Court.

The issue in this case is whether the transfer of a prisoner from a state prison ****1743** in Hawaii to one in California implicates a liberty interest within the meaning of the Due Process Clause of the Fourteenth Amendment.

I

A

Respondent Delbert Kaahanui **Wakinekona** is serving a sentence of life imprisonment without the possibility of parole as a result of his murder conviction in a Hawaii state court. He also is serving sentences for various other crimes, including rape, robbery, and escape. At the Hawaii State Prison outside Honolulu, respondent was classified as a maximum security risk and placed in the maximum control unit.

Petitioner Antone **Olim** is the administrator of the Hawaii State Prison. The other petitioners constituted a prison "Program Committee." On August 2, 1976, the Committee held hearings to determine the reasons for a breakdown in discipline and the failure of certain programs within the prison's maximum control unit. Inmates of the unit appeared at these hearings. The Committee singled out respondent and another inmate as troublemakers. On August 5, respondent received notice that the Committee, at a hearing to be held on August 10, would review his correctional program to determine whether his classification within the system should be changed and whether he should be transferred to another Hawaii facility or to a mainland institution.

***241** The August 10 hearing was conducted by the same persons who had presided over the hearings on August 2. Respondent retained counsel to represent him. The Committee recommended that respondent's classification as a maximum security risk be continued and that he be transferred to a prison on the mainland. He received the following explanation from the Committee:

> "The Program Committee, having reviewed your entire file, your testimony and arguments by your counsel, concluded that your control classification remains at Maximum. You are still considered a security risk in view of your escapes and subsequent convictions for serious felonies. The Committee noted the progress you made in vocational training and your expressed desire to continue in this endeavor. However your relationship with staff, who reported that you threaten and intimidate them, raises grave concerns regarding your potential for further disruptive and violent behavior. Since there is no other Maximum security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at [the maximum control unit] because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland." App. 7–8.

Petitioner **Olim**, as administrator, accepted the Committee's recommendation, and a few days later respondent was transferred to Folsom State Prison in California.

B

Rule IV of the Supplementary Rules and Regulations of the Corrections Division, Department of Social Services and Housing, State of Hawaii, approved in June 1976, recites that the inmate classification process is not concerned with punishment. Rather, it is intended to promote the best interests ***242** of the inmate, the State, and the prison community. [1] Paragraph 3 of Rule ****1744** IV requires a hearing prior to a prison transfer involving "a grievous loss to the inmate," which the Rule defines "generally" as "a serious loss to a reasonable man." App. 21. [2] The administrator, under ¶ 2 of the Rule, is required to establish "an impartial Program Committee" to conduct such a hearing, the Committee to be "composed of at least three members who were not actively involved in the process by which the inmate ... was brought before the Committee." App. 20. Under ¶ 3, the Committee must give the inmate written notice of the hearing, permit him, with certain stated exceptions, to confront and cross-examine witnesses, afford him an opportunity to be heard, and apprise him of the Committee's findings. App. 21–24. [3]

The Committee is directed to make a recommendation to the administrator, who then decides what action to take:

> "[The administrator] may, as the final decisionmaker:
>
> "(a) Affirm or reverse, in whole or in part, the recommendation; or
>
> "(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate ***243** ..., other inmates ..., institution, or community and refer the matter back to the Program Committee for further study and recommendation." Rule IV, ¶ 3d(3), App. 24.

The regulations contain no standards governing the administrator's exercise of his discretion. See *Lono v. Ariyoshi,* 63 Haw. 138, 144–145, 621 P.2d 976, 980–981 (1981).

C

Respondent filed suit under 42 U.S.C. § **1983** against petitioners as the state officials who caused his transfer. He alleged that he had been denied procedural due process because the Committee that recommended his transfer consisted of the same persons who had initiated the hearing, this being in specific violation of Rule IV, ¶ 2, and because the Committee was biased against him. The United States District Court for the District of Hawaii dismissed the complaint, holding that the Hawaii regulations governing prison transfers do not create a substantive liberty interest protected by the Due Process Clause. 459 F.Supp. 473 (1978). [4]

The United States Court of Appeals for the Ninth Circuit, by a divided vote, reversed. 664 F.2d 708 (1981). It held that Hawaii had created a constitutionally protected liberty interest by promulgating Rule IV. In so doing, the court declined to follow cases from other Courts of Appeals holding that certain procedures mandated by prison transfer regulations do not create a liberty interest. See, *e.g., Cofone v. Manson,* 594 F.2d 934 (CA2 1979); *Lombardo v. Meachum,* 548 F.2d 13 (CA1 1977). The court reasoned that Rule IV gives Hawaii prisoners a justifiable expectation that they will not be transferred to the mainland absent a hearing, before an impartial committee, concerning the facts alleged in the

***244** pre-hearing notice.[5] Because ****1745** the Court of Appeals' decision created a conflict among the circuits, and because the case presents the further question whether the Due Process Clause in and of itself protects against interstate prison transfers, we granted certiorari. 456 U.S. 1005, 102 S.Ct. 2294, 73 L.Ed.2d 1299 (1982).

II

In *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), and *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976), this Court held that an *intrastate* prison transfer does not directly implicate the Due Process Clause of the Fourteenth Amendment. In *Meachum,* inmates at a Massachusetts medium security prison had been transferred to a maximum security prison in that Commonwealth. In *Montanye,* a companion case, an inmate had been transferred from one maximum security New York prison to another as punishment for a breach of prison rules. This Court rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum,* 427 U.S., at 224, 96 S.Ct., at 2538 (emphasis in original). It went on to state:

> "The initial decision to assign the convict to a particular institution is not subject to audit under the Due Process Clause, although the degree of confinement in one prison may be quite different from that in another. The conviction has sufficiently extinguished the defendant's liberty ***245** interest to empower the State to confine him in *any* of its prisons.
>
> "Neither, in our view, does the Due Process Clause in and of itself protect a duly convicted prisoner against transfer from one institution to another within the state prison system. Confinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Id.,* at 224–225, 96 S.Ct., at 2538 (emphasis in original).

The Court observed that, although prisoners retain a residuum of liberty, see *Wolff v. McDonnell,* 418 U.S. 539, 555–556, 94 S.Ct. 2963, 2974–75, 41 L.Ed.2d 935 (1974), a holding that "*any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts." 427 U.S., at 225, 96 S.Ct., at 2538 (emphasis in original).

