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Fourteenth Amendment--Due Process and Interstate Prison Transfers

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FOURTEENTH AMENDMENT—DUE PROCESS AND INTERSTATE PRISON TRANSFERS

Olim v. Wakinekona, 103 S. Ct. 1741 (1983).

I. INTRODUCTION

In *Olim v. Wakinekona*,¹ the United States Supreme Court clarified its position as to when the involuntary relocation of a duly convicted prisoner implicates a liberty interest protected by the due process clause of the fourteenth amendment.² The Court, in an opinion by Justice Blackmun, held that an interstate prison transfer does not directly deprive the inmate of any liberty interest protected by the due process clause, even if the transfer involves long distances and an ocean crossing.³ The Court further held that Hawaii's prison regulations⁴ do not create a constitutionally protected liberty interest because they do not substantially limit the prison administrator's discretion in making transfer decisions.⁵

An analysis of the Court's recent treatment of other cases involving prison transfers yields the conclusion that the *Wakinekona* Court logically and convincingly applied the "entitlement"⁶ view of liberty interests in deciding that the transfer did not directly implicate the due process clause. In the second part of the opinion, the Court correctly decided that Hawaii's prison regulations do not create such a liberty interest. Here, the majority applied the correct standards concerning the issue of official discretion, while the dissent wrongly viewed *Wakinekona* as indistinguishable from a seemingly inconsistent previous decision of the Court.

II. BACKGROUND

While he was serving a sentence of life imprisonment without possi-

¹ 103 S. Ct. 1741 (1983).

² The due process clause of the fourteenth amendment provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

³ 103 S. Ct. at 1746-47.

⁴ See *infra* notes 10-15, 19 and accompanying text.

⁵ 103 S. Ct. at 1747-48.

⁶ See *infra* notes 83-85 and accompanying text.

bility of parole⁷ at the Hawaii State Prison near Honolulu, Delbert Kaahanui Wakinekona was classified as a maximum security risk and placed in the maximum control unit. After an apparent breakdown in discipline and the failure of programs within this unit, a prison "Program Committee" held hearings to determine the causes of the problems.⁸ The Committee designated Wakinekona as one of the troublemakers and informed him that another hearing would be held, pursuant to Rule IV of the Supplemental Rules and Regulations of the Corrections Division, to determine whether he should be reclassified, and whether he should be transferred to another Hawaii institution or to one on the mainland.⁹

Rule IV sets forth certain procedures that are to be followed in the inmate classification and transfer processes. The Rule requires that a hearing be held prior to a prison transfer that involves "a grievous loss to the inmate"¹⁰ and that the inmate receive certain procedural protections, such as notice of the hearing and the opportunity to cross examine witnesses and retain counsel.¹¹ The Rule also requires that the prison administrator establish "an impartial Program Committee" to conduct the hearing, and that the Committee be "composed of at least three members who were not actively involved in the process by which the inmate . . . was brought before the Committee."¹²

At Wakinekona's hearing, which was conducted by the same persons who had presided over the hearings designed to identify the troublemakers, the Committee recommended that his classification as a maximum security risk be continued¹³ and that he be transferred to a prison on the mainland.¹⁴ Rule IV provides that the prison administra-

⁷ Wakinekona was serving sentences for murder, rape, robbery, and escape, among other crimes. 103 S. Ct. at 1743. The notice that the Program Committee of the Hawaii State Prison sent to California prison authorities stated that Wakinekona "is considered to be the most dangerous and assaultive inmate in the Hawaii prison system. . . ." *Wakinekona v. Olim*, 664 F.2d 708, 709 (9th Cir. 1981) *rev'd*, 103 S. Ct. 1741 (1983).

⁸ 103 S. Ct. at 1743.

⁹ *Id.*

¹⁰ Dep't of Social Services and Housing, State of Hawaii, Supplementary Rules and Regulations of the Corrections Division, Rule IV (1976) [hereinafter cited as Hawaii, Supplementary Rules and Regulations, Rule IV].

¹¹ Other procedural protections provided the inmate under Rule IV include the opportunity to examine all relevant, non-confidential material related to his case, and the opportunity to offer evidence in his own behalf. *Id.*

¹² *Id.*

¹³ 103 S. Ct. at 1743.

¹⁴ The prison Program Committee recommended that Wakinekona be transferred to Folsom State Prison in California "because of reports that he frequently threatened and intimidated prison guards." *Wakinekona*, 664 F.2d at 709. There were no other maximum-security prisons in Hawaii that could have offered Wakinekona the correctional programs he needed and he was unable to remain at the maximum control unit because of the planned construction of a new facility there. *Wakinekona*, 103 S. Ct. at 1743.

tor, as the "final decisionmaker," can "[a]ffirm or reverse, in whole or in part, the recommendation" or can "hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate . . . , other inmates . . . , institution, or community and refer the matter back to the Program Committee for further study and recommendation."¹⁵ Antoine Olim, the administrator of the Hawaii State Prison, accepted the Committee's recommendation, and a few days later Wakinekona was transferred to Folsom State Prison in California.¹⁶

Wakinekona filed suit under 42 U.S.C. § 1983¹⁷ against Olim and the members of the Program Committee, claiming that the Committee's decision violated his right to due process.¹⁸ Specifically, he alleged that the decision had been rendered by a biased and prejudicial board composed of the same people who had initiated the hearings and, hence, violated Rule IV.¹⁹ The United States District Court for the District of Hawaii dismissed Wakinekona's suit.²⁰ The court held that Rule IV did not create a protected liberty interest because the Rule granted "practically unlimited discretion" to Hawaiian prison authorities regarding transfers of inmates.²¹ In so deciding, the District Court limited its inquiry to whether the state regulations created a liberty interest protected by the due process clause of the fourteenth amendment.²²

¹⁵ Hawaii, Supplementary Rules and Regulations, Rule IV, ¶3d(3).

