SUPREME COURT OF THE UNITED STATES

No. 93–1911

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 19, 1995]

JUSTICE BREYER, with whom JUSTICE SOUTER joins, dissenting.

The specific question in this case is whether a particular punishment that, among other things, segregates an inmate from the general prison population for violating a disciplinary rule deprives the inmate of "liberty" within the terms of the Fourteenth Amendment's Due Process Clause. The majority, asking whether that punishment "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *ante,* at 11, concludes that it does not do so. The majority's reasoning, however, particularly when read in light of this Court's precedents, seems to me to lead to the opposite conclusion. And, for that reason, I dissent.

The respondent, DeMont Conner, is an inmate at Halawa Correctional Facility, a maximum security prison in Hawaii. In August 1987, as a result of an altercation with a guard, prison authorities charged Conner with violating several prison disciplinary regulations, including one that prohibited "physical interference . . . resulting in the obstruction . . . of the performance of a correctional function. . . ." Haw. Admin. Rule §17–201–7 (14) (1983). The prison's "adjustment committee" found Conner "guilty" and imposed a punishment of 30 days of "disciplinary

segregation.” Eventually, but after Conner had served the 30 days, a review official in the prison set aside the committee's determination, and expunged it from Conner's record.

In the meantime, Conner had brought this "civil rights" action in Federal District Court in Hawaii. See 42 U. S. C. §1983. He claimed, among other things, that the adjustment committee's failure to let him call certain witnesses had deprived him of his "liberty . . . without due process of law." U. S. Const., Amdt. 14, §1. The District Court granted summary judgment for the prison officials. But, the Ninth Circuit agreed with Conner that the committee's punishment had deprived him of procedurally protected "liberty." 15 F. 3d 1463, 1466 (1993). It remanded the case to the District Court to determine whether the refusal to allow Conner to call the particular witnesses denied him of the process he was "due." See Part V, *infra*.

The issue before this Court is whether Connner's particular punishment amounted to a deprivation of Conner's "liberty" within the meaning of the Due Process Clause.

The Fourteenth Amendment says that a State shall not "deprive any person of life, liberty, or property, without due process of law." U. S. Const., Amdt. 14, §1. In determining whether state officials have deprived an inmate, such as Conner, of a procedurally protected "liberty," this Court traditionally has looked either (1) to the nature of the deprivation (how severe, in degree or kind) or (2) to the State's rules governing the imposition of that deprivation (whether they, in effect, give the inmate a "right" to avoid it). See, *e.g., Kentucky Department of Corrections* v. *Thompson,* 490 U. S. 454, 460–461, 464–465 (1989). Thus, this Court has said that certain changes in conditions may be so severe or so different from ordinary conditions of confinement that, whether or not state law gives state authorities broad discretionary power to impose them, the state authorities may not do so "without complying with minimum requirements of due process." *Vitek* v.

Jones, 445 U. S. 480, 491–494 (1980) ("involuntary commitment to a mental hospital"); *Washington* v. *Harper*, 494 U. S. 210, 221–222 (1990) ("unwanted administration of antipsychotic drugs"). The Court has also said that deprivations that are less severe or more closely related to the original terms of confinement nonetheless will amount to deprivations of procedurally protected liberty, provided that state law (including prison regulations) narrowly cabins the legal power of authorities to impose the deprivation (thereby giving the inmate a kind of right to avoid it). See *Hewitt* v. *Helms*, 459 U. S. 460, 471–472 (1983) (liberty interest created by regulations "requiring . . . that administrative segregation will not occur absent specified substantive predicates"); *Thompson, supra,* at 461 ("method of inquiry . . . always has been to examine closely the language of the relevant statutes and regulations"); *Board of Pardons* v. *Allen*, 482 U. S. 369, 382 (1987) (O'CONNOR, J., dissenting) (insisting upon "standards that place real limits on decisionmaker discretion"); *Olim* v. *Wakinekona*, 461 U. S. 238, 248–249 (1983) (existence of liberty interest regarding interstate prison transfers depends upon state regulations); *Montanye* v. *Haymes*, 427 U. S. 236, 242 (1976) (same for intrastate prison transfers); *Meachum* v. *Fano*, 427 U. S. 215, 225–227 (1976) (same).