Applying the *Meachum* and *Montanye* principles in *Vitek v. Jones,* 445 U.S. 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980), this Court held that the transfer of an inmate from a prison to a mental hospital did implicate a liberty interest. Placement in the mental hospital was "not within the range of conditions of confinement to which a prison sentence subjects an individual," because it brought about "consequences ... qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Id.,* at 493, 100 S.Ct., at 1264. Respondent argues that the same is true of confinement of a Hawaii prisoner on the mainland, and that *Vitek* therefore controls.

[1] We do not agree. Just as an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a State, he has no justifiable expectation that he will be incarcerated in any particular State.[6] Often, confinement ***246** in the inmate's home State will not be possible. ****1746** A person convicted of a federal crime in a State without a federal correctional facility usually will serve his sentence in another State. Overcrowding and the need to separate particular prisoners may necessitate interstate transfers. For any number of reasons, a State may lack prison facilities capable of providing appropriate correctional programs for all offenders.

[2] Statutes and interstate agreements recognize that, from time to time, it is necessary to transfer inmates to prisons in other States. On the federal level, 18 U.S.C. § 5003(a) authorizes the Attorney General to contract with a State for the transfer of a state prisoner to a federal prison, whether in that State or another. See *Howe v. Smith,* 452 U.S. 473, 101 S.Ct. 2468, 69 L.Ed.2d 171 (1981).[7] Title 18 U.S.C. § 4002 (1976 ed. and Supp. V) permits the Attorney General to contract with any State for the placement of a federal prisoner in state custody for up to three years. Neither statute requires that the prisoner remain in the State in which he was convicted and sentenced.

On the state level, many States have statutes providing for the transfer of a state prisoner to a federal prison, *e.g.,* Haw.Rev.Stat. § 353–18 (1976), or another State's prison, *e.g.,* Alaska Stat.Ann. § 33.30.100 (1982). Corrections compacts between States, implemented by statutes, authorize incarceration of a prisoner of one State in another State's prison. See, *e.g.,* Cal.Penal Code Ann. § 11189 (West

1982) (codifying Interstate Corrections Compact); § 11190 (codifying Western Interstate Corrections Compact); ***247** Conn.Gen.Stat. § 18–102 (1981) (codifying New England Interstate Corrections Compact); § 18–106 (codifying Interstate Corrections Compact); Haw.Rev.Stat. § 355–1 (1976) (codifying Western Interstate Corrections Compact); Idaho Code § 20–701 (1979) (codifying Interstate Corrections Compact); Ky.Rev.Stat. § 196.610 (1982) (same). And prison regulations such as Hawaii's Rule IV anticipate that inmates sometimes will be transferred to prisons in other States.

[3] **[4]** **[5]** In short, it is neither unreasonable nor unusual for an inmate to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced, or to be transferred to an out-of-state prison after serving a portion of his sentence in his home State. Confinement in another State, unlike confinement in a mental institution, is "within the normal limits or range of custody which the conviction has authorized the State to impose." *Meachum,* 427 U.S., at 225, 96 S.Ct., at 2538. [8] Even when, as here, the transfer involves long distances and an ocean crossing, the confinement remains within constitutional limits. The difference between such a transfer and an intrastate or interstate transfer of ***248** shorter ****1747** distance is a matter of degree, not of kind, [9] and *Meachum* instructs that "the determining factor is the nature of the interest involved rather than its weight." 427 U.S., at 224, 96 S.Ct., at 2538. The reasoning of *Meachum* and *Montanye* compels the conclusion that an interstate prison transfer, including one from Hawaii to California, does not deprive an inmate of any liberty interest protected by the Due Process Clause in and of itself.

III

The Court of Appeals held that Hawaii's prison regulations create a constitutionally protected liberty interest. In *Meachum,* however, the State had "conferred no right on the ***249** prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct," 427 U.S., at 226, 96 S.Ct., at 2539, and "ha[d] not represented that transfers [would] occur only on the occurrence of certain events," *id.,* at 228, 96 S.Ct., at 2540. Because the State had retained "discretion to transfer [the prisoner] for whatever reason or for no reason at all," *ibid.,* the Court found that the State had not created a constitutionally protected liberty interest. Similarly, because the state law at issue in *Montanye* "impose[d] no conditions on the discretionary power to transfer," 427 U.S., at 243, 96 S.Ct., at 2547, there was no basis for invoking the protections of the Due Process Clause.

These cases demonstrate that a State creates a protected liberty interest by placing substantive limitations on official discretion. An inmate must show "that particularized standards or criteria guide the State's decisionmakers." *Connecticut Board of Pardons v. Dumschat,* 452 U.S. 458, 467, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981) (BRENNAN, J., concurring). If the decisionmaker is not "required to base its decisions on objective and defined criteria," but instead "can deny the requested relief for any constitutionally permissible reason or for no reason at all," *ibid.,* the State has not created a constitutionally protected liberty interest. See *id.,* at 466–467, 101 S.Ct., at 2465 (opinion of the Court); see also *Vitek v. Jones,* 445 U.S., at 488–491, 100 S.Ct., at 1261–62 (summarizing cases).

[6] **[7]** **[8]** **[9]** **[10]** Hawaii's prison regulations place no substantive limitations on official discretion and thus create no liberty interest entitled to protection under the Due Process Clause. As Rule IV itself makes clear, and as the Supreme Court of Hawaii has held in *Lono v. Ariyoshi,* 63 Haw. 138, 144–145, 621 P.2d 976, 980–981 (1981), the prison administrator's discretion to transfer an inmate is completely unfettered. No standards ****1748** govern or restrict the administrator's determination. Because the administrator is the only decisionmaker under Rule IV, we need not decide whether the introductory paragraph ***250** of Rule IV, see n. 1, *supra,* places any substantive limitations on the purely advisory Program Committee. [10]

The Court of Appeals thus erred in attributing significance to the fact that the prison regulations require a particular kind of hearing before the administrator can exercise his unfettered discretion. [11] As the United States Court of Appeals for the Seventh Circuit recently stated in *Shango v. Jurich,* 681 F.2d 1091, 1100–1101 (1982), "[a] liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality." [12] Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. See generally Simon, Liberty and Property in the Supreme Court: A Defense of *Roth* and *Perry,* 71 Calif.L.Rev. 146, 186 (1983). If officials may transfer a prisoner "for whatever reason or for no reason at all," *Meachum,* 427 U.S., at 228, 96 S.Ct., at 2540, there is no such interest for process to protect. The State may choose to require procedures for reasons other than protection against deprivation of substantive ***251**

rights, of course, [13] but in making that choice the State does not create an independent substantive right. See *Hewitt v. Helms,* ––– U.S. –––, –––, 103 S.Ct. 864, 871, 74 L.Ed.2d 675 (1983) (slip op. 10).