¹⁶ 103 S. Ct. at 1743.

¹⁷ 42 U.S.C. § 1983 (1979) provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

¹⁸ *Wakinekona v. Olim*, 459 F. Supp. 473, 474 (D. Hawaii 1978) *rev'd*, 664 F.2d 708 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1741 (1983).

¹⁹ *See supra* note 12 and accompanying text. Wakinekona also claimed that his transfer violated the purpose of the program classification hearing as governed by Hawaii state regulations. *Wakinekona*, 459 F. Supp. at 474-75. According to paragraph 1 of Rule IV, the classification process

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.

Hawaii, Supplementary Rules and Regulations, Rule IV, ¶1, (1976).

²⁰ 459 F. Supp. at 476.

²¹ *Id.* Two years before Wakinekona's suit, the United States District Court for the District of Hawaii had held that Rule IV's requirement of a hearing before a fair and impartial board gave rise to a liberty interest protected by the due process clause of the fourteenth amendment. *Wakinekona v. Doi*, 421 F. Supp. 83 (D. Hawaii 1976). The District Court was persuaded to reverse its position in light of *Lombardo v. Meachum*, where the First Circuit held that prison regulations that do not impose substantive limitations on the decision to transfer a prisoner do not create a protected liberty interest. 548 F.2d 13, 15 (1st Cir. 1977).

²² In light of its decision that there was no longer a substantial federal due process claim

On appeal, the United States Court of Appeals for the Ninth Circuit reversed,²³ concluding that "the Hawaii prison regulations created a liberty interest subject to due process protection."²⁴ The court determined that the transfer regulations embodied in Rule IV, which require that certain procedures be followed whenever a transfer involves a "grievous loss" to the prisoner,²⁵ "create a justifiable expectation that a prisoner will not be transferred absent the specified procedures" and "consequently give rise to a constitutionally protected liberty interest."²⁶ The Court of Appeals rejected the State's argument that the prison administrator has unfettered discretion to transfer inmates at will, stating that the procedural conditions "certainly do not contemplate" such a transfer.²⁷ The court decided that Wakinekona, who had not been given an impartial tribunal,²⁸ had stated a claim under 42 U.S.C. § 1983, and therefore reversed the District Court's dismissal of his suit.²⁹ The court declined to address the issue of whether the transfer of Wakinekona from Hawaii to California directly implicated the due process clause because it concluded that the state regulations did create a liberty interest.³⁰

Before the Court of Appeals handed down its decision, the Supreme Court of Hawaii held that Rule IV did not limit the administrator's discretion in transferring prisoners, and therefore does not "clothe" plaintiffs with a liberty interest protected by the due process clause of the fourteenth amendment.³¹ In an opinion denying a petition for rehearing in the *Wakinekona* case, the Ninth Circuit concluded that the

to which claims arising exclusively under the Hawaii State Constitution, regulations, and statute could be appended, the District Court also held that Wakinekona's state claims must be heard in the state court. *Wakinekona v. Olim*, 459 F. Supp. at 476.

²³ *Wakinekona v. Olim*, 664 F.2d 708 (9th Cir. 1981) (divided opinion).

²⁴ *Id.* at 710.

²⁵ *See supra* notes 10-11 and accompanying text.

²⁶ 664 F.2d at 711-12.

²⁷ *Id.* at 712. Further, the court maintained that the purpose of the procedural requirements, "to protect against arbitrary or uninformed action" by the prison official, "cannot be reduced to constitutional insignificance." *Id.*

²⁸ The court agreed with Wakinekona's claim that, because the Committee that had recommended his transfer also initiated his transfer proceedings, he had been deprived of an impartial tribunal. *Id.*

²⁹ *Id.*

³⁰ The Court of Appeals, while resolving only the issue of whether the prison regulations created a protected liberty interest, nevertheless noted its previous decisions in which it held that an inmate's transfer from Hawaii to California does not directly implicate the due process clause. *See id.* at 710 n.1 (citing *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974); *Hillen v. Director of Dep't of Social Services*, 455 F.2d 510 (9th Cir.), *cert. denied*, 409 U.S. 989 (1972) (involving interstate transfers from Alaska)). The court noted, however, that these cases were decided *prior* to *Meachum v. Fano*, 427 U.S. 215 (1976), where the Supreme Court held that intrastate prison transfers do not necessarily trigger due process protections.

³¹ *Lono v. Ariyoshi*, 63 Hawaii 138, 145, 621 P.2d 976, 981 (1981).