If we apply these general pre-existing principles to the relevant facts before us, it seems fairly clear, as the Ninth Circuit found, that the prison punishment here at issue deprived Conner of constitutionally protected "liberty." For one thing, the punishment worked a fairly major change in Conner's conditions. In the absence of the punishment, Conner, like other inmates in Halawa's general prison population would have left his cell and worked, taken classes, or mingled with others for eight *hours* each day. See Exh. 36, App. 126; Exh. 6, App. 101. As a result of disciplinary segregation, however, Conner, for 30

days, had to spend his entire time alone in his cell (with the exception of 50 *minutes* each day on average for brief exercise and shower periods, during which he nonetheless remained isolated from other inmates and was constrained by leg irons and waist chains). See Exh. 61, App. 156–157, 166. Cf. *Hughes* v. *Rowe*, 449 U. S. 5, 9, 11 (1980) *(per curiam)* (disciplinary "[s]egregation of a prisoner without a prior hearing may violate due process if the postponement of procedural protections is not justified by apprehended emergency conditions"); *Wolff* v. *McDonnell*, 418 U. S. 539, 552, n. 9, 571–572, n. 19 (1974) ("solitary confinement"—*i.e.*, segregation "in the usual `disciplinary cell'" or a "`dry cell'"—"represents a major change in the conditions of confinement"); *Baxter* v. *Palmigiano*, 425 U. S. 308, 323 (1976) (segregation for "`serious misconduct'" triggers due process protection) (citation omitted).

Moreover, irrespective of whether this punishment amounts to a deprivation of liberty *independent* of state law, here the prison's own disciplinary rules severely cabin the authority of prison officials to impose this kind of punishment. They provide (among other things):

> (a) that certain specified acts shall constitute *"high misconduct,"* Haw. Admin. Rule §17–201–7a;
>
> (b) that misconduct punishable by more than four hours in disciplinary segregation "shall be punished" through a prison "adjustment committee" (composed of three unbiased members), §§17–201–12, 13;
>
> (c) that, when an inmate is charged with such misconduct, then (after notice and a hearing) "[a] finding of guilt shall be made" if the charged inmate admits guilt or the "charge is supported by substantial evidence," §§17–201–18(b), (b)(2); see §§17–201–16, 17; and

(d) that the "[s]anctions" for high misconduct that "may be imposed as punishment . . . shall include . . . [d]isciplinary segregation up to thirty days," §17–201–7(b).

The prison rules thus: (1) impose a punishment that is substantial, (2) restrict its imposition as a punishment to instances in which an inmate has committed a defined offense, and (3) prescribe nondiscretionary standards for determining whether or not an inmate committed that offense. Accordingly, under this Court's liberty-defining standards, imposing the punishment would "deprive" Conner of "liberty" within the meaning of the Due Process Clause. Compare *Hewitt* v. *Helms, supra,* at 471–472 (liberty interest created by regulations "requiring that . . . administrative segregation will not occur absent specified substantive predicates"), with *Thompson*, 490 U. S., at 457, n. 2 (no liberty interest created by regulations which gave officials broad discretion to refuse a visit whenever "there are reasonable grounds to believe that," among other things, "[t]he visit will be detrimental to the inmate's rehabilitation"). Thus, under existing law, the Ninth Circuit correctly decided that the punishment deprived Conner of procedurally protected liberty and that the District Court should go on to decide whether or not the prison's procedures provided Conner with the "process" that is "due."