IV

In sum, we hold that the transfer of respondent from Hawaii to California did not implicate the Due Process Clause directly, and that Hawaii's prison regulations do not create a protected liberty interest. [14] Accordingly, the judgment of the Court of Appeals is

Reversed.

Justice MARSHALL, with whom Justice BRENNAN joins, and with whom Justice STEVENS joins as to Part I, dissenting.

In my view, the transfer of respondent Delbert Kaahanui Wakinekona from a prison in Hawaii to a prison in California implicated an interest in liberty protected by the Due Process Clause of the Fourteenth Amendment. I respectfully dissent.

I

An inmate's liberty interest is not limited to whatever a State chooses to bestow upon him. An inmate retains a significant residuum of constitutionally protected liberty following his incarceration independent of any state law. As we stated in **1749 *Wolff v. McDonnell,* 418 U.S. 539, 555–556, 94 S.Ct. 2963, 2974, 41 L.Ed.2d 935 (1974), "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons *252 of this country.... [P]risoners may not be deprived of life, liberty, or property without due process of law."

In determining whether a change in the conditions of imprisonment implicates a prisoner's retained liberty interest, the relevant question is whether the change constitutes a sufficiently "grievous loss" to trigger the protection of due process. *Vitek v. Jones,* 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980). See *Morrissey v. Brewer,* 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972), quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 168, 71 S.Ct. 624, 646, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring). The answer depends in part on a comparison of "the treatment of the prisoner with the customary, habitual treatment of the population of the prison as a whole." *Hewitt v. Helms, supra,* 459 U.S., at –––, 103 S.Ct., at 879 (STEVENS, J., dissenting). This principle was established in our decision in *Vitek,* which held that the transfer of an inmate from a prison to a mental hospital implicated a liberty interest because it brought about "consequences ... qualitatively different from the punishment characteristically suffered by a person convicted of crime." 445 U.S., at 493, 100 S.Ct., at 1264. Because a significant qualitative change in the conditions of confinement is not "within the range of conditions of confinement to which a prison sentence subjects an individual," *ibid.,* such a change implicates a prisoner's protected liberty interest.

There can be little doubt that the transfer of Wakinekona from a Hawaii prison to a prison in California represents a substantial qualitative change in the conditions of his confinement. In addition to being incarcerated, which is the ordinary consequence of a criminal conviction and sentence, Wakinekona has in effect been banished from his home, a punishment historically considered to be "among the severest." [1] For an indeterminate period of time, possibly the *253 rest of his life, nearly 4,000 miles of ocean will separate him from his family and friends. As a practical matter, Wakinekona may be entirely cut off from his only contacts with the outside world, just as if he had been imprisoned in an institution which prohibited visits by outsiders. Surely the isolation imposed on him by the transfer is far more drastic than that which normally accompanies imprisonment.

I cannot agree with the Court that *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976), and *Montanye v. Haymes,* 427 U.S. 236, 243, 96 S.Ct. 2543, 2547, 49 L.Ed.2d 466 (1976), compel the conclusion that Wakinekona's transfer implicates no liberty interest. *Ante,* at 1748. Both cases involved transfers of prisoners between institutions located within the same State in which they were convicted, and the Court expressly phrased its holdings in terms of *intra*state transfers. [2] **1750 Both decisions rested on the premise that no liberty interest is implicated by an initial decision to place a prisoner in one institution in the State rather than another. See *Meachum, supra,* 427 U.S., at 224, 96 S.Ct., at 2538; *Montanye, supra,* 427 U.S., at 243, 96 S.Ct., at 2547. On the basis of that premise, the Court concluded that the subsequent transfer of a prisoner

to a different facility within the State likewise implicates no liberty interest. In this case, however, we cannot assume that a State's initial placement of an individual in a prison far removed from his family and residence would raise no due process questions. None of our ***254** prior decisions has indicated that such a decision would be immune from scrutiny under the Due Process Clause.

Actual experience simply does not bear out the Court's assumptions that interstate transfers are routine and that it is "not unusual" for a prisoner "to serve practically his entire sentence in a State other than the one in which he was convicted and sentenced." *Ante,* at 1746. In Hawaii less than three percent of the state prisoners were transferred to prisons in other jurisdictions in 1979, and on a nationwide basis less than one percent of the prisoners held in state institutions were transferred to other jurisdictions. [3] Moreover, the vast majority of state prisoners are held in facilities located less than 250 miles from their homes. [4] Measured against these norms, **Wakinekona's** transfer to a California prison represents a punishment "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Vitek v. Jones,* 445 **U.S**., at 493, 100 S.Ct., at 1264.

I therefore cannot agree that a State may transfer its prisoners at will, to any place, for any reason, without ever implicating any interest in liberty protected by the Due Process Clause.

II

Nor can I agree with the majority's conclusion that Hawaii's prison regulations do not create a liberty interest. This Court's prior decisions establish that a liberty interest ***255** may be "created" [5] by state laws, prison rules, regulations, or practices. State laws that impose substantive criteria which limit or guide the discretion of officials have been held to create a protected liberty interest. See, e.g., *Hewitt v. Helms, supra; Wolff v. McDonnell, supra; Greenholtz v. Nebraska Penal Inmates,* 442 **U.S**. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979); *Wright v. Enomoto,* 462 F.Supp. 397 (ND Cal.1976), summarily aff'd, 434 **U.S**. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978). By contrast, a liberty interest is not created by a law which "imposes no conditions on [prison officials'] discretionary power," *Montanye, supra,* 427 **U.S**., at 243, 96 S.Ct., at 2547, authorizes prison officials to act "for whatever reason or for no reason at all," *Meachum, supra,* 427 **U.S**., at 228, 96 S.Ct., at 2540, or accords officials "unfettered discretion," *Connecticut Board of Pardons v. Dumschat,* 452 **U.S**. 458, 466, 101 S.Ct. 2460, 2465, 69 L.Ed.2d 158 (1981).

****1751** The Court misapplies these principles in concluding that Hawaii's prison regulations leave prison officials with unfettered discretion to transfer inmates. *Ante,* at 1747–1748. Rule IV establishes a scheme under which inmates are classified upon initial placement in an institution, and must subsequently be reclassified before they can be transferred to another institution. Under the Rule the standard for classifying inmates is their "optimum placement within the Corrections Division" in light of the "best interests of the individual, the State, and the community." [6] In classifying inmates, the Program ***256** Committee may not consider punitive aims. It may consider only factors relevant to determining where the individual will be "best situated," such as "his history, his changing needs, the resources and facilities available to the Corrections Divisions, the other inmates/wards, the exigencies of the community, and any other relevant factors." Section 3 of Rule IV establishes a detailed set of procedures applicable when, as in this case, the reclassification of a prisoner may lead to a transfer involving a "grievous loss," a phrase contained in the Rule itself. [7] The procedural rules are cast in mandatory language, and cover such matters as notice, access to information, hearing, confrontation and cross-examination, and the basis on which the Committee is to make its recommendation to the faculty administrator.