Hawaii Supreme Court's interpretation of the state regulations was similar to its own, but that the courts disagreed on the federal question of whether the interest created by the regulations should be given fourteenth amendment protection.³² Hence, the Court of Appeals upheld its decision³³ and in so doing declined to follow other circuits which had held that liberty interests were not created by state regulations which merely mandate certain procedures.³⁴ Since the Court of Appeals' decision created a conflict among the circuits on that issue, and because the case also presented the issue of whether such an interstate prison transfer directly implicates the due process clause of the fourteenth amendment, the United States Supreme Court granted certiorari.³⁵

III. DECISION OF THE UNITED STATES SUPREME COURT

A. THE MAJORITY OPINION

The Supreme Court reversed the judgment of the Ninth Circuit.³⁶ First, the Court addressed the issue of whether the interstate prison transfer directly implicated the due process clause, a matter resolved neither by the District Court nor the Court of Appeals.³⁷ The Court adhered to the principle it had established in *Meachum v. Fano*,³⁸ that a prisoner has a liberty interest in being confined "within the normal limits or range of custody which the conviction has authorized the State to impose."³⁹ In determining whether the State had exceeded such limits thus directly implicating the prisoner's protected liberty interest, the

³² *Wakinekona*, 664 F.2d at 714-15.

³³ *Id.* at 715.

³⁴ *See, e.g.*, *Cofone v. Manson*, 594 F.2d 934 (2d Cir. 1979); *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977). In *Lombardo*, the United States Court of Appeals for the First Circuit rejected a prisoner's claim that his transfer from one Massachusetts prison to another violated the due process clause, because the statutes and regulations in question did not "establish that Massachusetts law limits transfers to those instances in which specified events have occurred." 548 F.2d at 15. The regulations, stated the court, "simply provide that an inmate will receive a certain type of a hearing before he is reclassified." *Id.* The court concluded that the provisions were either merely "general statements of the purposes of the Massachusetts system of corrections" or "general directives to the correctional system as to how to treat inmates." *Id.*

In *Cofone*, the Second Circuit held that a statute authorizing the Connecticut Commissioner of Corrections to transfer a state prisoner into federal custody when the inmate needs special treatment or facilities, does not create a justifiable expectation for the prisoner that he would not be transferred absent misbehavior or other specified event. 594 F.2d at 938. Thus, the transfer of a prisoner from a Connecticut correctional institution to a federal penitentiary in Atlanta, Georgia, did not violate the due process clause. *Id.* at 939.

³⁵ *Olim v. Wakinekona*, 456 U.S. 1005 (1982).

³⁶ *Olim v. Wakinekona*, 103 S. Ct. 1741, 1748 (1983). Joining Justice Blackmun in the majority opinion were Chief Justice Burger and Justices White, Powell, Rehnquist, and O'Connor.

³⁷ *See supra* notes 22, 30 and accompanying text.

³⁸ 427 U.S. 215 (1976).

³⁹ *Id.* at 225.

Court utilized the test it had established in *Vitek v. Jones*.⁴⁰ Under this test, confinement directly implicates a liberty interest when the "consequences visited on the prisoner are *qualitatively* different from the punishment characteristically suffered by a person convicted of crime."⁴¹ In *Wakinekona*, the Court rejected respondent Wakinekona's argument that confinement of a Hawaii prisoner on the mainland is "qualitatively different" from the normal circumstances faced such by a prisoner.⁴² Instead, the Court decided that the interstate transfer of Wakinekona, which involved long distances and an ocean crossing, differed from an intrastate transfer only in degree, not in kind.⁴³ In *Meachum*, the Court had held that the "Due Process Clause in and of itself [does not] protect a duly convicted prisoner against transfer from one institution to another within the state prison system."⁴⁴ Hence, because the determining factor in such a due process inquiry is the "nature of the interest involved rather than its weight,"⁴⁵ the *Wakinekona* Court was compelled under *Meachum* to conclude that an interstate prison transfer, even from Hawaii to California, does not directly deprive the prisoner of any liberty interest protected by the due process clause.⁴⁶

As further support for this decision, the Court noted that an inmate "has no justifiable expectation that he will be incarcerated in any particular State,"⁴⁷ indeed, that confinement in the prisoner's home state will often not be possible for a variety of reasons.⁴⁸ Furthermore, state and federal statutes,⁴⁹ interstate agreements,⁵⁰ and prison regulations⁵¹ in-

⁴⁰ 445 U.S. 480 (1980).

⁴¹ *Id.* at 493 (emphasis added).

⁴² *Wakinekona*, 103 S. Ct. at 1745.

⁴³ *Id.* at 1746-47.

⁴⁴ *Meachum*, 427 U.S. at 225.

⁴⁵ *Wakinekona*, 103 S. Ct. at 1747 (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)).

⁴⁶ *Id.* at 1747.

⁴⁷ *Id.* at 1745.

⁴⁸ The Court discussed such reasons as overcrowding; the need to separate certain prisoners; lack of prison facilities with appropriate correctional programs within the State; and the lack within the State of a federal correctional facility in which to place one convicted of a federal crime. *Id.* at 1745-46.

⁴⁹ On the federal level, 18 U.S.C. § 5003(a)(1976) provides in pertinent part:

The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory. . . .

As the majority noted, this statute was invoked to transfer Hawaii prisoners from state facilities to federal prisons on the mainland in *Anthony v. Wilkinson*, 637 F.2d 1130 (7th Cir. 1980), *vacated and remanded sub nom. Hawaii v. Mederios*, 453 U.S. 902 (1981). *Wakinekona*, 103 S. Ct. at 1746 n.7.

