CONSTITUTIONAL RIGHTS OF PRISONERS

A Thesis

Presented To

The Judge Advocate General's School, U. S. Army

The opinions and conclusions expressed herein are those of the individual student author and do not necessarily represent the views of either The Judge Advocate General's School, U. S. Army, or any other governmental agency. References to this study should include the foregoing statement.

by

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INTRODUCTION

A. The Prison System

In discussing the rights of military prisoners, an understanding of the past and present institutional framework is helpful. The current confinement practices with which we will be concerned have evolved not alone from a separate military confinement system, but also from the federal, state and local systems which have had a considerable influence.

Until 1875, serious military offenders were confined in the state operated prisons, and minor offenders were handled within the Army at post guardhouses or central facilities such as Governors Island.[1]

In 1873, the first United States Military Prison was established by Congress at Rock Island, Illinois and transferred in 1874 to Fort Leavenworth, Kansas.[2] Branch prisons were established at Fort Jay and Alcatraz in 1907, and for a short time (1913 to 1915) the entire system was operated by the Judge Advocate General. In 1915, the system was renamed the United States Army Disciplinary Barracks with control of the disciplinary barracks and staff supervision of post guardhouses and stockades vested in the Adjutant General. In the same year a system of parole for all military prisoners in the United States Army Disciplinary Barracks and its branches was authorized.

Since 1946, control of the United States Disciplinary Barracks and its various branches (now inactive) and staff supervision of post guardhouses and stockades has passed to the Provost Marshal General.

In parallel to the military system, federal civilian prisoners were confined in state institutions until 1895 when the United States Military Prison was temporarily used by the Department of Justice until the completion of the United States Penitentiary at Leavenworth, Kansas in 1906, marking the start of the present federal system. Female federal prisoners continued to be boarded in state institutions until a separate facility was opened at Alderson, West Virginia in 1927.[3]

The military and federal prison systems, pursuant to agreement between the Secretary of the Army and the Attorney General, the present Article 58, UCMJ (1969) and 18 U.S.C. § 4083 have long provided for the confinement of military prisoners in federal civilian facilities.[4]

B. The Courts

For many years the courts have been extremely reluctant to review the internal administration of any prison system, a reluctance which undoubtedly stemmed from their recognition of the many problems faced by prison administrators and the courts' own lack of expertise in the area. In view of these factors, a denial of jurisdiction over the subject matter by a court would be understandable if limited to a dismissal of those prisoners' petitions alleging no more than those deprivations inevitably accompanying incarceration in highly regulated institutions with limited resources, such as complaints of restrictions on movement, poor lighting or plumbing. However, the courts have not so limited their dismissal of prisoners' suits, but have also denied jurisdiction where mistreatment, needless restrictions, and arbitrary and capricious action by prison officials have been alleged. Such a broad denial of jurisdiction, often referred to as "the hands-off doctrine,"[5] in effect allowed prison officials to function without judicial review of their actions, and resulted in prisoners having few if any enforceable rights.

Recently, as in so many other areas of the law, the courts no longer seem willing to accept their lack of expertise and the problems facing administrators as impenetrable obstacles.

precluding their scrutiny of administrative action within prison walls. The assumptions of "the hands-off doctrine," that courts have no jurisdiction to entertain prisoner grievances, and therefore prisoners have no enforceable rights, are now of doubtful validity. The courts now generally assume they are competent to review prisoners' grievances and fashion appropriate remedies, which results in their now considering the previously neglected issue of what rights prisoners retain. In considering what rights prisoners retain, the early statement that "a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication taken from him by law"[6] is fast becoming the prevailing judicial philosophy. The implications of this new attitude are far reaching. As soon as a court adopts this attitude it is obviously either compelled to search the record for some justification for a withdrawal of the particular right by prison officials, or take the unlikely step of permitting the right to be withdrawn arbitrarily. Thus, it follows that absent institutional necessity, the restriction or deprivation of prisoners' rights will be condemned as arbitrary action that cannot, and indeed should not, survive. Even when the premise that a prisoner retains all those rights except those withdrawn by necessity is obliquely phrased as, a prisoner has only such rights as can be exercised without impairing the

requirements of prison discipline or security,[7] judicial attention has been focused on the basis for denial of the right, if any exists.

