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Constitutional Law and Civil Rights

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CONSTITUTIONAL LAW AND CIVIL RIGHTS

OVERVIEW

During the period covered by this survey, the Tenth Circuit Court of Appeals was presented with a variety of cases in the area of constitutional law and civil rights. The majority of the cases arose under either section 1983 of the Civil Rights Act of 1871 or Title VII of the Civil Rights Act of 1964. There were, however, several significant decisions in the areas of freedom of religion, freedom of speech and expression, and the right of the judiciary to review military decisions.

I. SECTION 1983 OF THE CIVIL RIGHTS ACT OF 1871

A. *Basis for Liability*

Congress, in 42 U.S.C. § 1983,[1] has provided a remedy for the deprivation of rights guaranteed by the Constitution or laws of the United States.[2] The party seeking relief must "demonstrate that he was deprived of a right secured by the Constitution or laws of the United States, and that any such deprivation was achieved under color of law."[3]

1. Due Process and Deprivation of Property

A basic concept of constitutional law is that due process must be afforded individuals in actions designed to deprive them of property.[4] The initial inquiry focuses on whether a property interest exists. Once a property right is established, the scope of the due process protections may be ascertained. *Poolaw v. City of Anadarko*[5] involved an American Indian who, after being fired from the city's police force, was not reinstated after the police review board determined that his termination was improper. Poolaw claimed that he was subjected to employment discrimination due to his race in violation of section 1981[6] and Title VII.[7] Poolaw also asserted a section

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1. 42 U.S.C. § 1983 (1976 & Supp. IV 1980). This section provides that:
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. . . .

2. Wise v. Bravo, 666 F.2d 1328, 1331 (10th Cir. 1980); *see also* Chapman v. Houston Welfare Rights Org., 441 U.S. 600 (1979).

3. Wise v. Bravo, 666 F.2d 1328, 1331 (10th Cir. 1980); *see also* Paul v. Davis, 424 U.S. 693 (1976); Adickes v. Kress & Co., 398 U.S. 144 (1970).

4. U.S. CONST. amend V.

5. 660 F.2d 459 (10th Cir. 1981).

6. 42 U.S.C. § 1981 (1976). He alleged certain improper employment practices: "discriminatory job classifications, promotional practices, and rates of pay." 660 F.2d at 461. Poolaw also asserted that the city's failure to reinstate him after the review board found his discharge improper to be "racially discriminatory because a Caucasian police officer was reinstated under similar circumstances." *Id.*

7. 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. IV 1980).

1983 cause of action claiming he was denied equal protection and due process of the law through the official conduct of the city.[8] The district court dismissed the action for failure to state a claim.

The court of appeals reversed the district court's finding that Poolaw failed to state a claim under section 1981. The court noted that section 1981 provides a remedy for employment discrimination on the basis of race,[9] whether it is from the public or private sector.[10] Finding the existence of a property right to be "irrelevant to a claim of denial or equal employment because of race under section 1981," the court held that the allegation of purposeful employment discrimination on account of the plaintiff's race, was sufficient to state a claim.[11]

Turning to the denial of due process claims,[12] the court held that state law must be examined to determine if Poolaw had " 'a legitimate claim of entitlement to his position,' "[13] or a " 'sufficient expectancy of continued employment to constitute a property interest.' "[14] This holding reversed the District Court of Oklahoma which relied upon *DeBono v. Vizas*[15] and *Montera v. Vizas*.[16] In the consolidated cases of *DeBono* and *Montera*, the Tenth Circuit court held that due to the city manager's unfettered discretion regarding police employment and cause for dismissal, no property interest was created.[17] In contrast, the *Poolaw* court held that because the Anadarko City Charter specifically stated that a policeman may not be discharged without cause, and provided for an independent, objective, and final decision of the issue through administrative and judicial procedures, Poolaw did have a sufficient interest in continued employment to require due process.[18]

In *Atencio v. Board of Education*,[19] rather than examine the nature of a property right, the court focused on the issue of the scope of due process protections. Atencio was dismissed from his position as superintendent of the school district by the Board of Education. The Board failed to follow the prescribed conference procedures that were to precede termination. Regula-

8. 660 F.2d at 461.

9. *Id.* (citing Johnson v. Railway Express Agency, 421 U.S. 454, 459-60 (1975)).

10. 660 F.2d at 462.

11. *Id.*

12. In addressing the plaintiff's claims that the defendants deprived him of equal protection, the court held that: "[T]he constitutional right to equal protection with regard to public employment does not depend on the existence of a property interest in that employment." *Id.* The court found the same allegations that supported the plaintiff's claims under § 1981 were sufficient to state an equal protection claim under § 1983. *Id.*

13. 660 F.2d at 463 (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

14. 660 F.2d at 463 (quoting Hall v. O'Keefe, 617 P.2d 196, 200 (Okla. 1980)).

15. No. 77-1299 (10th Cir. Dec. 18, 1978).

16. No. 77-1300 (10th Cir. Dec. 18, 1978).

17. 660 F.2d at 463. In these cases the court applied a Colorado statute (COLO. REV. STAT. § 31-4-213(2) (1973)) which creates a protected property interest in certain city jobs.

18. Because the question of the existence of a property interest in *Poolaw* is a question of state law, the court determined the Oklahoma Supreme Court, if it were to decide the issue, would find such an interest did exist in the case. 660 F.2d at 464. The court based its determination upon the holding of the Oklahoma Supreme Court in Hall v. O'Keefe, 617 P.2d 196 (Okla. 1980). "[T]he terms of employment established by an employee . . . may create a sufficient expectancy of continued employment to constitute a property interest which must be afforded constitutionally guaranteed due process." *Id.* at 200.

19. 658 F.2d 774 (10th Cir. 1981).

tions provide that prior to notification of discharge for unsatisfactory work performance, each employee is entitled to two or more conferences with school personnel.[20] This requirement, Atencio argued, created a property interest protected by the federal Constitution.[21]

The Tenth Circuit Court of Appeals overturned a jury verdict for Atencio, and dismissed the case for failure to establish the federal claim. In addressing the necessity of following the procedures set forth in the regulations, the court adopted the rationale of the Sixth Circuit: "[A] breach of state procedural requirements is not, in and of itself, a violation of the Due Process Clause."[22] Noting that an " 'action under the civil rights statutes is not a plenary review of a challenged state administrative procedure,' "[23] the court found the proper avenue for review was that provided by New Mexico law.[24] A federal constitutional violation would exist if Atencio was "denied a fair forum for protecting his state rights."[25] The court of appeals, however, found the procedure to be sufficient under the due process clause.[26]

In *Phelps v. Kansas Supreme Court*,[27] the court examined what process is due in a disciplinary action against an attorney. The Kansas Supreme Court had upheld a Review Panel's finding of four violations of Kansas disciplinary standards by Phelps. In addition, the court found a fifth violation that was not specified in the complaint.[28] In light of both the evidence before it and Phelp's prior disciplinary history, he was disbarred. Phelps filed a section 1983 suit in federal district court alleging a denial of due process. Phelps claimed the addition of a violation, of which he had no notice or opportunity to defend, constituted a deprivation of property without due process of law. The district court granted the defendant's motion to dismiss.[29]

The Tenth Circuit court held that due process was not violated.[30] The fact that the Kansas Supreme Court found one statutory and three ethical

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20. *Id.* at 777.

21. *Id.*

22. *Id.* at 779. In Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976), the court held:

> It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions.

Id. at 329-30.

23. 658 F.2d at 779 (quoting Whitsel v. Southeast Local School Dist., 484 F.2d 1222, 1227 (6th Cir. 1973)).

24. 658 F.2d at 779.

25. *Id.* at 780.

26. *Id.* (citing Harrah Independent School Dist. v. Martin, 440 U.S. 194, 197-98 (1979); Prebble v. Broderick, 535 F.2d 605, 617 (10th Cir. 1976)).

27. 662 F.2d 649 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2009 (1982).