The majority, while not disagreeing with this summary of pre-existing law, seeks to change, or to clarify, that law's "liberty" defining standards in one important respect. The majority believes that the Court's present "cabining of discretion" standard reads the Constitution as providing procedural protection for trivial "rights," as, for example, where prison rules set forth specific standards for the

content of prison meals. *Ante*, at 9–10. It adds that this approach involves courts too deeply in routine matters of prison administration, all without sufficient justification. *Ibid.* It therefore imposes a minimum standard, namely that a deprivation falls within the Fourteenth Amendment's definition of "liberty" only if it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Ante*, at 11, 13.

I am not certain whether or not the Court means this standard to change prior law radically. If so, its generality threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain "atypical" hardships that pre-existing law would not have covered. There is no need, however, for a radical reading of this standard, nor any other signficant change in present law, to achieve the majority's basic objective, namely to read the Constitution's Due Process Clause to protect inmates against deprivations of freedom that are important, not comparatively insignificant. Rather, in my view, this concern simply requires elaborating, and explaining, the Court's present standards (without radical revision) in order to make clear that courts must apply them in light of the purposes they were meant to serve. As so read, the standards will not create procedurally protected "liberty" interests where only minor matters are at stake.

Three sets of considerations, taken together, support my conclusion that the Court need not (and today's generally phrased minimum standard therefore does not) significantly revise current doctrine by deciding to remove minor prison matters from federal-court scrutiny. First, although this Court has said, and continues to say, that *some* deprivations of an inmate's freedom are so severe in kind or

degree (or so far removed from the original terms of confinement) that they amount to deprivations of liberty, irrespective of whether state law (or prison rules) "cabin discretion," *e.g.*, *ante*, at 10–11; *Vitek* v. *Jones*, 445 U. S., at 491–494; *Washington* v. *Harper*, 494 U. S., at 221–222; cf. *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U. S. 123, 168 (1951) (Frankfurter, J., concurring), it is not easy to specify just *when*, or *how much* of, a loss triggers this protection. There is a broad middle category of imposed restraints or deprivations that, considered by themselves, are neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the Clause's protection.

Second, the difficult line-drawing task that this middle category implies helps to explain why this Court developed its additional liberty-defining standard, which looks to local law (examining whether that local law creates a "liberty" by significantly limiting the discretion of local authorities to impose a restraint). See, *e.g.*, *Thompson, supra,* at 461; *Hewitt*, 459 U. S., at 471–472. Despite its similarity to the way in which the Court determines the existence, or nonexistence, of "property" for Due Process Clause purposes, the justification for looking at local law is not the same in the prisoner liberty context. In protecting property, the Due Process Clause often aims to protect *reliance*, say, reliance upon an "entitlement" that local (*i.e.*, non-constitutional) law itself has created or helped to define. See *Board of Regents of State Colleges* v. *Roth*, 408 U. S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined"). In protecting liberty, however, the Due Process Clause protects, not this kind of reliance upon a government-conferred benefit, but rather an absence of government restraint, the very absence of restraint that we

call freedom. Cf. *Meachum,* 427 U. S., at 230–231 (STEVENS, J., dissenting) (citing *Morrissey* v. *Brewer,* 408 U. S. 471, 482 (1972)).

Nevertheless, there are several *other* important reasons, in the prison context, to consider the provisions of state law. The fact that a further deprivation of an inmate's freedom takes place under local rules that cabin the authorities' discretionary power to impose the restraint suggests, *other things being equal*, that the matter is more likely to have played an important role in the life of the inmate. Cf. *Hewitt, supra,* at 488 (STEVENS, J., dissenting). It suggests, other things being equal, that the matter is more likely of a kind to which procedural protections historically have applied, and where they normally prove useful, for such rules often *single out* an inmate and condition a deprivation upon the existence, or nonexistence, of particular facts. Cf. *Thompson*, 490 U. S., at 468–470 (Marshall, J., dissenting); *United States* v. *Florida East Coast R. Co.*, 410 U. S. 224, 244–245 (1973). It suggests, other things being equal, that the matter will not involve highly judgmental administrative matters that call for the wise exercise of discretion—matters where courts reasonably should hesitate to second-guess prison administrators. See *Meachum, supra,* at 225. It suggests, other things being equal, that the inmate will have thought that he himself, through control of his own behavior, could have avoided the deprivation, and thereby have believed that (in the absence of his misbehavior) the restraint fell outside the "sentence imposed" upon him. Cf. *Thompson,* 490 U. S., at 464–465. Finally, courts can identify the presence or absence of cabined discretion fairly easily and objectively, at least much of the time. Cf. *id.*, at 461. These characteristics of "cabined discretion" mean that courts can use it as a kind of touchstone that can help them, when they consider the broad middle category of prisoner restraints, to