The new theoretical basis for the courts is exemplified by the following:

> It is true that "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system" (citing Price v. Johnston, 334 U.S. 266). Some deprivations are a necessary and expected result of being an inmate of a penal institution which institution must provide for the custody, maintenance, discipline and optimistically, rehabilitation of those who have violated the laws of the sovereign.... Acceptance of the fact that incarceration, because of inherent administrative problems, may necessitate the withdrawal of many rights and privileges does not preclude recognition by the courts of a duty to protect the prisoner from unlawful and onerous treatment of a nature that, of itself, adds punitive measures to those legally meted out by the court. "It is well established that prisoners do not lose all their constitutional rights and that the Due Process and Equal Protection clauses of the Fourteenth Amendment follow them into prison and protect them there from unconstitutional action on the part of prison authorities carried out under the color of state law" (citing Washington v. Lee, 203 Fed. Supp.327, 33 affirmed per curiam 390 U.S. 333).[8]

The above opinion is noteworthy not only for its articulation of the new judicial attitude, but for the proposition that the Due Process and Equal Protection clauses are among the rights which prisoners retain. The question of what other rights are retained by prisoners will be discussed at length in the body of this paper which will examine prisoner rights in the following areas: racial segregation, communications, exercise of religion, medical treatment, punitive proceedings and early release, and prisoner and military status. In this examination, the reader should be alert to the actual or potential justifications for regulation of prisoners and withdrawal of their rights. If, as has been asserted, justification is mandatory, then unnecessary regulations or limitations are arbitrary action that should not be continued.

Part I

Racial Segregation

Considering how thoroughly the United States Supreme Court has searched for the requisite state action in order to invalidate racial segregation under the Fourteenth Amendment,[9] it would seem that any racial segregation in a confinement system could not be justified. However, under certain circumstances racial segregation in a prison is legally permissible. In Lee v. Washington,[10] the Supreme Court affirmed the decree of a three judge district court[11] directing desegregation of Alabama's prisons and invalidating the state statute which had required complete and permanent segregation of the penal system; the opinion noted that the decree would make allowance for the necessities of prison security and discipline.[12] A concurring opinion elaborated on this:[13]

> In joining the opinion of the Court, we wish to make explicit something that is left to be gathered only by implication from the Court's opinion. That is that prison authorities have the right, acting in good faith and on particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails. We are unwilling to assume that state or local prison authorities might mistakenly regard such an explicit pronouncement as evincing any dilation of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination.

Subsequent to this case, two federal district courts have held that temporary racial segregation is permitted when compelled by necessity as an exception to the requirement for permanent desegregation.[14] One of these two courts[15] concluded:

> "it is evident that segregation, for the limited purpose of avoiding imminent prison violence, is at the discretion of prison authorities."

Although a group of militant prisoners may want continuing segregation within an institution for their own reasons, one district court has recently stated that Black prisoners have no constitutional right to establish their own distinct society within a prison,[16] which indicates that the courts will be alert to any continuing segregation attempted by prisoners as well as prison officials.

Although racial segregation under the Lee v. Washington exception is not explicitly authorized in Army regulations as an emergency measure available for confinement facilities, it should be included, considering that it has in fact been used in the last resort by corrections officers and is legally permissible. However distasteful and sensitive a measure it may be, it is certainly preferable to injury or loss of life whenever a race riot is imminent within a stockade.