Also on the federal level, 18 U.S.C. § 4002 (Supp. V 1981) provides in pertinent part:

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General

clude provisions that suggest that interstate transfers of prisoners may be necessary. Thus, the Court concluded that confinement in another state is "neither unreasonable nor unusual" and therefore is "within the normal limits or range of custody which the conviction has authorized the State to impose."⁵²

The majority next rejected the Ninth Circuit's conclusion that Rule IV creates a constitutionally protected liberty interest.⁵³ The Court began by summarizing the established legal rule that a State may create a liberty interest for prisoners by placing substantive limitations on the discretion employed by officials in making decisions which adversely affect the prisoners.⁵⁴ The Court noted that Hawaii's regulations do not limit the prison administrator's discretion and therefore create no liberty

may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons. . . .

At the state level, a relevant Hawaii statute provides that "[t]he director of social services shall, with the approval of the governor, effect the transfer of a state prisoner to any federal correctional institution for imprisonment, subsistence, care, and proper employment of such a prisoner." HAWAII REV. STAT. § 353-18 (1976). An Alaska statute provides that the "commissioner may designate any available, suitable and appropriate facility for the service of sentence by a prisoner . . . whether or not it is in another state, territory or possession of the United States." ALASKA STAT. § 33.30.100 (1982).

⁵⁰ See, e.g., HAWAII REV. STAT. § 355-1 (1976) (codifying the Western Interstate Corrections Compact). The Western Interstate Corrections Compact provides, *inter alia*, that "[e]ach party state may make one or more contracts with any one or more of the other party states for the confinement of inmates on behalf of a sending state in institutions situated within receiving states." *Id.* The statutory codification of the Compact further provides:

Whenever the duly constituted judicial or administrative authorities in a state party to this compact . . . shall decide that . . . transfer of an inmate to an institution within the territory of another party state is necessary in order to provide . . . an appropriate program of rehabilitation or treatment, said officials may direct that the confinement be within an institution within the territory of said other party state. . . .

Id.

⁵¹ For example, Rule V of Hawaii's Supplementary Rules and Regulations of the Corrections Division provides that a prisoner may retain counsel if his reclassification hearing concerns a "potential interstate transfer," and hence, recognizes that such transfers do occur. Hawaii, Supplementary Rules and Regulations, Rule V.

⁵² *Wakinekona*, 103 S. Ct. at 1746 (quoting *Meechum v. Fano*, 427 U.S. 215, 225 (1976)).

⁵³ The Court has recognized that state statutes can create liberty or property interests protected by the due process clause of the fourteenth amendment. For example, the Court, in *Board of Regents v. Roth*, 408 U.S. 564 (1972), explained that

[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 577. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Supreme Court established that state prison regulations can create protected liberty interests for inmates. *Id.* at 557.

⁵⁴ *Wakinekona*, 103 S. Ct. at 1747. For there to be a state-created liberty interest, a prisoner must demonstrate that the decisionmaker is "required to base its decisions on objective and defined criteria." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring).

interest entitled to due process protection.⁵⁵ Here, the Court used the traditional approach it had set forth in *Greenholtz v. Nebraska Penal Inmates*⁵⁶—a case-by-case examination of the structure and language of the regulations. The crucial inquiry was whether Rule IV provides that transfers be “conditioned upon certain specified events,”⁵⁷ and the Court agreed with the Hawaii Supreme Court that “the prison administrator’s discretion to transfer an inmate is completely unfettered.”⁵⁸ The Court noted that the Program Committee is purely advisory in nature,⁵⁹ while the administrator is the only decisionmaker.⁶⁰ The Court of Appeals had erred in viewing as significant the procedural requirements listed in the regulations.⁶¹ The Court stated that a liberty interest is substantive in nature and not merely the “right to demand needless formality.”⁶² Although due process serves to “protect a substantive interest to which the individual has a legitimate claim of entitlement,” the complete discretion given the administrator implies that there was no such interest here to protect.⁶³

B. THE DISSENT’S OPINION

In his dissent, Justice Marshall attacked both conclusions reached by the majority. First, Marshall concluded that the transfer of Wakinekona from Hawaii to California directly implicated a constitutionally protected liberty interest.⁶⁴ Unlike the majority, Marshall found that this interstate prison transfer effects consequences qualitatively different from those usually suffered by a convict.⁶⁵ Marshall characterized the 4,000 mile transfer as a banishment, which imposed upon Wakinekona an isolation “far more drastic than that which normally accompanies imprisonment.”⁶⁶ Marshall rejected the majority’s assumption that interstate prison transfers are common. By pointing to criminal justice statistics which suggested that very few prisoners held in state prisons were transferred to other jurisdictions,⁶⁷ he concluded that

⁵⁵ *Wakinekona*, 103 S. Ct. at 1747.

⁵⁶ 442 U.S. 1, 12 (1979).

⁵⁷ *Meachum*, 427 U.S. at 226-27.

⁵⁸ *Wakinekona*, 103 S. Ct. at 1747 (citing *Lono v. Ariyoshi*, 63 Hawaii 138, 144-45, 621 P.2d 976, 980-81 (1981)); see *supra* note 31 and accompanying text.

⁵⁹ For a discussion of this Committee’s role, see *supra* notes 13-16 and accompanying text.

⁶⁰ *Wakinekona*, 103 S. Ct. at 1748.

⁶¹ *Id.*

⁶² *Id.* (quoting *Shango v. Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982)).

⁶³ *Id.* at 1748.

⁶⁴ *Id.* at 1749-50 (Marshall, J., dissenting). Justices Brennan and Stevens agreed with Marshall’s opinion on this issue. See *id.* at 1748.

⁶⁵ See *supra* notes 40-43 and accompanying text.

⁶⁶ 103 S. Ct. at 1749.