The limitations imposed by Rule IV are at least as substantial as those found sufficient to create a liberty interest in *Hewitt v. Helms, supra,* decided earlier this Term. In *Hewitt* an inmate contended that his confinement in administrative custody implicated an interest in liberty protected by the Due Process Clause. State law provided that a prison official could place inmates in administrative custody "upon his assessment of the situation and the need for control," or "where it has been determined that there is a threat of a serious disturbance or a serious threat to the individual or others," and mandated certain procedures such as notice and a ***257** hearing. [8] This Court construed the phrases " 'the need for control,' or 'the threat of a serious disturbance,' " as "substantive predicates" which restricted official discretion. *Id.,* at ——, 103 S.Ct., at 871. These restrictions, in combination with the mandatory procedural safeguards, "deman[ded] a conclusion that the State has created a protected liberty interest." 459 **U.S**., at ——, 103 S.Ct., at 871.

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Rule IV is not distinguishable in any meaningful respect from the provisions at issue in *Helms.* The procedural requirements contained in Rule IV are, if anything, far more elaborate than those involved in *Helms,* and are likewise couched in "language of an unmistakably mandatory character." *Id.,* at ——, 103 S.Ct., at 871. Moreover, Rule IV, to no less an extent than the state law at issue in *Helms,* imposes substantive criteria restricting official discretion. In *Helms* this Court held that a statutory phrase such as "the need ****1752** for control" constituted a limitation on the discretion of prison officials to place inmates in administrative custody. In my view Rule IV, which states that transfers are intended to ensure an inmate's "optimum placement" in accordance with considerations which include "his changing needs [and] the resources and facilities available to the Corrections Division," also restrict official discretion in ordering transfers. [9]

The Court suggests that, even if the Program Committee does not have unlimited discretion in making recommendations for classifications and transfers, this cannot give rise to a state-created liberty interest because the prison administrator retains "completely unfettered ... discretion to transfer ***258** an inmate," *ante,* at 1747. I disagree. Rule IV(3)(d)(3) provides for review by the prison administrator of recommendations forwarded to him by the Program Committee. [10] Even if this provision must be construed as authorizing the administrator to transfer a prisoner for wholly arbitrary reasons, [11] that mere possibility does not defeat the protectible expectation otherwise created by Hawaii's reclassification and transfer scheme that transfers will take place only if required to ensure an inmate's optimum placement. In *Helms* a prison regulation also left open the possibility that the Superintendent could decide, for any reason or no reason at all, whether an inmate should be confined in administrative custody. [12] This Court nevertheless held that the state scheme as a whole created an interest in liberty protected by the Due Process Clause. 459 U.S., at ——, 103 S.Ct., at 871. *Helms* thus necessarily rejects the view that state laws which impose substantive ***259** limitations and elaborate procedural requirements on official conduct create no liberty interest solely because there remains the possibility that an official will act in an arbitrary manner at the end of the process. [13]

For the foregoing reasons, I dissent.

All Citations

461 U.S. 238, 103 S.Ct. 1741, 75 L.Ed.2d 813

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Paragraph 1 of Rule IV states:
"An inmate's ... classification determines where he is best situated within the Corrections Division. Rather than being concerned with isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates ..., the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division." App. 20.

2 Petitioners concede, "for purposes of the argument," that respondent suffered a "grievous loss" within the meaning of Rule IV when he was transferred from Hawaii to the mainland. Tr. of Oral Arg. 9, 25.

3 Rule V provides that an inmate may retain legal counsel if his hearing concerns a "potential Interstate transfer." App. 25.

4 Respondent also had alleged that the transfer violated the Hawaii Constitution and state regulations and statutes. In light of its dismissal of respondent's federal claims, the District Court declined to exercise pendent jurisdiction over these state-law claims. 459 F.Supp., at 476.

5 Several months before the Court of Appeals handed down its decision, the Supreme Court of Hawaii had held that because Hawaii's prison regulations do not limit the administrator's discretion to transfer prisoners to the mainland, they do not create any liberty interest. *Lono v. Ariyoshi,* 63 Haw. 138, 621 P.2d 976 (1981). In a petition for rehearing in the present case, petitioners directed the Ninth Circuit's attention to the *Lono* decision. See 664 F.2d, at 714. The Court of Appeals, however, concluded that the Hawaii court's interpretation of the regulations was not different from its own; the Hawaii court merely had reached a different result on the "federal question." The Court of Appeals thus adhered to its resolution of the case. *Id.,* at 714–715.

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6 Indeed, in *Vitek* itself the Court did not read *Meachum* and *Montanye* as stating a rule applicable only to intrastate transfers. The Court stated: "In *Meachum v. Fano* ... and *Montanye v. Haymes* ... we held that the transfer of a prisoner *from one prison to another* does not infringe a protected liberty interest." 445 U.S., at 489, 100 S.Ct., at 1261 (emphasis added). The Court's other cases describing *Meachum* and *Montanye* also have eschewed the narrow reading respondent now proposes. See *Hewitt v. Helms,* —— U.S. ——, ——, 103 S.Ct. 864, 869, 74 L.Ed.2d 675 (1983); *Moody v. Daggett,* 429 U.S. 78, 88, n. 9, 97 S.Ct. 274, 279 n. 9, 50 L.Ed.2d 236 (1976).

7 This statute has been invoked to transfer prisoners from Hawaii state facilities to federal prisons on the mainland. See *Anthony v. Wilkinson,* 637 F.2d 1130 (CA7 1980), vacated and remanded *sub nom. Hawaii v. Mederios,* 453 U.S. 902, 101 S.Ct. 3135, 69 L.Ed.2d 989 (1981).