28. 662 F.2d at 650. The Review Board's findings were: 1) dishonest conduct in violation of DR 1-102(A)(4); 2) conduct prejudicial to the administration of justice in violation of DR 1-102(A)(5); 3) false statements in violation of DR 7-102(A)(5); and 4) signing a pleading in bad faith in violation of a Kansas statute. The fifth violation, found by the supreme court, was a violation of DR 7-102(A)(1) (prohibition against action which serves to harass or maliciously injure another). *Id.*

29. *Id.*

30. *Id.* at 652.

violations arising out of the same incident, any one sufficient to sustain the disbarment decision, enabled the Tenth Circuit to find no due process violations.[31] As additional support for this holding, the court noted that "[t]he evidence supporting the additional violation was the same as that supporting the other ethical violations."[32] The court likened this case to a criminal case with multiple charges and the imposition of a general sentence. "[The] sentence may be upheld if conviction on any one of the counts is supportable."[33]

In his dissent, Judge McKay objected to the majority's assumption that the Kansas Supreme Court would have disbarred Phelps regardless of the additional violations found. He argued that this assumption allowed the majority to distinguish improperly the United States Supreme Court case of *In Re Ruffalo*.[34] In *Ruffalo* the Court held that the "absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived [the attorney] of procedural due process."[35] Judge McKay viewed the majority's distinction that *Ruffalo* "involved two distinct incidents, only one of which was charged," whereas *Phelps* involved "several charges growing out of the same incident,"[36] as a distinction without a difference in a due process analysis.[37]

Rodziewicz v. Widener[38] involved a prisoner's claim that his watch was broken by the jail authorities while he was in custody. When the authorities denied breaking the watch and refused to reimburse him, he sued for forty-five dollars, alleging deprivation of property without due process.[39] In its decision, the Tenth Circuit relied upon the recent Supreme Court case, *Parratt v. Taylor*.[40] Under *Parratt* if the deprivation was unintentional or did not occur as a result of established state procedures, and the state provided a remedy that met the requirements of due process, no claim was stated under section 1983.[41] The Tenth Circuit found both prongs of the test were met and dismissed the constitutional claim.[42]

2. First Amendment

In *Owens v. Rush*,[43] the plaintiff appealed from a dismissal of a claim that the defendants fired him from his position as under-sheriff in retaliation for helping his wife file a Title VII discrimination action against the sheriff's

31. *Id.*
32. *Id.*
33. *Id.* (citing Barenblatt v. United States, 360 U.S. 109, 115 (1959)).
34. 390 U.S. 544, *modified*, 392 U.S. 919 (1968).
35. 390 U.S. at 552.
36. 662 F.2d at 652 (McKay J., dissenting).
37. *Id.* at 653.
38. No. 81-2290 (10th Cir. Feb. 11, 1982).
39. *Id.* slip op. at 2.
40. 451 U.S. 527 (1981).
41. *Id.* at 543. COLO. REV. STAT. § 24-10-106(1)(b) (1973) exempts from sovereign immunity the prosecution of tortious claims arising from the operation of a penitentiary such as Rodziewicz' claim.
42. No. 81-2290, slip op. at 3.
43. 654 F.2d 1370 (10th Cir. 1981).

department.[44] Both Owens and his wife held positions in the sheriff's department. Anne Owens began legal proceedings against the Board of County Commissioners for unlawful discrimination in the form of disparate pay scales. Prior to her filing the lawsuit in federal court alleging violations of numerous constitutional and statutory rights, Owens and his wife received termination notices.[45]

Owens claimed that the defendants' action violated his first amendment right to free speech and association and interfered with a protected property interest, his public employment.[46] After determining that Owens did not have a vested interest or property right in his position, the district court, following the reasoning of *Abeyta v. Town of Taos*, dismissed the case.[47] In *Abeyta*, the Tenth Circuit held that former municipal employees had no protected property interest in their position unless circumstances indicated a continued right to employment; absent a property interest in their employment due process was not required prior to termination.[48]

In its decision in *Owens*, the Tenth Circuit noted the difference between a procedural due process claim and a first amendment claim. While procedural due process requires a property interest to trigger constitutional protections, a free speech claim under the first amendment does not.[49] "The First Amendment clearly affords protection against action penalizing or inhibiting the exercise of such constitutional rights, even absent a contractual or tenure right to continued employment."[50] The *Abeyta* holding was inapplicable to the facts due to its reliance on the lack of a protected property or liberty interest to sustain a *procedural* due process claim.[51] Because " 'assisting' litigation vindicating civil rights; attending meetings on necessary legal steps; and associating for the purpose of assisting persons seeking legal redress [are] 'modes of expression and association protected by the First and Fourteenth Amendments . . . ,' "[52] the appellate court reversed the district court's dismissal of Owen's first amendment claim.

The court of appeals discussed the first amendment and its relation to public employment more thoroughly in *Childers v. Independent School District No. 1*.[53] Childers was a tenured teacher who claimed that he was involuntarily reassigned by the Board of Education in retaliation for exercising his constitutional right to support a board candidate and to organize a teachers' union. In his claim under section 1983, he argued that the reassignment denied him a property interest without according him any due process pro-

44. *Id.* at 1372.
45. *Id.* at 1373.
46. *Id.* at 1377-78.
47. 499 F.2d 323 (10th Cir. 1974).
48. *Id. See also* Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).
49. 654 F.2d at 1379 (citing Board of Regents v. Roth, 408 U.S. 564, 569 (1972); Perry v. Sindermann, 408 U.S. 593, 599 (1972)).
50. 654 F.2d at 1379.
51. *Id.*
52. *Id.* (quoting NAACP v. Button, 371 U.S. 415, 420-21, 428-29 (1962)). *See also In re* Primus, 436 U.S. 412, 426 (1977); Rampey v. Allen, 501 F.2d 1090, 1098 (10th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975).
53. 676 F.2d 1338 (10th Cir. 1982).

tections. He also alleged impermissible infringement of his first amendment rights.[54]

In disposing of the due process claim, the Tenth Circuit court recognized that while a tenured teacher has "a property right in continued employment [under Oklahoma law] he does not have a property interest in any particular position."[55] By separating the right to continued employment from the right to retain the same position, the court in *Childers* found that, under Oklahoma law, a tenured teacher can be demoted with a consequent reduction in salary without activating constitutional due process considerations.[56] Thus, the district court's dismissal was proper.

Turning to Childer's first amendment claim, the court recognized the necessity of balancing the competing interests involved. While "[p]ublic employment may not be conditioned upon relinquishment of the right to engage in activities protected by the First Amendment,"[57] the state's interests in regulating the speech of its employees differs significantly from its interests in the regulation of the speech of the citizenry in general.[58] Quoting the Supreme Court's test in *Pickering v. Board of Education*[59] and its own decision in *Key v. Rutherford*,[60] the court balanced the employee's private interest in "commenting upon matters of public concern" with the interest of the employer, the state, "in promoting the efficiency of the public services it performs through its employees."[61] If the employer can show that an unrestricted exercise of first amendment rights will cause a significant disruption, the employee's rights will be limited to accommodate the state's interest. Nevertheless, if the employee's activities are protected under *Pickering* and *Key*, he must prove that his activities motivated the employer to alter his employment status. The burden is placed on the employer to show that he would have made the same decision in the absence of the protected activity.[62] The fact that Childer's employment was not terminated did not foreclose his section 1983 claim. "Retaliation that takes the form of altered employment conditions instead of termination may nonetheless be an unconstitutional infringement of a protected activity."[63] In light of this holding, the court reversed the district court's dismissal of this claim.

A first amendment analysis was also applied in the context of refusal to renew athletic scholarships at a public university. *Marcum v. Dahl*[64] involved a suit by several members of the women's basketball team at the University of Oklahoma who alleged that they were deprived of their scholarships as a result of their exercise of their first amendment right of free speech. They

54. *Id.* at 1340-41.
55. *Id.* at 1341.
56. *Id.*
57. *Id.*
58. *Id.*
59. 391 U.S. 563, 568 (1968).
60. 645 F.2d 880, 884 (10th Cir. 1981). For a discussion of this case, see *Constitutional Law and Civil Rights, Eighth Annual Tenth Circuit Survey*, 59 DEN. L.J. 239, 243 (1982).
61. 676 F.2d at 1341.
62. *Id.*
63. *Id.* at 1342.
64. 658 F.2d 731 (10th Cir. 1981).

also alleged a deprivation of property rights without due process.[65] During the 1977-78 season, the plaintiffs told the athletic director they were opposed to the continued employment of their coach. After the season had ended, they voiced the same objection to the press, stating they would not play if the coach was retained. Subsequently, their scholarships were not renewed.[66] The district court judge granted the defendant's motion for judgment notwithstanding the verdict and dismissed the action.[67]

The court of appeals agreed with the trial court's finding that the women's comments to the press were "not of general public concern" and as such, did not warrant constitutional protection.[68] The comments to the athletic director were not protected speech because they were "statements at the school on the internal affairs of the school system [and] do not invoke First Amendment protection."[69] Thus, the plaintiffs' first amendment rights were not violated.

The plaintiffs also contended that the refusal to renew their scholarships deprived them of a property right without due process. The plaintiffs were notified twice of the decision not to renew the scholarships and were given a right to a hearing before the effective date of the scholarships. After the second notification, the plaintiffs requested a hearing, but subsequently withdrew the request. A hearing was held, however, with notification to the plaintiffs' counsel, but no appearance was made.[70] In response to plaintiffs' argument that a hearing was required before the decision not to renew was made, the court quoted *Fuentes v. Shevin*:[71] " '[I]f the right to notice and hearing is to serve its full purpose, then it is clear that it must be granted at a time when the deprivation can still be prevented.' "[72] Due to the fact that the hearing was "in ample time" prior to the effective date of the scholarships, the court found no denial of due process and upheld the dismissal of this claim.[73] To have held otherwise would have enabled an employee to make any unprotected in-house statement and then protect himself by going public in the press or other media.