separate those kinds of restraints that, in general, are more likely to call for constitutionally guaranteed procedural protection, from those that more likely do not. Given these reasons and the precedent, I believe courts will continue to find this touchstone helpful as they seek to apply the majority's middle category standard.

Third, there is, therefore, no need to apply the "discretion-cabining" approach—the basic purpose of which is to provide a somewhat more objective method for identifying deprivations of protected "liberty" within a broad middle-range of prisoner restraints—where a deprivation is unimportant enough (or so similar in nature to ordinary imprisonment) that it rather clearly falls *outside* that middle category. Prison, by design, restricts the inmates' freedom. And, one cannot properly view unimportant matters that happen to be the subject of prison regulations as substantially aggravating a loss that has already occurred. Indeed, a regulation about a minor matter, for example, a regulation that seems to cabin the discretionary power of a prison administrator to deprive an inmate of, say, a certain kind of lunch, may amount simply to an instruction to the administrator about how to do his job, rather than a guarantee to the inmate of a "right" to the status quo. Cf. *Colon* v. *Schneider*, 899 F. 2d 660, 668 (CA7 1990) (rules governing use of Mace to subdue inmates "directed toward the prison staff, not the inmates"). Thus, this Court has never held that comparatively unimportant prisoner "deprivations" fall within the scope of the Due Process Clause even if local law limits the authority of prison administrators to impose such minor deprivations. See *Thompson, supra,* at 461, n. 3 (leaving question open). And, in my view, it should now simply specify that they do not.

I recognize that, as a consequence, courts must separate the unimportant from the potentially signifi-

cant, without the help of the more objective "discretion-cabining" test. Yet, making that judicial judgment seems no more difficult than many other judicial tasks. See *Goss* v. *Lopez*, 419 U. S. 565, 576 (1975) ("*de minimis*" line defining property interests under the Due Process Clause). It seems to me possible to separate less significant matters such as television privileges, "sack" versus "tray" lunches, playing the state lottery, attending an ex-stepfather's funeral, or the limits of travel when on prison furlough, *e.g.*, *Lyon* v. *Farrier*, 727 F. 2d 766, 768–769 (CA8 1984); *Burgin* v. *Nix*, 899 F. 2d 733, 734–735 (CA8 1990) *(per curiam); Hatch* v. *Sharp*, 919 F. 2d 1266, 1270 (CA7 1990); *Merritt* v. *Broglin*, 891 F. 2d 169, 173–174 (CA7 1989); *Segal* v. *Biller*, No. 94–35448, 1994 U. S. App. LEXIS 30628, *4–*5 (CA9, Oct. 31, 1994), from more significant matters, such as the solitary confinement at issue here. Indeed, prison regulations themselves may help in this respect, such as the regulations here which separate (from more serious matters) "low moderate" and "minor" misconduct. Compare, on the one hand, the maximum punishment for "moderate" misconduct of two weeks of disciplinary segregation, Haw. Admin. Rule §§ 17–201–8, with the less severe maximum punishments, on the other hand, for "low moderate" and "minor" misconduct, §§17–201–9, 10 (several hours of disciplinary segregation and "[l]oss of privileges" such as "community recreation; commissary; snacks; cigarettes, smoking; personal visits—no longer than fifteen days; personal correspondence; personal phone calls for not longer than fifteen days"; impounding personal property; extra duty; and reprimand).