The Lee v. Washington decision may have implications beyond the field of racial segregation. If the "institutional

need" of maintaining security, discipline and good order is so essential to effective prison administration that the Supreme Court will permit prison authorities acting in good faith to modify desegregation when warranted by the circumstances, then perhaps other limitations on constitutional rights can also be justified in prisons using the same analysis. Conversely, if the "nexus" between a regulation or action by officials that limits constitutional rights and institutional needs (security, discipline and good order) cannot be sufficiently shown under the particular factual circumstances, then the limitations on the particular rights involved cannot be continued. If no showing of justification under the facts can be made, then the regulation or action by prison officials could be challenged as arbitrary and capricious. This analysis provides a convenient tool for guaging the merits of any Army regulation that has an effect upon the constitutional rights of prisoners, and determining whether any modifications are called for. It can also be used to determine the reasonableness of a corrections officer's actions in managing a confinement facility, and in this regard the prerequisite of good faith is of particular importance. However, the elements of security, discipline and good order that comprise this concept of "institutional need" should not be regarded as all inclusive, and perhaps other elements such as rehabilitation should be added to complete

analysis.

Part II

Communications

The control of prisoner communications is typically covered in a detailed body of prison regulations which include a variety of limitations on incoming and outgoing mail, the amount of printed matter which can be retained in a prisoner's possession, the number and types of visitors permitted, communications with news media, and verbal expressions of prisoners.[17] In reviewing the earlier case law in the area, one commentator concluded that there is no absolute prisoner right to use the mails,[18] and until quite recently the courts generally by-passed any constitutional issues raised by prison control of prisoner communications.[19] In 1965, the Eighth Circuit[20] asserted that prison administration of correspondence would be subjected to judicial scrutiny whenever it was administered in such a fashion as to "shock the general conscience or to be intolerable in fundamental fairness."[21] This indicated that judicial review would be warranted in cases alleging severe restrictions on communications. By this time the courts had generally upheld the censorship of both incoming[22] and outgoing mail.[23] Such censorship was permitted either as rationally related to the ends of discipline, institutional security, and rehabilitation, or as simply a

matter of prison regulation not within the court's jurisdiction. The following passage is a typical judicial response:

> While an inmate of such an institution should be allowed a reasonable and proper correspondence with members of his immediate family, and, at times, with others, it is subject to censorship to be certain of its reasonableness and propriety. A broader correspondence is subject to substantial limitations or to absolute prohibitions. Control of the mail to and from inmates is an essential adjunct of prison administration and the maintenance of order within the prison. [24]

As this passage indicates, prison officials have also assumed a moralistic role by screening correspondence to insure "reasonableness and propriety." However, institutional regulation of such mail may not be exercised arbitrarily or in a discriminatory fashion as in Rivers v. Royster, where the prison superintendant's denial of the right to receive a non-subversive Negro newspaper by a Negro prisoner while permitting white inmates to receive white newspapers was held to be a denial of equal protection under the Fourteenth Amendment.[25] Major exceptions to censorship by prison authorities have been made in the case of mail addressed to the courts or attorneys or government officials. The general feeling is that the right to counsel carries with it the right to use the mails to obtain and communicate with counsel,[26] and since the sole means of access to the courts available to prisoners is the mails,

unlimited and uncensored use of the mails is required.[27]

But, some recent cases indicate that correspondence with attorneys is still not absolutely free from censorship. In Cox v. Crouse,[28] a warden's opening, reading, and communicating to the attorney general the contents of letters from a prisoner to his attorney was upheld by the Tenth Circuit, and in Rhinehart v. Rhay[29] the intercepting of those letters written to a prisoner's attorney which contained reports of the prisoner's alleged observations of acts of oral sodomy among the prison population was held not a violation of the prisoner's civil rights. The latter case would suggest that the inclusion of extraneous matter (prison gossip, etc.) in correspondence with attorneys may serve as a pretext for official scrutiny of such mail, and may be enough to persuade a court to allow such censorship to continue. In permitting scrutiny of prisoner mail addressed to attorneys, a court in effect decides that interception of mail on behalf of other interested government officers, or suppression of allegations concerning prison conditions are more important than the preservation of the attorney-client communications privilege. Since prison officials do not know whether collateral matters are within correspondence unless they examine it, "reasonable limitations"[30] on privileged correspondence nullify the privilege.