3. Privacy Interests—Family

The Supreme Court has recognized that the relationship between a par-

65. *Id.* at 733.
66. *Id.*
67. *Id.*
68. *Id.* at 734.
69. *Id.* The Tenth Circuit court, in dicta, apparently analogized a student on an athletic scholarship at a public university to a public employee.

> The exercise of a constitutionally protected right by a public employee does not serve as a curative for all prior misconduct during the course of employment. A public employee cannot expunge all prior transgressions from his employment record by merely exercising a constitutional right. A discharge for exercise of first amendment rights is impermissible. . . . The exercise of a first amendment right, however, does not insulate a public employee from being discharged for occurrences prior to the exercise of the right. (citations omitted).

Id.
70. *Id.* at 735.
71. 407 U.S. 67 (1972).
72. 658 F.2d at 735 (quoting *Fuentes*, 407 U.S. at 81).
73. 658 F.2d at 735.

ent and child is constitutionally protected and that interference with that relationship may give rise to a section 1983 action.[74] While recognizing this protection, *Wise v. Bravo*[75] demonstrates that not all interferences with these rights rise to a constitutional level.

Wise involved an attempt by several police officers, including Bravo, to enter Wise's home to retrieve his daughter and return her to her mother. Wise's daughter was visiting him with the mother's permission. The mother, however, had changed her mind and wanted the child back sooner than they had originally agreed. Wise initially refused Officer Bravo entry to his home, but then allowed him to enter when another officer indicated they were there in their official capacity.[76] Wise sued under section 1983 for interference with his visitation rights, for an assault, and trespass. The trial court granted summary judgment in favor of the defendants on the assault and trespass claims, and dismissed the other claims.[77]

In its opinion, the Tenth Circuit court reviewed several United States Supreme Court decisions that recognized the existence of a fundamental interest in personal rights.[78] The court, however, found "no substantive federal constitutional, statutory or common law governing family relationships, including matters of custody and visitation rights between parents and children."[79] This area was found to be uniquely within the state's power, subject to review under the fourteenth amendment.[80] Colorado law provided the plaintiff with several remedies.[81]

In upholding the trial court's dismissal of the claim for interference with his visitation rights, the court held that although the officers' actions may have constituted tortious interference with Wise's rights, the interference did not rise to a constitutional level. Similarly, the court viewed the allegations of assault and battery as a type of tort not actionable under section 1983

74. Quilloin v. Walcott, 434 U.S. 246 (1977) (right of unwed father to intervene in the adoption proceedings of his child if he has sought custody of or shouldered significant responsibility for the child); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974) (right of an expectant mother to continue to teach as long as she is able); Stanley v. Illinois, 405 U.S. 645 (1972) (right of an unwed father to a hearing on his fitness before his children are removed from his custody after death of the mother); Armstrong v. Manzo, 380 U.S. 545 (1965) (divorced father to be given notice of any adoption proceeding regarding his children to enable him to contest the adoption); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate is a basic right).

75. 666 F.2d 1328 (10th Cir. 1981).

76. *Id.* at 1330.

77. *Id.* at 1330-31.

78. *Id.* at 1331. The court cited: Lassiter v. Dept. of Social Serv., 452 U.S. 18 (1981); Quilloin v. Walcott, 434 U.S. 246 (1978); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Wisconsin v. Yoder, 406 U.S. 205 (1972); Stanley v. Illinois, 406 U.S. 645 (1972); Armstrong v. Manzo, 380 U.S. 545 (1965); Prince v. Massachusetts, 321 U.S. 158 (1944); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska 262 U.S. 390 (1923).

79. 666 F.2d at 1332.

80. *Id.* The court noted that "§ 1983 should not be viewed as a vehicle to resolve a dispute involving visitation rights-privileges. That is a subject uniquely reserved to the state court system. Any claim for relief that Wise may have exists under Colorado law and in the Colorado state system." *Id.* at 1333.

81. The court cited the Uniform Dissolution of Marriage Act, COLO. REV. STAT. § 14-10-129 (1973) (provides visitation rights to the noncustodial parent); *id.* § 14-10-121 (enforcement of child custody order in contempt proceeding); *id.* § 29-5-111 (remedy for torts committed by police officers).

unless the aggrieved individual's deprivation rises to a constitutional level. This occurs only when the actions cause severe injuries or are "grossly disproportionate to the need for action under the circumstances and [are] inspired by malice . . . amounting to an abuse of official power that shocks the conscience . . . ."[82] When the interference rises to this level, a claim under section 1983 is made. Finding that Wise failed to allege conduct that met this criteria, the court upheld the district court's grant of summary judgment.[83]

4. Statutory Rights

Pushkin v. Regents of University of Colorado,[84] was a suit under section 1983, by a doctor with multiple sclerosis, alleging that the University had discriminated against him in violation of section 504 of the Rehabilitation Act of 1973 (Act).[85] Pushkin alleged that the medical school had denied him admission to the psychiatric residency program solely due to his handicap. The University appealed the trial court's ruling, that Pushkin was "an otherwise qualified handicapped individual who had been excluded from a program receiving federal funds solely by reason of his handicap," and was entitled to admission to the program.[86] The Regents' appeal was based primarily on their contentions that section 504 does not provide for a private right of action.[87] Whether a private right of action exists under section 504 is critical because without it Pushkin would have had no standing to bring the action under section 1983.

Section 504 is silent as to whether a private right of action exists.[88] In holding that a private right of action does exist, the Tenth Circuit court noted that the Supreme Court had suggested that such a right exists[89] and that "[e]very court of appeals and district court . . . which considered [the] question [have] held that a private right of action exists under the statute."[90] The Tenth Circuit court also examined the legislative history, finding that it expressly "permit[ted] a judicial remedy through a private action."[91] Additionally, the *Cort v. Ash*[92] test for determining the existence of an implied

82. *Id.* at 1333.

83. *Id.*

84. 658 F.2d 1372 (10th Cir. 1981).

85. 29 U.S.C. § 794 (1976 & Supp. IV 1980). The statute reads in part:

> No otherwise qualified handicapped individual in the United States, as defined by section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

86. 658 F.2d at 1376. *See* Pushkin v. Regents of Univ. of Colo., 504 F. Supp. 1292, 1299 (D. Colo.) *aff'd*, 658 F.2d 1372 (10th Cir. 1981).

87. The other grounds for appeal were that Pushkin failed to exhaust his administrative remedies and that the trial court's decision was erroneous. 658 F.2d at 1376.

88. *Id.* at 1376-80.

89. Campbell v. Kruse, 434 U.S. 808 (1977).

90. 658 F.2d at 1377 (citations omitted). The Tenth Circuit, in Coleman v. Darden, 595 F.2d 533 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979) recognized that a private right of action may be available under § 504.

91. 658 F.2d at 1379. *See* SENATE COMM. ON LABOR AND PUBLIC WELFARE, REHABILITATION ACT AMENDS. OF 1974, S. REP. NO. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6390-91.

92. 422 U.S. 66 (1975). The test uses four inquiries:

private right of action was met.[93]

Finally, the court adopted the reasoning of the Supreme Court in *Cannon v. University of Chicago*,[94] which held that because Title IX of the Civil Rights Act was patterned after Title VI of the same Act, the implied private right of action for discrimination in Title VI should be read into Title IX.[95] By analogy, the Tenth Circuit reasoned that because section 504 of the Rehabilitation Act was also patterned after Title VI of the Civil Rights Act, the implied private right of action should extend to section 504.[96]

Turning to the defendants' contention of failure to exhaust administrative remedies, the court held that all of the administrative remedies available under the act need not be exhausted prior to bringing the suit.[97] The court's rationale was that a party should not have to pursue a remedy irrelevant to his particular needs. The Act provides for the possible termination of federal funding for any organization in violation of the Act. If Dr. Pushkin were to pursue and succeed with this course of action, it would not remedy the discrimination. On the contrary, it would severely damage, if not destroy, the program into which he was attempting to obtain admission.[98]

The final, and perhaps most significant question resolved by the court, concerned the proper standard of review to be applied under the Rehabilitation Act. The court rejected the University's contention that because no suspect class, fundamental right, or irrebuttable presumption was involved, the rational basis test should be applied.[99] Rather, the court interpreted the statute as providing its own criteria for evaluating claims. The individual must prove that he is otherwise qualified for the position sought and that he was rejected *solely* on the basis of his handicap.[100] Pushkin met his burden of proof, and the district court's order of injunction was affirmed.[101]

B. *Procedural Problems Under Section 1983*

1. Statute of Limitations

Congress did not provide for a statute of limitations for suits brought under section 1983. Therefore, the federal courts will generally apply the

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First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? (citations omitted).

Id. at 78.

93. 658 F.2d at 1378.

94. 441 U.S. 677 (1979).

95. *Id.* at 709.