8 After the decisions in *Meachum* and *Montanye,* courts almost uniformly have held that an inmate has no entitlement to remain in a prison in his home State. See *Beshaw v. Fenton,* 635 F.2d 239, 246–247 (CA3 1980), cert. denied, 453 U.S. 912, 101 S.Ct. 3145, 69 L.Ed.2d 995 (1981); *Cofone v. Manson,* 594 F.2d 934, 937, n. 4 (CA2 1979); *Sisbarro v. Warden,* 592 F.2d 1, 3 (CA1), cert. denied, 444 U.S. 849, 100 S.Ct. 99, 62 L.Ed.2d 64 (1979); *Fletcher v. Warden,* 467 F.Supp. 777, 779–780 (Kan.1979); *Curry-Bey v. Jackson,* 422 F.Supp. 926, 931–933 (DC 1976); *McDonnell v. United States Attorney General,* 420 F.Supp. 217, 220 (ED Ill.1976); *Goodnow v. Perrin,* 120 N.H. 669, 671, 421 A.2d 1008, 1010 (1980); *Girouard v. Hogan,* 135 Vt. 448, 449–450, 378 A.2d 105, 106–107 (1977); *In re Young,* 95 Wash.2d 216, 227–228, 622 P.2d 373, 379 (1980); cf. *Fajeriak v. McGinnis,* 493 F.2d 468 (CA9 1974) (pre-*Meachum* transfers from Alaska to other States); *Hillen v. Director of Department of Social Services,* 455 F.2d 510 (CA9), cert. denied, 409 U.S. 989, 93 S.Ct. 331, 34 L.Ed.2d 256 (1972) (pre-*Meachum* transfer from Hawaii to California). But see *In re Young,* 95 Wash., at 233, 622 P.2d, at 382 (concurring opinion); *State ex rel. Olson v. Maxwell,* 259 N.W.2d 621 (ND 1977); cf. *Tai v. Thompson,* 387 F.Supp. 912 (Haw.1975) (pre-*Meachum* transfer).

9 Respondent's argument to the contrary is unpersuasive. The Court in *Montanye* took note that among the hardships that may result from a prison transfer are separation of the inmate from home and family, separation from inmate friends, placement in a new and possibly hostile environment, difficulty in making contact with counsel, and interruption of educational and rehabilitative programs. 427 U.S., at 241, n. 4, 96 S.Ct., at 2546, n. 4. These are the same hardships respondent faces as a result of his transfer from Hawaii to California.

Respondent attempts to analogize his transfer to banishment in the English sense of "beyond the seas," arguing that banishment surely is not within the range of confinement justified by his sentence. But respondent in no sense has been banished; his conviction, not the transfer, deprived him of his right freely to inhabit the State. The fact that his confinement takes place outside Hawaii is merely a fortuitous consequence of the fact that he must be confined, not an additional element of his punishment. See *Girouard v. Hogan,* 135 Vt., at 449–450, 378 A.2d, at 105. Moreover, respondent has not been exiled; he remains within the United States.

In essence, respondent's banishment argument simply restates his claim that a transfer from Hawaii to the mainland is different in kind from other transfers. As has been shown in the text, however, respondent's transfer was authorized by his conviction. A conviction, whether in Hawaii, Alaska, or one of the contiguous 48 States, empowers the State to confine the inmate in any penal institution in any State unless there is state law to the contrary or the reason for confining the inmate in a particular institution is itself constitutionally impermissible. See *Montanye,* 427 U.S., at 242, 96 S.Ct., at 2547; *id.,* at 244, 96 S.Ct., at 2548 (dissenting opinion); *Cruz v. Beto,* 405 U.S. 319, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972); *Fajeriak v. McGinnis,* 493 F.2d, at 470.

10 In *Hewitt v. Helms,* 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983), unlike this case, state law limited the decisionmakers' discretion. To the extent the dissent doubts that the administrator's discretion under Rule IV is truly unfettered, *post,* at 1752, and n. 11, it doubts the ability or authority of the Hawaii Supreme Court to construe state law.

11 In *Meachum* itself, the Court of Appeals had interpreted the applicable regulations as entitling inmates to a pre-transfer hearing, see *Fano v. Meachum,* 520 F.2d 374, 379–380 (CA1 1975), but this Court held that state law created no liberty interest.

12 Other courts agree that an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause. See, *e.g., United States v. Jiles,* 658 F.2d 194, 200 (CA3 1981), cert. denied, 455 U.S. 923, 102 S.Ct. 1282, 71 L.Ed.2d 465 (1982); *Bills v. Henderson,* 631 F.2d 1287, 1298–1299 (CA6 1980); *Pugliese v. Nelson,* 617 F.2d 916, 924–925 (CA2 1980); *Cofone v. Manson,* 594 F.2d 934, 938 (CA2 1979); *Lombardo v. Meachum,* 548 F.2d 13, 14–16 (CA1 1977); *Adams v. Wainwright,* 512 F.Supp. 948, 953 (ND Fla.1981); *Lono v. Ariyoshi,* 63 Haw., at 144–145, 621 P.2d, at 980–981.

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13 Petitioners assert that the hearings required by Rule IV not only enable the officials to gather information and thereby to exercise their discretion intelligently, but also have a therapeutic purpose: inmate participation in the decisionmaking process, it is hoped, reduces tension in the prison. See Tr. of Oral Arg. 52–53.

14 In light of this conclusion, respondent's claim of bias in the composition of the prison Program Committee becomes irrelevant.

1 J. Madison, 4 Elliott's Debates, 455. Whether it is called banishment, exile, deportation, relegation or transportation, compelling a person "to quit a city, place, or country, for a specified period of time, or for life," has long been considered a unique and severe deprivation, and was specifically outlawed by "[t]he twelfth section of the English Habeas Corpus Act, 31 Car. II, one of the three great muniments of English liberty." *United States v. Ju Toy,* 198 **U.S**. 253, 270, 25 S.Ct. 644, 649, 49 L.Ed.2d 1040 (1905) (Brewer, J., dissenting).

2 Thus in *Meachum* the Court stated that the State, by convicting the defendant, was "empowere[d] to confine him to any of its prisons," 427 **U.S**., at 224, 96 S.Ct., at 2538 (latter emphasis added), that a "transfer from one institution to another within the state prison system" implicated no due process interest, *id.,* at 225, 96 S.Ct., at 2538, and that "[c]onfinement in any of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." *Ibid.* See also *Montanye, supra,* 427 **U.S**., at 242, 96 S.Ct., at 2547 ("We held in *Meachum v. Fano,* that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State.")

3 **U.S**. Department of Justice, T. Flanagan, et al., Sourcebook of Criminal Justice Statistics—1981, Table 6.27, pp. 478–479. These figures reflect "all inmates who were transferred from one State's jurisdiction to another to continue sentences already in force," and "[d]oes not include the release if [the] State does not relinquish jurisdiction." *Id.,* at 580.