In contrast to whatever censorship exception may exist in regards to courts, attorneys, and other public officers, absolute prohibitions against prisoner communications with the news media have been sustained.[31] This would seem to indicate that preventing the dissemination of prisoner allegations is a matter of high priority, although there are no opinions sustaining the prohibition that discuss the underlying policy reasons.

Besides the censorship restrictions, regulations limiting the number and type of persons with whom a prisoner may correspond have been upheld[32] as well as limits on the amount of printed matter that may be retained in a prisoner's possession.[33] Similarly, prison authorities have routinely limited the number and type of persons who may visit a prisoner. Considering that in Walker v. Pate,[34] a prisoner's complaint that he was not permitted to receive visits by his wife and daughter was held not to state a claim under the Sixth or Fourteenth Amendments, visitation rights can be severely limited[35] under the majority of court opinions. Although limitations of some sort are warranted by the time and space available to prisoners, narrower restrictions would seem to have little justification other than their traditional place in prison regulations, and may be viewed as a subtle punitive measure directed at prisoners generally. This feeling is buttressed by the observation that

even greater restrictions on correspondence and visitation normally accompany prisoners placed in punitive isolation in many prison systems. In response to the argument that administrative limitations in censoring mail require limiting prisoners' correspondence, one commentator has answered that providing more censors should be considered as an alternative to limiting mail volume.[36] The same alternative should be applicable to visitation rights as well. Indeed, the possible consequences of eliminating all such restrictions should be explored, particularly the potential effect upon rehabilitation efforts. Most importantly, the justifications for all censorship and other limitations on communications should be examined in light of their adverse affects upon the First Amendment rights of not only the prisoners, but those other persons desirous of communicating with them. While such restrictions may be justified as rationally related to the ends of discipline, security, and perhaps rehabilitation, the rights of free speech that are involved demands vindication.

One federal district court has recently faced the constitutional issues alluded to above in a sweeping opinion[37] abolishing censorship of all outgoing mail and reducing censorship of incoming mail in the Rhode Island state prison system, concluding that "total censorship serves no rational deterrent, rehabilitative, or security purpose."[38] It should be noted

that the temporary injunction issued by the court is only a prelude to the resolution of the issue as part of a suit now pending before a three judge court, but the merits of the arguments are reflected by the court's rather drastic action at this early stage of the proceedings.

Based on both First and Fourth Amendment grounds, the court opinion is unique in considering not only the free speech rights of prisoners, but those persons wishing to communicate with the inmates. The screening of incoming mail to protect prison security (drugs, weapons, escape implements), eliminate inflammatory writings and hard core pornography under the Roth test is allowed under this ruling, but outgoing mail is not subject to scrutiny except pursuant to a search warrant, and then only if the mail is not directed to courts, attorneys, or public officials, which are considered to be protected under the First Amendment right to petition for grievances. In eliminating the censorship of outgoing mail, except pursuant to a search warrant in certain cases, the court commented upon the prison regulation requiring prisoners to authorize censorship of outgoing mail in return for mail privileges as an inherently coercive violation of prisoner's rights under the Fourth Amendment. This raises an interesting question as to the validity of any prison regulation prohibiting communications with the news media. While the court stated that prisoners

have a right to receive printed matter, reasoning that freedom of the press includes freedom to circulate such material absent a compelling justification for interference by prison officials, it did not specify that prisoners may communicate directly with the media themselves. But since the court criticized the prison officials for using their censorship controls to suppress criticism of the institution and its officials, stating that censorship for this reason is an unconstitutional infringement of the First Amendment rights of the prisoners, including the right to petition for grievances, the right of prisoners to communicate with news media would seem to exist by implication.[39] As a practical matter, considering that officials would be required to obtain a search warrant in the case of mail addressed to the media under the court's ruling, an institutional policy of restricting such mail would be difficult to enforce, especially when such a policy could be circumvented by addressing media correspondence to relatives or other private persons who would then forward the mail pursuant to the prisoner's instructions.