96. 658 F.2d at 1379-80.

97. *Id.* at 1382.

98. *Id.* at 1381-82.

99. *Id.* at 1383. This test would have allowed the University to discriminate if it could articulate a rational basis behind its actions.

100. *Id.* at 1385.

101. *Id.* at 1387-91.

state statute of limitations applicable to the most analogous state action.[102] However, in *Childers v. Independent School District No. 1*,[103] the court of appeals followed the Supreme Court's holding in *Occidental Life Insurance Co. v. EEOC*.[104] *Occidental* requires courts to look beyond the superficial requirements of the state statute to the underlying policies and compare them with the policies of section 1983.[105] The court drew a distinction between a state right and a constitutional right, and stated that a statute of limitations should be selected that is "sufficiently generous in the time periods to preserve the remedial spirit of federal civil rights actions."[106] An action seeking to vindicate a federally created right should not be governed by the "procedural hoops" required for state tort cases.[107]

2. Standing to Sue Under Section 1983

Dohaish v. Tooley[108] illustrates the distinction between the concepts of cause of action and standing. In *Dohaish*, the plaintiff not only failed to present a cause of action, but could not establish standing to maintain an action. The case involved the death of Saud Dohaish, a Saudi Arabian student who died as a result of a bar fight.[109] Eddie Santistevan was arrested and charged with first degree murder. Shortly after the preliminary hearing, a prosecutor from the Denver District Attorney's office successfully moved to dismiss the charges. Subsequently, Abdullah Dohaish, the decedant's father, filed a section 1983 suit in federal district court, alleging that the district attorney's refusal to prosecute stemmed from prejudice and violated the fourteenth amendment and the Civil Rights Act. The district court dismissed the action for lack of standing.[110]

The Tenth Circuit evaluated the strengths of Dohaish's section 1983 action on two grounds: standing and the legal sufficiency of the action.[111] The court found standing to be absent; a section 1983 action is a personal suit, maintainable only by the individual who suffered the violation of his civil rights. The court also noted that the citizenry has no recognized right to bring a lawsuit based upon the nonprosecution of another.[112] The inabil-

102. Spiegel v. School District No. 1, Laramie County, 600 F.2d 264, 265 (10th Cir. 1979).

103. 676 F.2d 1338 (10th Cir. 1982). This case is also discussed *supra* text accompanying notes 51-63.

104. 432 U.S. 355, 367 (1977).

105. 676 F.2d at 1342-43.

> State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. . . . State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

Id. at 1342 (quoting *Occidental*, 432 U.S. at 367)).

106. 676 F.2d at 1343 (quoting Shouse v. Pierce County, 559 F.2d 1142, 1146 (9th Cir. 1977)).

107. 676 F.2d at 1343 (quoting Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1162 (9th Cir. 1976) (en banc)).

108. 670 F.2d 934 (10th Cir. 1982), *cert. denied*, 103 S. Ct. 60 (1982).

109. 670 F.2d at 935-36.

110. *Id.* at 936.

111. *Id.*

112. *Id.* at 937 (citing Linda S. v. Richard D., 410 U.S. 614, 619 (1973)).

ity of the father to prove that his civil rights were violated, barred him from pursuing the action.[113] Additionally, prosecutors enjoy absolute immunity from suit regarding the discretionary decisions inherent in their jobs. Dohaish had other remedies. He could file an action requesting the state court to require good cause for dismissing the charge,[114] and he could file a wrongful death charge against Santistevan.[115]

C. *Prisoner Rights*

In *Daniels v. Gilbreath*[116] the court set out the requisite test to be applied when a prisoner asserts a section 1983 action based upon cruel and unusual punishment under the eighth and fourteenth amendments. Jesse Daniels died in the Oklahoma Eastern State Hospital, where he was sent from the McCurtain County Jail for psychiatric evaluation concerning his competence to stand trial.[117] While Daniels was in jail he received no medical attention.[118] Jesse's father, Hervie Daniels, received permission to take him from the jail to the hospital where he was to be evaluated. The father spoke with the treating physician concerning Daniel's prior medical history. He attempted to tell the treating physician about his son's allergy to certain medicines, but failed to communicate this information.[119] When Jesse's behavior at the hospital became such that medication was required, he was given a sedative and died shortly thereafter. The cause of death was never established.[120]

In reversing a jury verdict for the plaintiff, the court of appeals held that the actions of the sheriff and his department were too indirect to have been considered a proximate cause of death. "[T]here were intervening acts subsequent to the time [Daniels] left the jail which rendered their actions legally remote causes—causes which do not qualify as proximate causes."[121] Their actions were removed both temporally and spacially from the activities associated with Daniels' death. Additionally, he would have been transferred to the hospital regardless of whether he was given his medication at the jail. The court also noted that the subsequent events were unforeseeable.[122]

Regarding Dr. Garcia, the treating physician, the court relied on *Estelle v. Gamble*,[123] in holding that an act of medical malpractice does not necessarily rise to the level of constitutional violation. The court indicated that the plaintiff may assert a claim for medical malpractice in state court.[124] Only a

113. 670 F.2d at 937.
114. *Id. See* COLO. REV. STAT. § 16-5-204 (1973).
115. 670 F.2d at 938. *See* COLO. REV. STAT. § 13-21-202 (1973).
116. 668 F.2d 477 (10th Cir. 1982).
117. He was arrested for the robbery and assault of an elderly woman. *Id.* at 478.
118. *Id.* at 478-79.
119. Daniels asserted that the physician "walked away" from him, however, this was never established. *Id.* at 479, 488.
120. *Id.* at 479.
121. *Id.* at 479-80.
122. *Id.* at 480.
123. 429 U.S. 97 (1976).
124. 668 F.2d at 482.

deliberate indifference to serious medical needs of prisoners constitutes cruel and unusual punishment barred by the eighth amendment.[125] The court held the evidence failed to show that the defendant, Dr. Garcia, "by his conduct or failure to act, created a condition which was the substantial cause of death," or that his conduct was done deliberately.[126]

D. *Remedies Under Section 1983*

The Tenth Circuit, in *Garrick v. City and County of Denver*,[127] addressed several issues concerning punitive damages in a section 1983 suit. Garrick sought actual and punitive damages for alleged violations of his constitutional rights by Jones, a Denver police officer. Jones shot Garrick several times during a scuffle following a traffic stop. The jury awarded Garrick $20,500 in actual damages and $70,000 in punitive damages.[128]

On appeal, it was argued that the exemplary damage award was excessive and that the jury misconceived the purpose of punitive damages. Finding defendants' assertion that the punitive damage award was reviewable *only* under Colorado standards meritless, the court held damages under federal civil rights statutes are to be governed by federal standards.[129] This view is harmonious with decisions of the First and Fifth Circuits.[130] "Punitive damages may be awarded under section 1983 even where they would not normally be recoverable under local law in the state where the violation occurred."[131] The court upheld the $70,000 verdict, finding that the award was not so excessive or inadequate as to shock the judicial conscience.[132]

While punitive damages are generally assessable in section 1983 actions, the Tenth Circuit in *Ray v. City of Edmond*,[133] narrowed the scope of their applicability. Ray filed a section 1983 action against the City of Edmond, Oklahoma, and four of its police officers, charging violations of his civil rights during his arrest and detention. After the remittitur, the plaintiff received one dollar nominal damages for each of the five defendants and a total of $125,350 in punitive damages, as well as attorneys' fees. The court reversed the punitive damage award against the city.[134] Relying on the Supreme Court's decision in *City of Newport v. Fact Concerts Inc.*,[135] the appel-

125. *Id.* at 481 (quoting *Estelle*, 429 U.S. at 104-05).

126. 668 F.2d at 488. The court emphasized the difference between the proof required in a § 1983 action and a case alleging negligence. The 1983 action must prove that there was a willful failure to give medical attention where it was necessary. "In some circumstances a reckless quality attending the conduct would suffice." *Id.*

127. 652 F.2d 969 (10th Cir. 1981).

128. *Id.* at 970.

129. *Id.* at 971 (citing 42 U.S.C. § 1988 (1976); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Furtado v. Bishop, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980)).

130. *See* McCulloch v. Glasgow, 620 F.2d 47 (5th Cir. 1980); Caperci v. Huntoon, 397 F.2d 799 (1st Cir. 1967), *cert. denied*, 393 U.S. 940 (1968).

131. 652 F.2d at 971.

132. *Id.* at 972.

133. 662 F.2d 679 (10th Cir. 1981) (per curiam).

134. *Id.* at 680.

135. 453 U.S. 247 (1981) (neither historical nor policy considerations support the exposure of municipalities to punitive damage liability for bad faith actions of employees).

late court held that a municipality is immune from punitive damages in section 1983 actions.[136]

II. CIVIL RIGHTS CLAIMS UNDER TITLE VII

The Tenth Circuit decisions dealing with employment discrimination under Title VII of the Civil Rights Act of 1964 (Act)[137] were almost equally divided between racial discrimination cases and sex discrimination cases. The scope of the protection afforded by the Act was examined as well as procedural issues.