4 **U.S**. Department of Justice, Profile of State Prison Inmates: Sociodemographic Findings from the 1974 Survey of Inmates of State Correctional Facilities, p. 1 (1979). Over 70% of state inmates are held in institutions located less than 250 miles from their homes.

5 But see *Hewitt v. Helms,* —— **U.S**. ——, at ——, 103 S.Ct. 864, at 880, 74 L.Ed.2d 675 (**1983**) (STEVENS, J., dissenting) (Prison regulations "provide evidentiary support for the conclusion that the transfer affects a constitutionally-protected interest in liberty," but they "do not *create* that interest." (Emphasis in original)).

6 Section 1 of Regulation IV provides:

"An inmate's/ward's classification determines where he is best situated within the Corrections Division. Rather than being concerned with the isolated aspects of the individual or punishment (as is the adjustment process), classification is a dynamic process which considers the individual, his history, his changing needs, the resources and facilities available to the Corrections Division, the other inmates/wards, the exigencies of the community, and any other relevant factors. It never inflicts punishment; on the contrary, even the imposition of a stricter classification is intended to be in the best interests of the individual, the State, and the community. In short, classification is a continuing evaluation of each individual to ensure that he is given the optimum placement within the Corrections Division." App. 20.

7 While the term "grievous loss" is not explicitly defined, the prison regulations treat a transfer to the mainland as a grievous loss entitling an inmate to the procedural rights established in IV(3). This is readily inferred from Rule IV(3), which states that intrastate transfers do not involve a grievous loss, and Rule V, which permits inmates to retain counsel only in specified circumstances, one of which is a reclassification that may result in an interstate transfer. App. 25.

8 See 459 **U.S**., at —— n. 6, 103 S.Ct., at 871 n. 6.

9 See also *Wright v. Enomoto,* 462 F.Supp. 397 (ND Cal.1976), summarily aff'd, 434 **U.S**. 1052, 98 S.Ct. 1223, 55 L.Ed.2d 756 (1978). In that case, the District Court held that the language of a prison *policy statement,* stating that "inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons," *id.,* at 403, was sufficient to create a protected expectation that an inmate would not be segregated for arbitrary reasons. See also *Bills v. Henderson,* 631 F.2d 1287, 1293 (CA6 1980), cert. denied, 449 **U.S**. 1093, 101 S.Ct. 891, 66 L.Ed.2d 822 (1981); *Winsett v. McGinnes,* 617 F.2d 996, 1007 (CA3 1980) (en banc).

10 Rule IV(3)(d)(3) provides:

"(3) The facility administrator will, within a reasonable period of time, review the Program Committee's recommendation. He may, as the final decisionmaker:

(a) Affirm or reverse, in whole or in part, the recommendation; or

(b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate/ward, other inmates/wards, institution, or community and refer the matter back to the Program Committee for futher study and recommendation."

11 I doubt that Rule IV would be construed to permit the administrator to order a transfer for punitive reasons, since Rule IV expressly disallows punitive transfers.

12 That provision provided: "All decisions of the Program Review Committee shall be reviewed by the Superintendent for his sustaining the decision or amending or reversing the decision in favor of the inmate." Pennsylvania Bureau of Correction Administrative Directive BC–ADM 801, Rule VI(C). Brief for Respondent, 12a, in *Hewitt v. Helms,* O.T. 1982, No. 81–638. Because an inmate could be confined in administrative custody only if the Program Review Committee determined that such confinement is and continues to be "appropriate," Brief for Respondent, *supra,* at 18a, the Superintendent in *Helms* was the "decisionmaker," *ante,* at 11, who determined whether inmates would be held in administrative custody.

13 This view was also implicitly rejected in *Greenholtz v. Nebraska Penal Inmates,* 442 **U.S**. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). The Court held that the Nebraska statute governing the decision whether or not to grant parole created a "protectible entitlement," *id.,* at 12, 99 S.Ct., at 2106, even though the statute, which listed a number of factors to be considered in the parole decision, also authorized the Parole Board to deny parole on the basis of "[a]ny other factors the board determines to be relevant." *Id.,* at 18, 99 S.Ct., at 2109.

To the extent that *Lono v. Ariyoshi,* 63 Haw. 138, 144–145, 621 P.2d 976, 980–981 (1981), on which the majority relies, *ante,* at 1747, suggests that no liberty interest is created as State law has not entirely eliminated the possibility of arbitrary action, it is inconsistent with both *Helms* and *Greenholtz.*

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Barfield v. Brierton, 11th Cir.(Fla.), September 15, 1989

96 S.Ct. 2543
Supreme Court of the United States

Ernest L. MONTANYE, former Superintendent, Attica Correctional Facility, et al., Petitioners,
v.
Rodney R. HAYMES.

No. 74-520.
|
Argued April 21, 1976.
|
Decided June 25, 1976.

Synopsis
Civil rights action was brought by state prisoner against prison officials for damages for confiscation of "legal petition" which he circulated while in custody and for his alleged summary punishment two days later by being transferred to another facility without a hearing. The United States District Court for the Western District of New York, dismissed action, and prisoner appealed. The Court of Appeals, 505 F.2d 977, deemed dismissal to have been a summary judgment and reversed and remanded, and the Supreme Court granted certiorari. The Supreme Court, Mr. Justice White, held that where under state law prisoner had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct, and transfer of prisoner was not conditional upon or limited to occurrence of misconduct, due process clause did not require hearing in connection with transfer of prisoner.

Reversed and remanded.

Mr. Justice Stevens filed dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

West Headnotes (2)

[1] Constitutional Law
Transfer

As long as conditions or degree of confinement to which a prisoner is subjected are within sentence imposed upon him and are not otherwise violative of Constitution, due process clause does not in itself subject prisoner's treatment by prison authorities to judicial oversight nor require hearings in connection with transfers whether they are result of inmate's misbehavior or whether they are labeled as disciplinary or punitive. U.S.C.A.Const. Amend. 14.

1461 Cases that cite this headnote

[2] Constitutional Law
Transfer

Prisons
Transfer

Where under state law prisoner had no right to remain at any particular prison facility and had no justifiable expectation that he would not be transferred unless found guilty of misconduct, and under state law transfer of inmate was not conditional upon or limited to occurrence of misconduct, due process clause of Fourteenth Amendment did not require hearing in connection with prisoner's transfer to another state facility whether or not such transfer resulted from prisoner's misbehavior or was disciplinary or punitive. Corrections Law N.Y. §§ 23, subd. 1, 71, subd. 1; U.S.C.A.Const. Amend. 14.