In pointing out that prison officials have no obligation to protect the community from prisoner communications, the court has in effect ruled that an institution's internal policies as implemented by its officials will be communicated to the public not only by the governmental agency concerned

but by those persons subject to its authority, who obviously have an entirely different perspective. Both the prisoners' and officials' views of the efficacy of prison regulations, the competence of management, and the quality of prison life are subject to the distortions of self interest, but the fact that prisoners' versions are often incorrect should not detract from their potential value in assessing actual prison conditions when they can be corroborated. With the benefit of both versions of prison conditions in the public forums the community is better equipped to make informed judgements concerning the type of prisons it wants. Thus, whenever prison facilities and regulations are ultimately determined to be unreasonably harsh, the recognition of the constitutional rights of prisoners and others in communicating would have the socially desirable result of promoting prison reform to an acceptable community standard.

Another issue raised in the Palmigiano case is whether limiting the number of persons with whom a prisoner may correspond is related to the maintenance of prison security.[40] Once the First Amendment rights of prisoners are recognized and the prison officials are deemed to have no duty to protect the community from prisoner communications, it would seem that only reasonable limitations imposed by time and space requirements within the prison can be legally justified. The court in

Palmigiano noted this probable conclusion by remarking, "Why should there be any limitation on the number of correspondents except as it may be bored on the amount of time available to the inmate for writing letters and the amount of physical space and facilities available?"[41] It would thus be difficult to sustain those prison regulations which prohibit correspondence to an unmarried woman on the basis of prison security or discipline.

By extending the Palmigiano and Fortune Society[42] holdings to visitation regulations, it would seem that any prison rules limiting visitation rights to those persons who have one of a number of specified relationships with the prisoner would be unconstitutional impairments of the First Amendment rights of both the prisoners and those persons desiring to communicate verbally with them, other than reasonable limitations dictated by time and space available. More stringent restrictions based on the need for maintaining security and good order would be justified only where a prisoner has established a threat to institutional order by a pattern of violent conduct within or outside the institution,[43] though it is difficult to imagine a prisoner so violent that he cannot be effectively controlled by using hand and leg irons or even tranquilizers to and from an appropriate visiting room. Surprisingly, giving visitors access to prisoners in punitive segregation has not been

seriously considered though it is certainly feasible so long as the visitors are willing to subject themselves to verbal abuse from the inmates, and the internal structure and security of the institution precludes the possibility of their physical abuse. Such a policy might have the additional benefit of insuring that maximum security areas would be properly maintained and may aid rehabilitation. Any person willing to enter this area would have an interest in the welfare of the prisoner at least as strong as that of confinement personnel.

In contrast, verbal expressions by prisoners within an institution directed to fellow inmates can be restricted because of the threat such expressions may pose to prison discipline and security as incitements to violence. In such cases the normal presumption against prior restraint of potentially inflammatory speech is not relevant because prison officials must be empowered to suppress violence in the first stages out of sheer necessity.[44]

The Army regulations governing the communications of military prisoners generally provide for limitations on mail and visiting privileges only as dictated by security control, correctional requirements, and facilities available.[45] In this area, the regulatory scheme represents a liberal approach by safeguarding the constitutional rights of military prisoners in most respects, but some improvements in the regulation

should be made. By specifically not setting a definite limitation on the number of correspondents and visitors the regulation begins in the right direction. However, routine approval of such persons is limited to the prisoner's relatives. In the case of other persons, approval as correspondents and visitors may be effected "when this appears to be in the best interest of the prisoner."[46] This phraseology would seem to place a burden upon the prisoner and the prospective correspondent of showing the propriety of their relationship. Would a corrections officer be justified, with or without such a showing, in prohibiting correspondence between a prisoner and a number of unmarried women, or married women unrelated to the prisoner? Under the current regulation confinement personnel may make such moral judgements. In the case of the United States Disciplinary Barracks, more restrictive regulations are in effect. Prisoners are normally not permitted to correspond with married women other than their own personal relatives, (i.e., wives and sisters) and married prisoners are not permitted to correspond with single women other than their own personal relatives, among many other restrictions, including a prohibition against corresponding with "pen pals."[47] Absent compelling justification, such limitations are infringements upon the First Amendment rights of both the prisoners and prospective correspondents.