⁶⁷ Marshall pointed out that less than 3% of Hawaii state prisoners were transferred to

respondent's transfer was a qualitatively different punishment.⁶⁸ Marshall distinguished *Meachum v. Fano*, the case under which the Court had felt compelled to decide *Wakinekona*,⁶⁹ by concluding that it had specifically dealt with *intrastate* transfers. *Meachum* rested on the accepted premise that the initial decision of where to place a prisoner within the state does not implicate a liberty interest.⁷⁰ Marshall stated, however, a state's initial placement of a prisoner outside the state, a long distance away from home and family, *could* raise due process questions.⁷¹

Justice Marshall then concluded that the majority had wrongly decided that Hawaii's prison regulations give the administrator complete discretion in transferring prisoners, and that, in actuality, the regulations do create a liberty interest.⁷² He noted that Rule IV establishes procedural rules⁷³ and limitations on official discretion⁷⁴ that "are at least as substantial as those found sufficient to create a liberty interest in *Hewitt v. Helms*,"⁷⁵ a case decided earlier in the Term.⁷⁶ And, while he concluded that Rule IV does provide that the ultimate decision rests solely in the hands of the prison administrator, Marshall nevertheless reasoned that the regulations created a "protectible expectation" that transfers would not occur for wholly arbitrary reasons.⁷⁷ As additional support for his conclusion that the regulations do create a protected liberty interest, Marshall cited the Court's decision in *Hewitt*, which "re-ject[ed] the view that state laws which impose substantive limitations and elaborate procedural requirements on official conduct create no liberty interest solely because there remains the possibility that an official

another jurisdiction in 1979; that less than 1% nationwide were transferred to other jurisdictions; and that 70% of all state inmates are in institutions less than 250 miles from home. *Id.* at 1750 & n.4.

⁶⁸ *Id.* at 1750.

⁶⁹ See *supra* notes 38-39, 44-47 and accompanying text.

⁷⁰ See *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

⁷¹ *Wakinekona*, 103 S. Ct. at 1749-50.

⁷² Only Justice Brennan agreed with Marshall's conclusion on this issue. *Id.* at 1748.

⁷³ Justice Marshall noted that 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 [Program] Committee is to make its recommendation to the faculty administrator." *Id.* at 1751 (Marshall, J., dissenting).

⁷⁴ The dissent viewed the purpose clause of Rule IV as restricting the administrator's discretion. *Id.* at 1752. This clause provides that transfers are intended to ensure an inmate's "optimum placement" in consideration of "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." *Id.* at 1751 n.6.

⁷⁵ 103 S. Ct. 864 (1983). For an analysis of *Hewitt*, see *infra* notes 119-22 and accompanying text.

⁷⁶ Further, Marshall viewed the procedural requirements of Hawaii's prison regulations as far more elaborate than those in the state regulations involved in *Hewitt*. *Wakinekona*, 103 S. Ct. at 1751 (Marshall, J., dissenting).

⁷⁷ *Id.* at 1752.

will act in an arbitrary manner at the end of the process.”⁷⁸ In so doing, the dissent declined to follow *Lono v. Ariyoshi*,⁷⁹ the Hawaii Supreme Court decision that the majority cited for its conclusion that the prison administrator’s discretion was unfettered, because Marshall found *Lono* to be inconsistent with recent decisions of the United States Supreme Court.⁸⁰

IV. ANALYSIS

This Note will first show that the Supreme Court convincingly applied the standards set forth in *Meachum* in concluding that the interstate transfer of respondent Wakinekona did not directly implicate the due process clause. Conversely, the dissent’s rationale is unpersuasive and lacks precedential support. Second, this Note will show that the Court’s decision that Hawaii’s prison regulations do not create a constitutionally protected liberty interest was correct and consistent with its previous rulings on state-created liberty interests.

A. DIRECT IMPLICATIONS OF THE DUE PROCESS CLAUSE

In determining that Wakinekona’s transfer did not directly implicate the due process clause of the fourteenth amendment, the Supreme Court used very sound reasoning and wisely felt compelled to decide this issue according to its decision in *Meachum v. Fano*.⁸¹ In *Meachum*, the Court held that an intrastate prison transfer does not directly trigger due process protection.⁸² The Court there used the “entitlement” approach to due process analysis under which one alleging to have a liberty interest “clearly must have more than an abstract need. . . , desire. . . , [or] unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”⁸³

⁷⁸ *Id.* Marshall also cited *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979), where the Court held that the expectancy of release provided by a statute on parole was entitled to some constitutional protection, *id.* at 12, even though the Parole Board ultimately could deny parole for any reason it deemed relevant. *Id.* at 18. For a more detailed discussion of the *Greenholtz* decision, see *infra* notes 101-06 and accompanying text.

⁷⁹ 63 Hawaii 138, 621 P.2d 976 (1981); see *supra* note 31 and accompanying text.

⁸⁰ *Wakinekona*, 103 S. Ct. at 1752 n.13 (Marshall, J., dissenting).

⁸¹ 427 U.S. 215 (1976).

⁸² *Id.* at 225. In *Meachum*, respondent inmates of a medium-security institution were given individual classification hearings, after which the Classification Board recommended to the Acting Deputy Commissioner for Classification and the Commissioner of Corrections that the inmates be transferred intrastate to institutions where the living conditions were substantially less favorable. These recommendations were accepted and the transfers were carried out. *Id.* at 216-21. Respondents then brought an action under 42 U.S.C. § 1983 (1979) against the prison officials, alleging that they were deprived of liberty without due process of law because they were transferred to a less favorable institution without an adequate fact-finding hearing. *Id.* at 222.