1306 Cases that cite this headnote

**2544 Syllabus *

***236** The Due Process Clause of the Fourteenth Amendment Held not to require a hearing in connection with the transfer of a state prisoner to another institution in the State whether or not such transfer resulted from the prisoner's misbehavior or was disciplinary or punitive, where under state law the prisoner had no right to remain at any particular prison and no justifiable expectation that he would not be transferred unless found guilty of misconduct, and the transfer of prisoners is not conditional upon or limited to the occurrence of misconduct. Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451. P. 2547.

505 F.2d 977, reversed and remanded.

Attorneys and Law Firms

Joel Lewittes, New York City, for petitioners.

Alvin J. Bronstein, Washington, D. C., for respondent.

Opinion

***237** Mr. Justice WHITE delivered the opinion of the Court.

On June 7, 1972, respondent Haymes was removed from his assignment as inmate clerk in the law library at the Attica Correctional Facility in the State of New York. That afternoon Haymes was observed circulating among other inmates a document prepared by him and at the time signed by 82 other prisoners. Among other things, each signatory complained that he had been ****2545** deprived of legal assistance as the result of the removal of Haymes and another inmate from the prison law library. [1] ***238** The document, which was addressed to a federal judge but sought no relief, was seized and held by prison authorities. On June 8, Haymes was advised that he would be transferred to Clinton Correctional Facility, which, like Attica, was a maximum-security institution. The transfer was effected the next day. No loss of good time, segregated confinement, loss of privileges, or any other disciplinary measures accompanied the transfer. On August 3, Haymes filed a petition with the United States District Court which was construed by the judge to be an application under 42 U.S.C. s 1983 and 28 U.S.C. s 1343 seeking relief against petitioner Montanye, the then Superintendent at Attica. The petition complained that the seizure and retention of the document, despite requests for its return, not only violated Administrative Bulletin No. 20, which allegedly made any communication to a court privileged and confidential, but also infringed Haymes' federally guaranteed right to petition the court for redress of grievances. It further asserted that Haymes' removal to Clinton was to prevent him from pursuing his remedies and also was in reprisal for his having rendered legal assistance to various prisoners as well as having, along with others, sought to petition the court for redress.

In response to a show-cause order issued by the court, petitioner Brady, the correctional officer at Attica in charge of the law library, stated in an affidavit that Haymes had been relieved from his assignment as an inmate clerk in the law library "because of his continual disregard for the rules governing inmates and the use of the law library" and that only one of the inmates who had signed the petition being circulated by Haymes had ever made an official request for legal assistance. The affidavit of Harold Smith, Deputy Superintendent of Attica, furnished the court with Paragraph 21 of the ***239** Inmate's Rule Book, [2] which prohibited an inmate from furnishing legal assistance to another inmate without official permission and with a copy of a bulletin board notice directing inmates with legal problems to present them to Officer Brady inmates were in no circumstances to set themselves up as legal counselors and receive pay for their services. [3] The affidavit ****2546** asserted that the petition taken from Haymes was being circulated "in direct disregard of the above rule forbidding legal assistance except with the approval of the Superintendent" and that Haymes had been cautioned on several occasions about assisting other inmates without the required approval.

Haymes responded by a motion to join Brady as a defendant, which was granted, and with a counteraffidavit denying that there was a rulebook at Attica, reasserting that the document seized was merely a letter to the court not within the scope of the claimed rule and alleging that his removal from the law library, the seizure of his petition, and his transfer to Clinton were acts of reprisal for his having attempted to furnish legal assistance to the other prisoners rather than merely hand out library books to them.

***240** After retained counsel had submitted a memorandum on behalf of Haymes, the District Court dismissed the action. It held that the rule against giving legal assistance without consent was reasonable and that the seizure of Haymes' document was not in violation of the Constitution. The court also ruled that the transfer to Clinton did not violate Haymes' rights: "Although a general allegation is made that punishment was the motive for the transfer, there is no allegation that the facilities at (Clinton) are harsher or substantially different from those afforded to petitioner at Attica. . . . Petitioner's transfer was consistent with the discretion given to prison officials in exercising proper custody of inmates." App. 26a.

The Court of Appeals for the Second Circuit reversed. 505 F.2d 977 (1974). Because the District Court had considered affidavits outside the pleadings, the dismissal was deemed to have been a summary judgment under Fed.Rule Civ.Proc. 56. The judgment was ruled erroneous because there were two unresolved issues of material fact: whether Haymes' removal to Clinton was punishment for a disobedience of prison rules and if so whether the effects of the transfer were

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sufficiently burdensome to require a hearing under the Due Process Clause of the Fourteenth Amendment.

The court's legal theory was that **Haymes** should no more be punished by a transfer having harsh consequences than he should suffer other deprivations which under prison rules could not be imposed without following specified procedures. Disciplinary transfers, the Court of Appeals thought, were in a different category from "administrative" transfers. "When harsh treatment is meted out to reprimand, deter, or reform an individual, elementary fairness demands that the one punished be given a satisfactory opportunity to establish ***241** that he is not deserving of such handling. . . . (T)he specific facts upon which a decision to punish are predicated can most suitably be ascertained at an impartial hearing to review the evidence of the alleged misbehavior, and to assess the effect which transfer will have on the inmate's future incarceration." 505 F.2d, at 980. The Court of Appeals found it difficult "to look upon the circumstances of the transfer as a mere coincidence," *id.*, at 979; it was also convinced that **Haymes** might be able to demonstrate sufficiently burdensome consequences attending the transfer to trigger the protections of the Due Process Clause, even though Attica and Clinton were both maximum-security prisons.[4] The case was ****2547** therefore remanded for further proceedings to the District ***242** Court. We granted certiorari, 422 **U.S**. 1055, 95 S.Ct. 2676, 4 L.Ed.2d 707 (1975), and heard the case with Meachum v. Fano, **427** **U.S**. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451. We reverse the judgment of the Court of Appeals.

[1] The Court of Appeals did not hold, as did the Court of Appeals in Meachum v. Fano, that every disadvantageous transfer must be accompanied by appropriate hearings. Administrative transfers, although perhaps having very similar consequences for the prisoner, were exempt from the Court of Appeals ruling. Only disciplinary transfers having substantial adverse impact on the prisoner were to call for procedural formalities. Even so, our decision in Meachum requires a reversal in this case. We held in Meachum v. Fano, that no Due Process Clause liberty interest of a duly convicted prison inmate is infringed when he is transferred from one prison to another within the State, whether with or without a hearing, absent some right or justifiable expectation rooted in state law that he will not be transferred except for misbehavior or upon the occurrence of other specified events. We therefore disagree with the Court of Appeals' general proposition that the Due Process Clause by its own force requires hearings whenever prison authorities transfer a prisoner to another institution because of his breach of prison rules, at least where the transfer may be said to involve substantially burdensome consequences. As long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight. The Clause does not require hearings in connection with transfers whether or not they are the result of the inmate's misbehavior or may be labeled as disciplinary or punitive.