A. *Standards for a Prima Facie Case*

The Tenth Circuit refined its interpretation of the criteria set out by the Supreme Court in *McDonnell Douglas Corp. v. Green*,[138] for establishing a prima facie case of prohibited discrimination or disparate treatment. Under *McDonnell* the plaintiff must show: 1) he or she belonged to a class protected by Title VII; 2) he or she applied for a job or promotion and was qualified for the position; 3) he or she was rejected for the job or from promotion despite being qualified; and 4) after the rejection, the position remained vacant, while the employer continued to seek applications from individuals with the plaintiff's qualifications.[139] The Court, in establishing this standard, noted, they "are not necessarily applicable in every respect to differing factual situations."[140]

In *Mortensen v. Callaway*,[141] the plaintiff, a civilian chemist employed by the Army, alleged that she was passed over for a promotion because she was a woman, and that after her complaint, she suffered retaliatory harassment. In affirming the trial court's finding for the Army, the court held that while the plaintiff had established a prima facie case, the Army had established valid reasons for her rejection.[142]

The court of appeals, following *McDonnell*,[143] limited to three the elements required for a prima facie case based on the particular facts. Her showing that the position was filled by another, as well as her proof that she belonged to a protected class under Title VII, applied for a promotion for which she was qualified, and was rejected, were sufficient to establish a prima facie case.[144] The trial court erred in requiring her to show also that the position had remained open.[145]

The court, however, failed to provide any criteria for determining in

136. 662 F.2d at 680. The court noted the effect of its decision in *Ray* was to "overrule any suggestions to the contrary in our earlier opinions." *Id. See, e.g.*, Simineo v. School Dist. No. 1, 594 F.2d 1353 (10th Cir. 1979).

137. 42 U.S.C. §§ 2000e to 2000e-1b (1976).

138. 411 U.S. 792 (1973).

139. *Id.* at 802.

140. *Id.* n.13.

141. 672 F.2d 822 (10th Cir. 1982).

142. *Id.* at 823-24.

143. *See* text accompanying note 139-40.

144. 672 F.2d at 823.

145. *Id.*

future cases when a showing that the position was filled by another would be sufficient, instead of proving that the position remained open and further applications were sought. A close reading of the authority relied upon by the court[146] indicates that the relevance of the criteria is determined by looking to the purpose behind Title VII. Individuals should be allowed to bring suits under Title VII when they "demonstrate that the alleged discrimination did not result from a lack of qualifications or the absence of a vacancy in the job sought."[147] Flexibility of the criteria for establishing a prima facie case is necessary to meet the broad remedial purposes of Title VII.[148] Thus, proof that the position was filled by a member of the class from which it is likely that the employer would draw if the employer were discriminating would tend to serve the same purpose as a showing that the position remained open after the plaintiff's rejection.[149]

B. *Scope of the Act's Protection*

While Title VII provides protection from employment discrimination to a broad class of individuals, it does not extend to all employees. Title VII contains an exception for members of the "personal staff" of elected officials.[150] The applicability of this exception was examined in *Owens v. Rush*.[151] Owens had been appointed to the position of undersheriff by the sheriff after the election. Later Owens was fired for aiding his wife in her effort to file a Title VII action of her own.[152] If Owens' job did not fall within the exception, his actions on behalf of his wife were protected by Title VII.[153] The dispute, therefore, focused upon the scope of the "personal staff" exception.

The *Owens* court first established the broad parameters of the exception: "Congress intended for the personal staff exception to apply to only those individuals who are in highly intimate and sensitive positions of responsibil-

146. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 (1977); Aikens v. United States Postal Serv., 642 F.2d 514, 517 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

147. Aikens v. United States Postal Serv., 642 F.2d 514, 517 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 912 (1981).

148. 672 F.2d at 823.

149. After the establishment of a prima facie case, if the defendant meets his burden of going forward by showing that his actions were proper, the burden shifts back to the plaintiff to show that the defendant's reasons were pretextual. *See id.*; Montgomery v. Yellow Freight Sys., Inc., 671 F.2d 412, 413 (10th Cir. 1982). *See also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

150. "[T]he term 'employee' shall not include . . . any person chosen by [an elected official] to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office." 42 U.S.C. § 2000e(f) (1976).

151. 654 F.2d 1370 (10th Cir. 1981). This case is also discussed *supra* text accompanying notes 43-52.

152. 654 F.2d at 1373.

153. 42 U.S.C. § 2000e-3(a) (1976) provides, in part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

ity on the staff of the elected official."[154] The court found that the statute should be narrowly construed so as not to defeat this intent.[155] In order to make this determination, the nature and circumstances of each employment relationship must be examined.[156] Factors the court considered relevant in determining that Owens' position fell within the exception included Owens' personal accountability to the sheriff, the sensitive and confidential nature of the work, the fact that he was second in command and therefore took on the sheriff's responsibilities when he was away or unable to perform his duties, and the fact that the sheriff, through his bond, was liable for the undersheriff's actions when the undersheriff was in command.[157]

III. FIRST AMENDMENT RIGHTS

A. *Freedom of Religion*

The inherent tension between the first amendment's establishment clause and the free exercise clause was at issue in *Lanner v. Wimmer*.[158] In a well reasoned opinion the Tenth Circuit held that although a released-time program did not constitute a *per se* violation of the first amendment, certain aspects of the program were unconstitutional.[159]

Parents of present and future public school students in Logan, Utah brought a class action suit against the members of the school board challenging the constitutionality of a released-time program.[160] For more than thirty years the Utah State Board of Education had permitted high school students, upon written request of their parents, to be released for one hour each day during school hours for religious instruction by the Church of Jesus Christ of Latter-Day Saints.[161] The plaintiffs alleged that this released-time program violated both the establishment clause and the free exercise clause of the first amendment.[162] The district court held the program did not constitute a *per se* violation of the first amendment,[163] but enjoined the granting of credit for completion of the Old Testament and New Testament course, the collecting of attendance reports, the recognition of enrollment in seminary classes in fulfillment of minimum hour attendance requirements, and the counting of seminary attendance in the formula for the school district's eligibility for state funds.[164]

The Tenth Circuit agreed with the trial court that released-time programs, which permit students to leave during the school hours to attend reli-

154. 654 F.2d at 1375.
155. *Id.*
156. *Id.* at 1376.
157. *Id.*
158. 662 F.2d 1349 (10th Cir. 1981).
159. *Id.* at 1359.
160. *Id.* at 1356.
161. Lanner v. Wimmer, 463 F. Supp. 867, 870 (D. Utah 1978), *aff'd in part, rev'd in part*, 662 F.2d 1349 (10th Cir. 1981).
162. 662 F.2d at 1356.
163. 463 F. Supp. at 883.
164. *Id.* at 876-83.

gious classes, do not unconstitutionally advance or inhibit religion.[165] The implementation of the program, however, was analyzed by the criteria developed by the Supreme Court in *Lemon v. Kurtzman*.[166] Under the *Lemon* test, 1) the statute must have a secular legislative purpose; 2) its primary effect must neither advance nor inhibit religion; and 3) it must not foster excessive government entanglement.[167]

The appellate court affirmed the district court's finding that the attendance-gathering procedure was unconstitutional.[168] Under this procedure, student aides went to the released-time schools to pick up the attendance slips provided by the public schools. Although this may have been a minor matter, as the district court observed, there was a possibility of government entanglement and hence, the court of appeals agreed that the use of the "least entangling administrative alternatives" was required.[169] While the school had a legitimate interest in knowing where its students were during the day, and the seminary's use of the school's slips was the most administratively efficient method for keeping track of the students, the fact that the public school collected the slips was not the least entangling alternative. "It is less entangling but as solicitous of the state's interests to require released-time personnel to transmit attendance reports to the public school."[170]

The court, on the other hand, found several aspects of the program constitutional because they were designed to accommodate the program with as little inconvenience to the students and the administrator as possible.[171] The court found these aspects of the program to be substantially similar to the program upheld in *Zorach v. Clauson*.[172] The connection of the seminary's bell and intercom system with the public school's system and the use of a box provided by the school to enable seminary personnel to pick up messages concerning school programs that may interfere with the seminary's schedule had a secular purpose.[173] Both the box and the intercom system served the secular purpose of facilitating a minimum amount of interference with the public school's meetings.[174] The court found a lack of excessive entanglement. The intercom system was one-way; it only allowed the public school to contact its students at the seminary. The boxes worked in the same manner, allowing the seminary to adjust to the school's needs.[175] The seminary, rather than the government, bore the cost of the installation and maintenance of the intercom system.[176]