⁸³ *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

The *Meachum* Court clarified the nature of the liberty interest a prisoner actually possesses under this "entitlement" approach. The Court noted that a prisoner has a constitutionally protected liberty interest in being confined "within the normal limits or range of custody which the conviction has authorized the State to impose."⁸⁴ Specifically, the prisoner has a liberty interest in not being subjected to confinement that brings about "consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of crime."⁸⁵

The majority in *Wakinekona* correctly applied these standards in concluding that the difference between *Wakinekona's* transfer, which involved a long distance and an ocean crossing, and an intrastate transfer or interstate transfer of shorter distance is "a matter of degree, not of kind."⁸⁶ The Court appropriately noted that respondent faced the same hardships that intrastate transferees suffered: separation from home, family, and inmate friends; placement in a possibly hostile environment; interruption of educational and rehabilitative programs; and difficulty in contacting counsel.⁸⁷ The Court correctly reasoned that the circumstances of respondent's transfer affected the *weight* and not the *nature* of the interest involved. Surely respondent faced *quantitatively* greater hardships than do most prison transfers, but nevertheless "[t]he 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."⁸⁸

Wakinekona can be distinguished from *Vitek v. Jones*,⁸⁹ where the Court held that involuntary commitment of prisoners to a mental hospital was not "within the range of conditions of confinement to which a prison sentence subjects an individual."⁹⁰ Whereas *Wakinekona's* transfer would subject him to essentially the same hardships that faced the intrastate transferees in *Meachum*, it would not subject him to two *kinds* of losses suffered by the transferee to a mental hospital: namely, the stigmatizing effects of such a transfer and the mandatory behavior modification therapy given for mental illness.⁹¹ Hence, a justifiable expectation does occur that an inmate will not be transferred to a mental hospital absent a due process hearing concerning his classification as "mentally ill" because placement in a mental hospital, unlike an inter-

⁸⁴ *Meachum*, 427 U.S. at 225.

⁸⁵ *Vitek v. Jones*, 445 U.S. 480, 493 (1980).

⁸⁶ *Wakinekona*, 103 S. Ct. at 1746-47.

⁸⁷ *See id.* at 1747 n.9.

⁸⁸ *Id.*

⁸⁹ 445 U.S. 480 (1980).

⁹⁰ *Id.* at 493.

⁹¹ *Id.* at 494.

state prison transfer, does bring about qualitatively different consequences than those usually faced by prisoners. Therefore, the majority was correct in concluding that a prisoner does not have a protectible liberty interest in not being incarcerated outside his home state.

In contrast, the dissent unconvincingly reasoned that Wakinekona *does* have such a liberty interest. Justice Marshall's analysis is actually not what it purports to be, namely, one using the "entitlement" approach, but is rather an analysis based on the "impact" approach. The "impact" approach is an alternative model of due process rights that the Supreme Court explicitly rejected over a decade ago.⁹² The "impact" approach to due process required procedural protections where a "grievous loss" occurs to the prisoner as the result of a state disciplinary action.⁹³ Marshall clearly followed this approach, for what he actually concluded was not that Wakinekona's transfer was a punishment qualitatively different from the norm, but rather that it was "far more drastic"⁹⁴ and thus *quantitatively* different from normal incarceration. Indeed, in attempting to analogize Wakinekona's transfer to a banishment, Marshall emphasized the prisoner's separation from family and friends, and his being "cut off from his only contacts with the outside world,"⁹⁵ which are consequences faced by *all* convicts.

The Court was indeed compelled to decide the case under *Meachum* because the *types* of consequences that Wakinekona faced as a result of his transfer from Hawaii to California are the same as those faced by prisoners who are transferred within the state. *Wakinekona* is thus best viewed as a slight and logical extension of the rationale employed in *Meachum*. Hence, the Court correctly held that the interstate transfer of Wakinekona was "within the normal limits or range of custody" and

⁹² See *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972); see also *infra* note 93.

⁹³ The "impact" approach is illustrated by the Supreme Court's language in *Morrissey v. Brewer*, 408 U.S. 471 (1972): "[T]he 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] calls for some orderly process. . . ." *Id.* at 482. The *Morrissey* Court was concerned with whether due process required that a State afford an individual procedural protections before revoking his parole.

Under the impact approach, the Court was only concerned with whether the "grievous loss" suffered by the individual outweighed the State's interest in denying the procedural safeguards. This approach was explicitly rejected by the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972):

[A] weighing process has long been a part of any determination of the *form* of hearing required in particular situations by procedural due process. But, to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake.

Id. at 570-71 (footnote omitted) (emphasis in original).

⁹⁴ *Wakinekona*, 103 S. Ct. at 1749 (Marshall, J., dissenting).

⁹⁵ *Id.*

that he therefore had no liberty interest in being incarcerated within the State of Hawaii.