[2] ***243** We also agree with the State of New York that under the law of that State **Haymes** had no right to remain at any particular prison facility and no justifiable expectation that he would not be transferred unless found guilty of misconduct. Under New York law, adult persons sentenced to imprisonment are not sentenced to particular institutions, but are committed to the custody of the Commissioner of Corrections. He receives adult, male felons at a maximum-security reception center for initial evaluation and then transfers them to specified institutions. N.Y.Correc.Law s 71(1) (McKinney Supp.1975-**1976**); 7 N.Y.C.R.R. s 103.10. Thereafter, the Commissioner is empowered by statute to "transfer inmates from one correctional facility to another." N.Y.Correc.Law s 23(1) (McKinney Supp.1975-**1976**). The Court of Appeals reasoned that because under the applicable state statutes and regulations, various specified punishments were reserved as sanctions for breach of prison rules and could not therefore be imposed without appropriate hearings, neither could the harsh consequences of a transfer be imposed as punishment for misconduct absent appropriate due process procedures. But under the New York law, the transfer of inmates is not conditional upon or limited to the occurrence of misconduct. The statute imposes no conditions on the discretionary power to transfer, and we are advised by the State that no such requirements have been promulgated. Transfers are not among the punishments which may be imposed only after a prison disciplinary hearing. 7 N.Y.C.R.R. s 253.5. Whatever part an inmate's behavior may play in a decision to transfer, ****2548** there is no more basis in New York law for invoking the protections of the Due Process Clause than we found to be the case under the Massachusetts law in the Meachum case.

***244** The judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

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Mr. Justice STEVENS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL join, dissenting.

Respondent's complaint, fairly read, alleges two quite different theories of recovery: First, that he was entitled to a hearing before he could be transferred from one facility to another because the transfer deprived him of an interest in liberty; second, that the transfer was a form of punishment for circulating a petition, for communicating with a court, and for rendering legal assistance to other inmates.

Since respondent has not alleged a material difference between the two facilities, I agree with the Court that the transfer did not cause him a grievous loss entitling him to a hearing. In my opinion this conclusion is unaffected by the motivation for the transfer, because I think it is the seriousness of its impact on the inmate's residuum of protected liberty that determines whether a deprivation has occurred.

I am persuaded, however, that the allegations of his complaint are sufficient to require a trial of his claim that the transfer was made in retribution for his exercise of protected rights. On this claim, the reason for the defendants' action is critical and the procedure followed is almost irrelevant. I do not understand the Court to disagree with this analysis, and assume that the Court of Appeals, consistently with this Court's mandate, may direct the District Court to conduct a trial. [*]

***245** The reason for my dissent is that the same result would follow from a simple affirmance. Thus, although the Court has explained why it believes the Opinion of the Court of Appeals should be "reversed," it has not explained why that court's Judgment was not correct. I would affirm that judgment.

All Citations

427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The document read verbatim:
"Hon. Judge John T. Curtin:
"I am writing to complain that I am now being deprived of legal assistance as a result of inmate Rodney R. Haymes and John Washington being removed from the prison law library.
"Since the removal of the above two from the law library, I cannot any longer obtain any legal assistance either in the nature of obtaining the proper applicable case law corresponding with the particular issue contained in my case, as well as assistance in preparing my post-conviction application to the courts.
"The major problem and reason for my not being able to obtain legal assistance is a direct result of the attitude displayed by the law library officer whom goes out of his way to circumvent inmates legal assistance.
"I feel that this was obviously the same reason why this officer has had Rodney Haymes and John Washington removed from the law library whereby they no longer have proper access to either the law books or myself and the other inmates whom they are legally assisting.
"Wherefore, I feel that my constitutional rights to adequate access to the courts for judicial review and redress is being violated as a direct result of the circumstances and conditions herein set forth.
"(Signed by 82 inmates.)"

2 Inmates are forbidden, except upon approval of the warden, to assist other inmates in the preparation of legal papers.

3 The notice read as follows:
"Office of Superintendent
"April 25, 1972
"To all concerned:
"In all instances where inmates desire assistance in the use of the Law Library, they are to present their problems to Correction Officer Brady, who will assist them to the extent necessary or will assign inmates on the Law Library staff to particular cases.
"Under no circumstances are inmates to set themselves up as 'legal counselors' and receive pay for their services.
"Ernest L. Montanye
"Superintendent"

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4 The Court of Appeals found "that the hardship involved in the mere fact of dislocation may be sufficient to render **Haymes's** summary transfer if a trial establishes that it was punitive a denial of due process." 505 F.2d, at 981. The court said: "The facts of this case may provide a good illustration of the real hardship in being shuttled from one institution to another. After being sent to Clinton, **Haymes** found himself several hundred miles away from his home and family in Buffalo, New York. Not only was he effectively separated by the transfer from his only contact with the world outside the prison, but he also was removed from the friends he had made among the inmates at Attica and forced to adjust to a new environment where he may well have been regarded as a troublemaker. Contacts with counsel would necessarily have been more difficult. A transferee suffers other consequences as well: the inmate is frequently put in administrative segregation upon arrival at the new facility, 7 N.Y.C.R.R. Part 260; personal belongings are often lost; he may be deprived of facilities and medications for psychiatric and medical treatment, See Hoitt v. Vitek, 361 F.Supp. 1238, 1249 (D.N.H.1973); and educational and rehabilitative programs can be interrupted. Moreover, the fact of transfer, and perhaps the reasons alleged therefor, will be put on the record reviewed by the parole board, and the prisoner may have difficulty rebutting, long after the fact, the adverse inference to be drawn therefrom." Id., at 981-982.

* Respondent alleged in his complaint that his transfer violated his First Amendment rights because it had the purpose of suppressing his attempt to petition the courts, and that any rule which forbade him to do that was unconstitutional. It was also disputed whether respondent had actually broken any rule against giving legal advice to other prisoners. It was improper for the District Court either to dismiss the complaint or to grant summary judgment for the defendants without a trial of the facts. Haines v. Kerner, 404 **U.S**. 519, 92 S.Ct. 594, 30 L.Ed.2d 652; Conley v. Gibson, 355 **U.S**. 41, 78 S.Ct. 99, 2 L.Ed.2d 80.

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