The most troublesome aspect of this case was the credit that was given

165. 662 F.2d at 1347 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971); Zorach v. Clauson, 343 U.S. 306 (1952)).
166. 403 U.S. 602 (1971).
167. *Id.* at 612-13.
168. 662 F.2d at 1358.
169. *Id.*
170. *Id.* at 1359.
171. *Id.*
172. 343 U.S. 306 (1952).
173. 662 F.2d at 1360.
174. *Id.* at 1359.
175. *Id.*
176. *Id.*

by the school for the time a student was in seminary classes. The court examined the issue in light of the several ways the word "credit" was used. "Credit" was employed to "measure the number of hours or units of instruction required for graduation from Logan Senior High School."[177] This practice was mandated by the Utah State Board of Education in guidelines, limiting the number of transferable hours and the areas to which they could be applied. More importantly, the Board stated "[n]o credit is to be given to courses devoted mainly to denominational instruction."[178] This limitation on transferable hours created constitutional problems in that it required the state, through the public schools, to examine and monitor the "content" of the courses taught at the seminary.[179] The court of appeals found this practice to be excessive entanglement between the school authorities and the religious institution. The state may not use a "purely religious test for determining what is not 'mainly denominational.' "[180]

The court recognized that this situation must be viewed differently from the common practice of the state placing requirements upon private religious schools in order to meet its compulsory education laws. It is not unconstitutional for the state to require a private secular school to meet certain minimum qualifications for its teachers and a minimum numbers of hours of instruction in the required subjects; to determine whether a course covered the required subject matter; and to monitor the private schools' compliance.[181] While the line may be fine at times, there is a difference between these requirements and the situation in *Lanner*, where the state judges what is or what is not religious in a private religious institution. The court found the monitoring of the content of the courses to be excessive entanglement, offensive to the establishment clause.[182]

The term "credit" was also employed to measure the time during which minors were required to attend school.[183] The court termed this "custodial credit," utilized to meet the state interest in maintaining supervision.[184] Under this category, no evaluation of the religious or non-religious character

177. *Id.* at 1360.

178. *Id.* (quoting the Utah Bd. of Education's 1969 Policy Statement, Record, vol. 2, at 350-g).

179. 662 F.2d at 1361.

180. *Id.* at 1361 (citations omitted).

181. *Id.*

182. *Id.*

> If the extent of state supervision is only to insure, just as is permitted in the case of church-sponsored full-time private schools, that certain courses are taught for the requisite hours and that teachers meet minimum qualification standards, nothing in either the establishment or free exercise clauses would prohibit recognizing *all* released-time classes *or none*, whether religious in content or not, in satisfaction of graduation requirements.

Id. (emphasis in original). *See* Lemon v. Kurtzman, 403 U.S. 602 (1972); *see generally* Cantwell v. Connecticut, 310 U.S. 296 (1943); Espinosa v. Rusk, 634 F.2d 477 (10th Cir. 1980), *aff'd mem.*, 102 S. Ct. 2025 (1982).

183. UTAH CODE ANN. § 53-24-1 (1981) provides that: "Every . . . person having control of any minor between six and eighteen years of age shall be required to send such minor to a public or regularly established private school during the regularly established school year of the district in which he resides . . . ."

184. 662 F.2d at 1362.

of the classes was necessary. It did not violate the three-prong *Lemon* test,[185] and in fact was complementary to the state's interest.[186]

The term "credit" was also used to measure the school's eligibility for state aid.[187] The school's funding was based upon the number of students who attended a minimum of four classes per day. The hour spent in the released-time program was considered in this determination.[188] In reversing the district court on this point, the court noted that none of the funding allocated to the school was given to the released-time school and held the financial benefit the program may produce for the school constitutional.[189]

B. *Freedom of Speech and Expression*

The Tenth Circuit ruled on an interesting first amendment claim in *McGurran v. Veterans Administration*.[190] A government regulation and parallel union contract clause restricting a Veterans Administration employees' union's right to display posters on a centrally located union bulletin board was found to be constitutional.[191] Local No. 1557 of the American Federation of Government Employees (the "Union") distributed a poster to many of its members employed by the Veterans Administration's (VA) Regional Office in Denver. The employees displayed the poster, which "showed a caricature of President Carter and announced the Union's intention to protest a 'pay cap' or limit on federal salary increases," on various walls, room dividers, and filing cabinets.[192] The assistant director for the VA office ordered the removal of the posters because their posting violated government regulations and the Union's contract. The federal regulations involved prohibited such posting except on the bulletin board provided by the government for the Union's use.[193] In the Union's contract, both parties agreed that the government was to provide a centrally located bulletin board for the Union's use.[194]

The court of appeals affirmed the trial court's determination that the regulation was constitutional. The restriction was not related to the subject-matter content of the posters, but was concerned with their placement.[195] The court stressed the basic principle that not only are first amendment rights subject to time, place, and manner restrictions,[196] but that the government may "preserve the property under its control for the use to which it is

185. *See supra* text accompanying note 167.
186. 662 F.2d at 1362.
187. *Id.*
188. *Id.*
189. *Id.* at 1363. "If giving 'funding credit' for attendance at released-time classes in allocating state subsidies has any effect, its sole effect is to increase funds available to the public schools. While the practice may assist the public schools, it neither enhances nor inhibits the church-sponsored released-time courses." *Id.*
190. 665 F.2d 321 (10th Cir. 1981).
191. *Id.* at 322.
192. *Id.*
193. *Id. See* 41 C.F.R. §§ 101-308 (1981).
194. 665 F.2d at 323.
195. *Id.* at 322. "The First Amendment does not guarantee the right of expression at any place a person may choose." *Id.* (citing Greer v. Spock, 424 U.S. 828, 836 (1976)).
196. 665 F.2d at 322 (citing Cox v. Louisiana, 379 U.S. 536 (1965)).

lawfully dedicated."[197] Alternative means of communication were available to the Union,[198] and because of the nature of the areas where the posting was prohibited, the court found no first amendment violation. The court also balanced the government's legitimate interest in promoting the efficiency and productivity of its employees with employees' freedom of expression of ideas.[199] One major criticism of this opinion is that it could be subject to a variety of interpretations.

This opinion fails to deal separately with the rights of speech and free expression for the *Union* and for the *individual employees*. The individual employees could have posted the materials as an expression of their own views, and thus, the opinion implies that the Union can contract away its individual members' first amendment rights. The opinion also does not require a showing by the government that the employees' work would be affected in any manner by the existence of the posters in the work area. Absent such a showing, the employees' freedom of expression interests should have been upheld.

3. Freedom of the Press and the Right of Access

After the 1980 census, a suit was brought to force adoption of a redistricting plan prior to the 1982 election. During court-ordered compromise negotiations held at the federal courthouse, Judge Finesilver denied a local television station's request to allow television cameras into the hearing rooms.[200] In *Combined Communications Corp. v. Finesilver*,[201] the plaintiff television station sought a writ of mandamus requiring Judge Finesilver to allow television broadcast coverage of the negotiations, alleging that the restriction violated the first amendment right of access to news of the operation and actions of the government.[202]

The court of appeals denied the writ, relying on several Supreme Court decisions addressing the issue of courtroom access. The first amendment does not grant to the media a constitutional right to televise inside a courthouse.[203] A reporter's rights within a courthouse are no greater than those of the general public.[204] Furthermore, the courtroom and courthouse are under the control of the court.[205] The court then balanced the competing interests, holding that any benefit derived from the visual presentation of the

197. 665 F.2d at 323 (citing Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1964)).

198. 665 F.2d at 322.

199. *Id.*

200. Combined Communications Corp. v. Finesilver, 672 F.2d 818 (10th Cir. 1982). The denial was under Rule 16, Local Rules of Practice, Federal Dist. Courts. *Id.* at 820 n.1.

201. 672 F.2d 818 (10th Cir. 1982).

202. *Id.* at 820.

203. 672 F.2d at 821 (citing Gannett Co. v. DePasquale, 443 U.S. 368, 381 (1979); Estes v. Texas, 381 U.S. 532, 539-40 (1965)).

204. 672 F.2d at 821 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 609 (1978)).