The upshot is the following: the problems that the majority identifies suggest that this Court should make explicit the lower definitional limit, in the prison context, of "liberty" under the Due Process Clause—a limit that is already implicit in this Court's precedent.

See *Morrissey* v. *Brewer*, 408 U. S., at 481 ("`grievous loss'") (citations omitted). Those problems do not require abandoning that precedent. *Kentucky Department of Corrections* v. *Thompson, supra; Olim* v. *Wakinekana,* 461 U. S. 238 (1983); *Hewitt* v. *Helms,* 459 U. S. 460 (1983); *Meachum* v. *Fano,* 427 U. S. 215 (1976); *Montanye* v. *Haymes,* 427 U. S. 236 (1976).

The Court today reaffirms that the "liberty" protected by the Fourteenth Amendment includes interests that state law may create. *Ante*, at 11. It excludes relatively minor matters from that protection. *Ibid.* (requiring "atypical and significant hardship on the inmate"). And, it does not question the vast body of case law, including cases from this Court and every Circuit, recognizing that segregation can deprive an inmate of constitutionally-protected "liberty." See, *e.g.*, *Hewitt, supra,* at 472; *Rodi* v. *Ventetuolo*, 941 F. 2d 22, 28 (CA1 1991); *Soto* v. *Walker*, 44 F. 3d 169, 172 (CA2 1995); *Layton* v. *Beyer*, 953 F. 2d 839, 849 (CA3 1992); *Baker* v. *Lyles*, 904 F. 2d 925, 929 (CA4 1990); *Dzana* v. *Foti*, 829 F. 2d 558, 560–561 (CA5 1987); *Mackey* v. *Dyke*, 29 F. 3d 1086, 1092 (CA6 1994); *Alston* v. *DeBruyn*, 13 F. 3d 1036, 1042–1043 (CA7 1994); *Brown* v. *Frey*, 889 F. 2d 159, 166 (CA8 1989); *Walker* v. *Sumner*, 14 F. 3d 1415, 1419 (CA9 1994); *Reynoldson* v. *Shillinger*, 907 F. 2d 124, 126–127 (CA10 1990); *McQueen* v. *Tabah*, 839 F. 2d 1525, 1528–1529 (CA11 1988); *Lucas* v. *Hodges*, 730 F. 2d 1493, 1504–1506 (CADC 1984). That being

so, it is difficult to see why the Court reverses, rather than affirms, the Court of Appeals in this case.

The majority finds that Conner's "discipline in segregated confinement did not present" an "atypical significant deprivation" because of three special features of his case, taken together. *Ante*, at 13–14. First, the punishment "mirrored" conditions imposed upon inmates in "administrative segregation and protective custody." *Ante,* at 13. Second, Hawaii's prison regulations give prison officials broad discretion to impose these other forms of *nonpunitive* segregation. *Ante*, at 14. And, third, the State later "expunged Conner's disciplinary record," thereby erasing any stigma and transforming Conner's segregation for violation of a specific disciplinary rule into the sort of "totally discretionary confinement" that would not have implicated a liberty interest. *Ante,* at 13–14.

I agree with the first two of the majority's assertions. The conditions in administrative and disciplinary segregation *are* relatively similar in Hawaii. Compare Exh. 60, App. 142–143, 152, with Exh. 61, App. 156–157, 166. And, the rules governing administrative segregation do, indeed, provide prison officials with broad leeway. See Haw. Admin. Rule §17–201–22(3) (1983) ("Whenever . . . justifiable reasons exist"). But, I disagree with the majority's assertion about the relevance of the expungement. How can a *later* decision of prison authorities transform Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules? How can a later expungement restore to Conner the liberty that, in fact, he had already lost? Because Conner was found guilty under prison disciplinary rules, and was sentenced to solitary confinement under those rules, the Court should look to *those* rules.

In sum, expungement or no, Conner suffered a deprivation that was significant, not insignificant.