B. STATE-CREATED LIBERTY INTERESTS

In the second part of the opinion, the majority applied the proper standards concerning discretionary decisionmaking in deciding that Hawaii's prison regulations do not create a constitutionally protected liberty interest. In *Wolff v. McDonnell*,⁹⁶ the Supreme Court established the now well-settled concept that state law can create liberty interests entitled to protection under the due process clause. Essentially, a state can statutorily create a protected liberty interest for prisoners by requiring that the decisionmaker base decisions, such as whether to transfer a prisoner, on "objective and defined criteria."⁹⁷ The Court has indicated that if the decisionmaker has complete discretion to transfer a prisoner at will, then the prisoner's expectation that he will remain at a particular prison is "too . . . insubstantial to trigger procedural due process protections. . . ."⁹⁸

It is well established that a decision is based on "objective and defined criteria" when a statute or regulation sets forth the exclusive conditions under which a prisoner can be transferred.⁹⁹ The Supreme Court has also indicated that "objective and defined criteria" are present when the statute or regulation "use[s] language of an unmistakably mandatory character" together with "specified substantive predicates"

⁹⁶ 418 U.S. 539 (1974).

⁹⁷ *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 467 (1981) (Brennan, J., concurring). As the Supreme Court stated in *Vitek v. Jones*, 445 U.S. 480 (1980):

[I]f the State grants a prisoner a right or expectation that adverse action will not be taken against him except upon the occurrence of specified behavior, "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 490-91 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). The same standard applies for state-created interests outside the prison context. *See infra* note 99.

⁹⁸ *Meachum v. Fano*, 427 U.S. at 228.

⁹⁹ *Id.* at 226-27. It has also been established in cases outside the prison context that adverse action is based upon "objective and defined criteria" when the statute or regulation sets forth the exclusive conditions under which a benefit may be denied. In *Arnett v. Kennedy*, 416 U.S. 134 (1974), the statute in question provided that a federal civil servant "may be removed or suspended without pay *only* for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501(a)(1976) (emphasis added), *quoted in Arnett*, 416 U.S. at 140. All of the Justices, while differing over specifically what process was due, nevertheless agreed that, since the statute mentioned the exclusive conditions under which the employee could be removed or suspended, the employee had a legitimate claim of entitlement to continued employment in the absence of the stated conditions. *Arnett*, 416 U.S. at 151-55.

In *Bishop v. Wood*, 426 U.S. 341 (1976), the applicable ordinance set forth several reasons for which a permanent employee could be dismissed. The Supreme Court defined the critical inquiry as whether the ordinance conferred upon the employee a guarantee that dismissal would not occur absent these specific occurrences, or rather merely described procedures for such dismissal. *Id.* at 345.

for the occurrence of the action.¹⁰⁰

It is clear that Rule IV is quite different from regulations that have been found to have "objective and defined" criteria for decisionmaking. In *Greenholtz v. Nebraska Penal Inmates*,¹⁰¹ the Court utilized this standard for "substantive limitation on official discretion" in holding that the Nebraska statutory language created a protectible expectation of parole.¹⁰² The statute in question provided that the Board of Parole "shall" order an eligible prisoner's release on parole "unless" deferral is mandated by any of four specific substantive determinations.¹⁰³ Further, the statute provided a detailed list of fourteen explicit factors and one all-inclusive factor which the Board was obligated to take into consideration in reaching a parole decision.¹⁰⁴ In light of its "unique structure and language," the statute "create[d] a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists."¹⁰⁵

Unlike the Nebraska statute in *Greenholtz*, Rule IV contains neither detailed criteria and standards nor language of a substantially mandatory nature. While the *Greenholtz* statute specifically set forth four situations under which deferral of a prisoner's release on parole is mandated,¹⁰⁶ Rule IV does not mention any substantive predicates that must occur before a transfer is effected. Instead, Rule IV merely states that the general purpose of transfers is to ensure the "optimum placement"¹⁰⁷ of prisoners and serve the "best interests of the individual, the State, and the community."¹⁰⁸ Further, while the Nebraska statute set forth in detailed fashion fourteen factors which the Board of Parole is obligated to take into consideration, Rule IV only generally mentions that the classification process "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."¹⁰⁹ Also, Rule IV employs mandatory language only with respect to procedural matters that the Program Committee must afford the prisoner, and not to any substantive predicates that must occur before the prisoner is transferred. Use of mandatory language in a statute or regulation is not sufficient to make

¹⁰⁰ *Hewitt v. Helms*, 103 S. Ct. at 871.

¹⁰¹ 442 U.S. 1 (1979).

¹⁰² *Id.* at 12.

¹⁰³ NEB. REV. STAT. § 83-1,114(1) (1976), *quoted in Greenholtz*, 442 U.S. at 11.

¹⁰⁴ NEB. REV. STAT. § 83-1,114(2), *quoted in Greenholtz*, 442 U.S. at 16-18 (Appendix to Opinion of the Court).

¹⁰⁵ *Greenholtz*, 442 U.S. at 12.

¹⁰⁶ *See supra* note 103.

¹⁰⁷ *See supra* note 19.