205. 672 F.2d at 821 (quoting Sheppard v. Maxwell, 384 U.S. 333, 358 (1966)). Due to this control "courts may impose restrictions upon media access to courtrooms and courthouse premises when necessary to protect and facilitate the proper administration of the judicial system." 672 F.2d at 821.

meeting room was outweighed by the potential disruption of the meeting and other judicial proceedings. The plaintiff was allowed access to the meetings; its representative was free to take notes and disseminate the information gathered.[206]

IV. CASE DIGESTS

A. *Military Regulations Review by the Judiciary*

Lindenau v. Alexander,[207] involved a divorced mother of two minor children, who, contrary to regulations,[208] enlisted in the New Mexico Army National Guard. When the facts came to light, she was honorably discharged.[209] Soon thereafter she filed suit, challenging the constitutionality of the regulation which, in effect, prohibited a single custodial parent from enlisting in the National Guard. She alleged that the regulation violated the equal protection clause because it discriminated against her as an unmarried parent with a minor child. She also alleged that the regulation discriminated against all women because it affected more women than men. In addition, she claimed that the regulation violated the constitutional right to make private decisions in matters of marriage and family life.[210]

In examining the alleged constitutional violation, the Tenth Circuit recognized the traditional judicial deference to internal military matters.[211] " 'Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.' "[212] The court noted, nevertheless, that members of the military community enjoy many of the same rights as members of the civilian community.[213]

Adopting the view of the Fifth Circuit,[214] the court determined the proper scope of review was limited to examining whether a military official has acted outside the scope of his powers, whether a military official violated internal regulations, whether statutes relating to the military, executive orders, or regulations are constitutional, and whether procedures followed in court martials and selective service inductions violate the Constitution.[215] The court also adopted the Fifth Circuit's test[216] for examining an internal military decision:

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206. *Id.* at 820.
207. 663 F.2d 68 (10th Cir. 1981).
208. Army Nat'l Guard Reg. AR-601-210, *quoted in Lindenau*, 663 F.2d at 70.
209. 663 F.2d at 70.
210. *Id.*
211. *Id.* at 70-71. *See* U.S. CONST. art. I, § 8. *See also* Schlesinger v. Ballard, 419 U.S. 498, 510 (1975) ("The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress."); Gilligan v. Morgan, 413 U.S. 1, 10 (1972) ("The complex, subtle, and professional decision as to the composition, training, equipping, and control of a military force is essentially professional military judgment, subject *always* to civilian control of the Legislative and Executive Branches.") (emphasis in original).
212. 663 F.2d at 70 (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1952)).
213. 663 F.2d at 71 (citing Parker v. Levy, 417 U.S. 733, 751 (1974)).
214. *See* Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).
215. 663 F.2d at 71.
216. Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).

> [a] court contemplating review of an internal military determination [is] first to determine whether the case involves an alleged violation of a constitutional right, applicable statute, or regulation, and whether intra-service remedies have been exhausted. If so, the court is then to weigh the nature and strength of the challenge to the military determination, the potential injury to the plaintiff if review is refused, the type and degree of anticipated interference with the military function, and the extent to which military discretion or expertise is involved in the challenged decision.[217]

Applying this criteria, the court first examined Lindenau's constitutional claims and held there is no right to enlist in the armed service.[218] While Lindenau failed to prove single parents with minor children were a suspect class, the government articulated a rational basis behind the regulation.[219] In response to Lindenau's claim that the regulation interfered with her freedom with respect to family matters and marriage, the court of appeals stated: " 'The regulation . . . does not affirmatively curtail marriage or childbearing,' . . . but instead insures that National Guard personnel can rapidly respond to national defense requirements and fulfill their duties . . . ."[220]

Two factors of the test were in the favor of the government. The Army National Guard had attempted to function with single custodial parents and determined that it adversely affected the morale and the ability of the Guard to mobilize quickly and respond to emergencies.[221] Lindenau also failed to prove factually that the regulation discriminates against women because it adversely affects more women than men. The court found the regulation was not intended to keep women out of the National Guard. The court stated that single women parents "with minor children are excluded because they are single parents with minor children, not because they are women."[222]

Judge McKay concurred with the result,[223] although he was troubled by the majority's reliance upon the Fifth Circuit's decision in *Mindes v. Seaman*.[224] He believed that the Supreme Court's decision in *Personnel Administrator v. Feeney*,[225] made *Mindes* no longer tenable.[226] He would have adopted the view of the Third Circuit in *Dillard v. Brown*,[227] decided subsequent to *Feeney*.[228]

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217. NeSmith v. Fulton, 615 F.2d 196, 201 (5th Cir. 1980) (summarizing the requirements of Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971)).

218. 663 F.2d at 72 (citations omitted).

219. *Id.* at 72-73.

220. *Id.* at 73 (quoting West v. Brown, 558 F.2d 757, 760 (5th Cir. 1977)).

221. *Id.* at 74.

222. *Id.*

223. *Id.* at 74-75 (McKay, J., concurring).

224. 453 F.2d 197 (5th Cir. 1971).

225. 442 U.S. 256 (1979).

226. 663 F.2d at 75.

227. 652 F.2d 316 (3d Cir. 1981).

228. 663 F.2d at 75.

B. *Standing and Mootness*

The question of standing and mootness was addressed by the court in the context of access for television cameras in a federal district court's hearing room, in *Combined Communications Corp. v. Finesilver*.[229] The court ruled that the plaintiff had standing because it suffered an injury in fact with respect to an interest within the zone of protection of the Constitution:[230] its ability to report the news, protected by the first amendment, was impaired.[231]

Examining the mootness issue, the court applied the test set forth by the Supreme Court in *Weinstein v. Bradford*.[232] Although the controversy generating the case may have passed, the question is not considered moot if " '1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and 2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.' "[233] *Weinstein's* first requirement was met due to the short duration of the hearings. As to the second criterion, the court held that the likelihood that the plaintiff's cameras would in the future, be barred from statutorily open meetings conducted at the federal courthouse was "not so remote and speculative that the controversy must be considered moot."[234]

C. *The Commerce Clause and State Sovereignty*

In *Oklahoma v. Federal Energy Regulatory Commission*,[235] Oklahoma, Texas, Wyoming[236] and Louisiana challenged portions of the National Gas Policy Act of 1979 (Act or NGPA),[237] as unconstitutional in its application as it applies to wholly intrastate gas. The plaintiffs contended that the NGPA was in violation of the commerce clause[238] because it regulated natural gas that had not moved in interstate commerce.[239] Plaintiffs also alleged viola-

229. 672 F.2d 818 (10th Cir. 1982). *See supra* text accompanying notes 200-206 for a discussion of this case in another context.

230. 672 F.2d at 820. *See also* Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 152 (1970).

231. 672 F.2d at 820.

232. 423 U.S. 147 (1975) (per curiam).

233. 672 F.2d at 820 (quoting *Weinstein*, 423 U.S. at 149). *See also* Napier v. Gertrude, 542 F.2d 825, 826 (10th Cir. 1976), *cert. denied*, 429 U.S. 1049 (1977).

234. 672 F.2d at 821.

235. 661 F.2d 832 (10th Cir. 1981), *cert. denied*, 102 S. Ct. 2902 (1982).

236. Wyoming and Ralph L. Harvey, individually and as the president of Marlin Oil Corp., were allowed to intervene as parties plaintiff. The United States was allowed to intervene as a party defendant. 661 F.2d at 833.

237. 15 U.S.C. §§ 3301-3432 (1976 & Supp. IV 1980).

> The relevant portions of the Act included Title I, which establishes price ceilings for all first sales of natural gas irrespective of its interstate or intrastate character; Title II, which provides for a pass-through of the costs incurred by interstate pipelines to industrial users and which, while not applicable to intrastate pipelines, prohibits the [s]tates from enacting or enforcing any conflicting regulations; Title III B, which authorizes sales between interstate and intrastate pipelines in accordance with certain non-discriminatory contractual requirements imposed by the Federal Energy Regulatory Commission; and Title V, which provides for the administration of the Act.

661 F.2d at 834.

238. U.S. CONST. art. I, § 8, cl. 3.

239. 661 F.2d at 833-34.

tions of state sovereignty and immunity as protected under the tenth amendment.[240]

In upholding the district court's grant of summary judgment in favor of the Federal Energy Regulatory Commission (FERC) and its finding that the Act was constitutional, the court recognized that the district court's analysis paralleled *Hodel v. Virginia Surface Mining & Reclamation Association, Inc.*[241] Under *Hodel*, the court's task of assessing whether Congress' exercise of its power is within its authority under the commerce clause is "relatively narrow."[242] " 'The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.' "[243]

Congress had determined that the intrastate sale of unregulated natural gas affected interstate commerce.[244] Relying on *Hodel*,[245] the appellate court deferred to Congress: "[The] [s]tates' burden of establishing that the means selected by Congress was not reasonably adapted to the end permitted by the Constitution is a heavy one which [the] States have failed to meet."[246]

The court in upholding the dismissal of the state sovereignty and governmental immunity claims under the tenth amendment again relied on *Hodel*.[247] The court noted that the states' participation was not mandated by the NGPA.[248] Furthermore, Congress has the authority to displace or preempt states' laws regulating activity that affects interstate commerce when they conflict with federal laws.[249] By merely allowing the states to participate in the program if they wished, the NGPA did not mandate state involvement, and did not infringe upon their sovereignty.[250]

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240. *Id.* at 834. U.S. CONST. amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

241. 452 U.S. 264 (1981) (upholding the constitutionality of the Surface Mining and Reclamation Control Act of 1977).

242. 661 F.2d at 837 (quoting *Hodel*, 452 U.S. at 276).

243. *Id. See also* Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

244. 661 F.2d at 835-36. The price disparity between the intrastate market and the interstate market prompted many producers to sell their production in the intrastate market. The result was shortages of natural gas in nonproducing states. *Id.* at 834.