And, that deprivation took place under disciplinary rules that, as described in Part II, *supra*, do cabin official discretion sufficiently. I would therefore hold that Conner was deprived of "liberty" within the meaning of the Due Process Clause.

Other related legal principles, applicable here, should further alleviate the majority's fear that application of the Due Process Clause to significant prison disciplinary action, see Part III, *supra*, will lead federal courts to intervene improperly (as the majority sees it) "in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Ante*, at 10. For one thing, the "process" that is "due" in the context of prison discipline is not the full blown procedure that accompanies criminal trials. Rather, "due process" itself is a flexible concept, which, in the context of a prison, must take account of the legitimate needs of prison administration when deciding what procedural elements basic considerations of fairness require. See, *e.g., Goss* v. *Lopez,* 419 U. S., at 578 (the "`very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation'") (quoting *Cafeteria & Restaurant Workers* v. *McElroy*, 367 U. S. 886, 895 (1961)); *Mathews* v. *Eldridge*, 424 U. S. 319, 334 (1976) ("`[D]ue process is flexible and calls for such procedural protections as the particular situation demands'") (quoting *Morrissey* v. *Brewer, supra,* at 481); Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1278 (1975) ("required degree of procedural safeguards varies"); *Wolff*, 418 U. S., at 563–567 (requiring—in addition to notice, some kind of hearing and written reasons for the decision—permission to call witnesses and to present documentary evidence when doing so "will not be unduly hazardous to institutional safety or correctional

goals," *id.*, at 566).

More importantly for present purposes, whether or not a particular procedural element *normally* seems appropriate to a certain *kind* of proceeding, the Due Process Clause does not require process unless, in the *individual* case, there is a relevant factual dispute between the parties. Just as courts do not hold hearings when there is no "genuine" and "material" issue of fact in dispute between the parties, see Fed. Rule Civ. Proc. 56 (summary judgment), so the Due Process Clause does not entitle an inmate to additional disciplinary hearing procedure (such as the calling of a witness) unless there is a factual dispute (relevant to guilt) that the additional procedure might help to resolve. See *Codd* v. *Velger*, 429 U. S. 624, 627 (1977) *(per curiam)*.

I mention this latter legal point both because it illustrates a legal protection against the meritless case, and because a review of the record before us indicates that, in this very case, if we were to affirm, it would pose an important obstacle to Conner's eventual success. The record contains the prison adjustment committee's report, which says that its finding of guilt rests upon Conner's own admissions. The committee wrote that it "based" its "decision" upon Conner's "statements" that (when he was strip searched) "he turned around" and "looked at" the officer, he "then `eyed up'" the officer, he "was hesitant to comply" with the strip-search instructions, he "dislikes" the officer, and he spoke an obscenity during the search process. App. to Pet. for Cert. A–67. The record contains no explanation that we have found, either in Conner's affidavits or elsewhere, of how the witnesses he wanted to call (or the other procedures that he sought) could have led to any evidence relevant to the facts at issue.

I note that the petitioner, in her petition for certiorari, asked us, for this reason, to decide this case in her favor. But, we cannot do so. Even were

we to assume that this question falls within the scope of the question we agreed to answer, the record nonetheless reveals that the petitioner did not ask for summary judgment on this basis. Thus, Conner has not had an opportunity to point to "specific facts" that might explain why these witnesses (or other procedures) were needed. See Fed. Rule Civ. Proc. 56(e) ("must set forth specific facts showing that there is a genuine issue for trial"). Were this Court to affirm, the defense would remain free to move for summary judgment on remand, and Conner would have to respond with a specific factual showing in order to avoid an adverse judgment.

Because the Court of Appeals remanded this case to the District Court for consideration of these matters, and because, as explained in Parts II-IV, *supra*, I believe it correctly decided that Conner was deprived of liberty within the meaning of the Due Process Clause, I would affirm its judgment. For these reasons, I respectfully dissent.