¹⁰⁸ *Id.*

¹⁰⁹ Hawaii, Supplementary Rules and Regulations, Rule IV, ¶1.

the decision a matter of "objective and defined criteria" unless it is used "in connection with requiring specific substantive predicates."¹¹⁰ Because Rule IV neither uses mandatory language concerning the administrator's treatment of the Program Committee's recommendation¹¹¹ nor specifies that a transfer will not occur absent the occurrence of specified events, the administrator's discretion is "completely unfettered."¹¹²

Indeed, the regulations in *Wakinekona* are similar to those in *Connecticut Board of Pardons v. Dumschat*¹¹³ and *Meachum*, two cases in which the Court held that there was no "objective and defined criteria" on which a decision must be founded. In *Dumschat*, the Court found that the statute "imposes no limit on what procedure is to be followed, what evidence may be considered, or what criteria are to be applied by the Board."¹¹⁴ The Court stated that in comparison with the statutory provisions in *Greenholtz*, the "Connecticut commutation statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement."¹¹⁵

Similarly, Rule IV does not define what conditions must exist before a prisoner is transferred, provides no criteria which must be followed by either the Program Committee or the administrator, and contains no mandatory language with respect to any action taken by the ultimate decisionmaker.¹¹⁶ The regulations in *Wakinekona* are also similar to the statutory provisions involved in *Meachum*.¹¹⁷ Those provisions did not limit the ability of the commissioner to transfer sentenced prisoners not only because they did not contain mandatory language, but also because they did not condition the transfer upon the evaluation of any specific criteria.¹¹⁸

The dissent wrongly asserted that *Wakinekona* was indistinguishable from *Hewitt v. Helms*,¹¹⁹ where the Court had held that Pennsylvania statutes and regulations setting forth procedures for confining an inmate to administrative segregation gave prisoners a protected liberty interest in remaining in the general prison population. In *Hewitt*, the Supreme

¹¹⁰ *Hewitt v. Helms*, 103 S. Ct. at 871.

¹¹¹ *See supra* note 15 and accompanying text.

¹¹² *Wakinekona*, 103 S. Ct. at 1747.

¹¹³ 452 U.S. 458 (1981).

¹¹⁴ *Id.* at 466.

¹¹⁵ *Id.*

¹¹⁶ *See supra* notes 15, 19, 109 and accompanying text.

¹¹⁷ MASS. GEN. LAWS ANN. ch. 127, § 97 (1974), quoted in *Meachum*, 427 U.S. at 227 n.7. This statute provides that "[t]he commissioner *may* transfer any sentenced prisoner from one correctional institution of the commonwealth to another. . . ." *Id.* (emphasis added). The commissioner's discretion is limited only to the extent that he must secure the approval of the county sheriff in certain cases. *Id.*

¹¹⁸ *See supra* note 117.

¹¹⁹ 103 S. Ct. 864 (1983).

Court noted that the Commonwealth "ha[d] gone beyond simple procedural guidelines" and had "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed . . . and that [the adverse action] . . . will not occur absent specified substantive predicates. . . ." ¹²⁰ The Pennsylvania statute provided that an inmate would not be administratively segregated absent such specified substantive predicates, namely, "the need for control" or "the threat of a serious disturbance."¹²¹ Thus, the statutory provision in *Hewitt* set forth conditions that must be present before a prisoner could be administratively segregated. The institutional officer's discretion was there limited in that he could not confine a prisoner to Close or Maximum Administrative Custody unless "it has been determined that there is a threat of a serious disturbance or a serious threat to the individual or others."¹²²

Rule IV, however, does not require that specified events or conditions must occur before the administrator transfers a prisoner and, hence, does not limit his discretion in making the final decision. The policy statement of Rule IV, which states that transfers are intended to ensure a prisoner's "optimum placement," is very similar to the statutory provision involved in *Lombardo v. Meachum*.¹²³ There the First Circuit held that the provision, which defined the purpose of the classification system as being the development of a rehabilitation program for each inmate did not "confer upon individual inmates, a right not to be transferred absent a showing that specified events have occurred."¹²⁴

The dissent in *Wakinekona* correctly noted that a prison policy statement in *Wright v. Enomoto*¹²⁵ did create a protected expectation that segregation would not occur for arbitrary reasons with its language that "inmates may be segregated for medical, psychiatric, disciplinary, or administrative reasons."¹²⁶ This provision, however, specifically mentioned "exclusive conditions" under which segregation could occur and, hence, gave the prisoner a justifiable expectation that segregation would not occur in the absence of those conditions. In contrast, Rule IV does not specifically mandate that certain criteria *must* be considered in the decisionmaking process and, further, does not delineate any substantive predicates upon which the transfer may be conditioned. Therefore, al-

¹²⁰ *Id.* at 871.

¹²¹ *Id.* (quoting PA. STAT. ANN. tit. 37, § 95.104(b) (Purdon 1980)).

¹²² *Id.* at 871 n.6.

¹²³ 548 F.2d 13 (1st Cir. 1977).

¹²⁴ *Id.* at 15.

¹²⁵ *Wright v. Enomoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *aff'd*, 434 U.S. 1052 (1978).

¹²⁶ *Id.* at 403.

though its language concerning procedural protection afforded the prisoner by the Program Committee is mandatory in nature, Rule IV does not require that decisions be based on "objective and defined criteria" because it does not set forth substantive predicates limiting official discretion. The fact that the administrator's discretion is unfettered implies that a prisoner can have no justifiable expectation that he will not be transferred absent specific misbehavior or other occurrences. Thus, Rule IV does not create any liberty interest.

V. CONCLUSION

Although the decision in *Wakinekona* does not cross any new legal frontiers, it does reflect the Court's position that due process protections only apply where one is legitimately entitled to a liberty interest as well as the Court's reluctance to impinge upon the discretion given prison officials. The decision that the interstate transfer of respondent from Hawaii to California does not directly implicate the due process clause is a proper ruling which only slightly extends the *Meachum* decision. Finally, the Court's conclusion that Hawaii's prison regulations do not create a constitutionally protected liberty interest is also correct and sound given the fact that the prison administrator certainly has unlimited discretion in transferring prisoners.

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