245. Once a rational basis for a finding that the regulated activity affects interstate commerce is made, the only question is whether "the means chosen by [Congress] is reasonably adapted to the end permitted by the Constitution." *Hodel*, 452 U.S. at 276 (citations omitted).

246. 661 F.2d at 838.

247. *Id.* at 838-39.

248. *Id.* at 840. For a tenth amendment challenge to prevail, there needs to be

> a showing the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty." And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure operations in areas of traditional functions."

Hodel, 452 U.S. at 287-88 (quoting National League of Cities v. Usury, 426 U.S. 833, 852, 854 (1976)).

249. 661 F.2d at 840.

250. *Id.*

D. *Aliens' Rights*

The Tenth Circuit Court of Appeals addressed the question of what constitutional rights and protections must be afforded aliens who have not officially entered the United States in *Rodriguez-Fernandez v. Wilkinson*.[251] The plaintiff, a Cuban national, arrived in the United States on the Freedom Flotilla on June 2, 1980. Immigration officials, acting pursuant to statute,[252] allowed him to disembark and placed him in custody, pending a determination of his eligibility for admission. He told immigration officials that he had a criminal record and was serving a sentence at the time the Cuban government allowed him to leave. Based upon his lack of immigration documents and his criminal record, it was determined that he was not entitled to disembark and was detained pending an exclusion hearing.[253] He was briefly detained at a processing camp in Wisconsin and then transferred to the federal penitentiary at Leavenworth, Kansas.[254]

The plaintiff was given a formal exclusion hearing on July 21, 1980. At that time, it was determined that he was an excludable alien and was ordered deported to Cuba. Attempts by the State Department to arrange for Rodriguez-Fernandez' deportation to Cuba were unsuccessful. The plaintiff remained in custody at the federal penitentiary in Leavenworth. In September, 1980, he filed a petition for a writ of habeas corpus. Shortly thereafter he was transferred to the federal penitentiary in Atlanta, Georgia.[255]

The district court found that while the plaintiff has no rights to avoid detention under the fifth or eighth amendments, the government's actions were arbitrary and an abuse of discretion. Furthermore, the court found the actions to be in violation of principles of international law which create a right to be free from detention.[256] By order dated December 31, 1980, the government was given ninety days to release Rodriguez-Fernandez. At a compliance hearing on April 22, 1981, it was established that the plaintiff had not yet been released. The government requested another sixty days to arrange either for the deportation or the parole of Rodriguez-Fernandez.[257] The court denied the request, ordering his release within twenty-four hours.[258]

The Tenth Circuit affirmed the district court's holding and gave the government thirty days in which to release Rodriguez-Fernandez.[259] Judge Logan, writing for the majority, based the holding on the applicable statutes, but also discussed the constitutional issues presented. The court recognized that as an alien, Rodriguez-Fernandez could invoke no "constitutional

251. 654 F.2d 1382 (10th Cir. 1981).

252. 8 U.S.C. § 1223(a) (1976). This section provides for the temporary removal of aliens for examination and inspection upon their arrival at a port of the United States. Under this section, temporary removal is not to be considered a landing.

253. *See* 8 U.S.C. §§ 1182(a)(9), (20), and 1225(b).

254. 654 F.2d at 1384.

255. *Id.*

256. 505 F. Supp. 787, 800 (D. Kan. 1980), *aff'd*, 654 F.2d 1382 (10th Cir. 1981).

257. 654 F.2d at 1384.

258. *Id.* at 1390.

259. *Id.* at 1386.

protections against his exclusion from the United States."[260] Nevertheless, an alien accused of committing a criminal act in the United States would have those protections found in the fifth and fourteenth amendments. The resulting consequence was that "an excludable alien in physical custody within the United States may not be punished without being accorded the substantive and procedural due process guarantees of the Fifth Amendment."[261]

The court found Rodriguez-Fernandez' imprisonment to be a "deprivation of liberty in violation of the fifth amendment, except for the fiction applied . . . that detention is only a continuation of the exclusion."[262] Other federal courts have held that the custody of deportable aliens longer than a "few months" is impermissible imprisonment, requiring release of the alien.[263]

Judge Logan distinguished *Shaughnessy v. United States ex rel. Mezei*.[264] In *Mezei* the Supreme Court refused to require the release of an alien who had been confined to Ellis Island for twenty-one months. His confinement was based upon the fact that he was excluded from landing in the United States and no other country would allow him entry.[265] *Mezei* was distinguished on several grounds: its concern was with an excludable alien's rights to a due process hearing determining his right of reentry into the United States; Mezei was considered a security risk; the Korean War was in progress; the conditions of his confinement were not the same as imprisonment in a federal penitentiary; there were continuous efforts to deport Mezei; and unlike Rodriguez-Fernandez, Mezei sought not only release from detention but also entry to the United States.[266] Finally, the Tenth Circuit court followed the Supreme Court's guidance and applied a basic principle of international law: "Human beings should be free from arbitrary imprisonment."[267]

The Immigration and Naturalization Act of 1952[268] provides for a six-month detention period in deportation cases;[269] however, the maximum detention period for excludable aliens seeking entry is not spelled out in the statute. "They provide for 'temporary removal' from the transportation vehicle or vessel to a place of 'detention, pending a decision on the aliens' eligibility to enter the United States and until they are either allowed to land or return to the care of the transportation line or to the vessel or aircraft which

260. *Id.* at 1387.

261. *Id.*

262. *Id.*

263. *See* Petition of Brooks, 5 F.2d 238 (D. Mass. 1925); United States *ex rel.* Ross v. Wallis, 279 F. 401 (2d Cir. 1922). *See also* Wolck v. Weedin, 58 F.2d 928 (9th Cir. 1932); Carancia v. Nagle, 28 F.2d 955 (9th Cir.) *cert. denied*, 277 U.S. 589 (1928); United States *ex rel.* Janararis v. Nicholls, 47 F. Supp. 201 (D. Mass. 1942).

264. 345 U.S. 206 (1953).

265. *Id.* at 209.

266. 654 F.2d at 1388.

267. *Id.* (citing The American Convention on Human Rights, Pt. I, ch. II, art. 7, 77 Dept. of State Bull. 28 (July 4, 1977); Universal Declaration of Human Rights, Pt. I, arts. 3 & 9, U.N. Doc. A1 801 (1948)). *See, e.g.*, Fong Yue Ting v. United States, 149 U.S. 698 (1893).

268. 8 U.S.C. §§ 1101-1503 (1976 & Supp. V 1981).

269. *Id.* § 1252(d).

brought them."[270] While the court of appeals refused to read a specific time limit for detention into the statute, it held that "detention is permissible during proceedings to determine eligibility to enter and, thereafter, during a reasonable period of negotiations for their return . . . . After such time, upon application of the incarcerated alien . . . the alien would be entitled to release."[271]

The court did not require the government to release Rodriguez-Fernandez into the United States. He could be returned to the vessel that brought him to the United States, sent to another country, or paroled.[272] Because the government did not meet its burden of proving that the detention remained temporary pending exclusion[273] and not an incarceration as an alternative to departure, the court of appeals required his release.

Judge McWilliams dissented, arguing that the district court's release order should have been reversed.[274] He maintained that the determination whether the plaintiff should be detained or released on parole, pending deportation, was solely within the discretion of the Attorney General.[275] Based upon his prior criminal record, the decision to detain him in a federal penitentiary was not an abuse of discretion, in Judge McWilliams' view.[276] He found the majority opinion to be flawed in its attempt "to deal with all 125,000 Cuban refugees in this one case."[277] Judge McWilliams distinguished those individuals who had criminal records, such as Rodriguez-Fernandez, from other Cuban refugees. In his opinion, only "the indefinite detention in a maximum security institution of a true Cuban political refugee with no history of criminality, who is nonetheless determined to be an excludable alien, would . . . constitute an abuse of discretion by the Attorney General."[278]

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270. 654 F.2d at 1389 (quoting 8 U.S.C. § 1223(b) (1976)). This provision's concern, however, is with the responsibility of expenses incurred in a temporary removal from the vessel of entry and does not actually address the time limitations on deportation. It is conceivable that due to the absence of a specific time period, the court used this section to infer "temporary" as the limitation on the duration of the detention.

271. 654 F.2d at 1389-90.

272. *Id.* at 1390.

273. There seemed to be no negotiations with Cuba or any other country to accept Rodriguez-Fernandez. The court states that the fact that no country had agreed to take him was insufficient reason for continued detention. *Id.*

274. *Id.* at 1390-92 (McWilliams, J., dissenting).

275. *Id.* at 1390-91.

276. *Id.* at 1391. "If Rodriguez-Fernandez had been serving a life sentence for murder in Cuba at the time he got out of Cuba and came to Florida, I cannot believe that there would be any hue and cry over the fact he was detained in a federal penitentiary . . . ." *Id.*

277. *Id.*

278. *Id.*