Outgoing mail cannot be inspected except in specific cases, but the regulations by providing for inspection when necessary for security, control or correctional treatment of a specific prisoner (except for privileged correspondence) can be viewed as permitting inspection in such broad circumstances as to allow the exception to swallow the rule. In contrast, all outgoing mail from the United States Disciplinary Barracks, is subject to inspection except when addressed to attorneys.[48] By permitting rejection of outgoing mail which, upon inspection, is found to contain "vulgar or obscene language," confinement personnel are thrust into the role of protecting the sensibilities of the public which was criticized in Palmigiano as unjustified. A better approach would be the inclusion of the Roth test in the regulation as a guide to the exercise of official discretion in excising obscene passages prior to forwarding if even this approach can be consistently applied.

Requiring inspection of all outgoing prisoner mail from the Disciplinary Barracks under AR 210-170 and in some cases from other confinement facilities under AR 190-4 can be viewed as inherently coercive. It collides directly with the Palmigiano requirement for a search warrant prior to opening mail not addressed to courts, attorneys, or public officials, and Fortune Society's requirement for a showing of a

substantial justification for curtailing First Amendment rights.[49] The specific needs for inspection of outgoing mail to particular classes of correspondents should be considered so that inspection can be eliminated whenever necessity does not exist to any compelling degree.

Surprisingly, the rather comprehensive listing of privileged correspondence in AR 190-4,[50] while including appellate agencies of The Judge Advocate General does not specifically include federal courts within the privilege, and AR 210-170 refers to such a privilege only indirectly by permitting petitions or writs for release to be forwarded subsequent to inspection.[51] Considering the importance of allowing unfettered correspondence with the judiciary, as discussed earlier in this section,[52] a specific inclusion of the judiciary within the privilege and without inspection prior to forwarding so that the privilege is absolute would be called for as a minimum.

For all practical purposes, the regulations prohibiting communications by prisoners with the press,[53] are constitutionally defective under the Palmingiano case by infringing on the First Amendment rights of the prisoners. The regulation also fails to consider the media's First Amendment right of freedom of the press by denying access to the prisoners. An examination of the underlying policy reasons for the prohibition is necessary to determine whether any compelling justification

exists for such an infringement, but it is doubtful if sufficient justification can be marshalled in support of a policy that results in the supression of criticism of the Army confinement system.

By providing for the rejection of prisoners' mail which contains complaints or grievances and is addressed to persons without requisite official capacity to correct the matters complained of, it could be argued that this portion of the United States Disciplinary Barracks regulation[54] is unconstitutional by impairing the right of prisoners to petition for grievances. However, a potential impairment can be viewed as cured by its affirmative provision for channelling such grievances to those officials who by virtue of their office are empowered to take appropriate action to correct any alleged wrong.[55] The provision may still be defective by its abridgement of the First Amendment rights of prisoners. While the channelling of grievances is commendable, does not the prisoner have the First Amendment right to communicate his complaints to society at large? Conversely, the members of the community should not be denied the opportunity to receive information concerning the confinement system from such sources so that an informed judgement concerning the reasonableness of confinement administration can be made.

Part III

Exercise of Religion

In considering the religious rights of prisoners, the courts have applied the holdings of Cantwell v. Connecticut[56] and related cases[57] that freedom of religious belief is an absolute right under the First Amendment, but religious exercise is subject to regulation. Since the First Amendment thus denies to government officials the power to determine what is a religion or religious activity,[58] the courts have focused upon the issue of what restrictions a prison may justifiably place upon the exercise of religion by inmates. The cases reflect the courts' attempts to strike a realistic balance between religious exercise and the regulation of prisoner conduct, usually done in terms of reasonableness. It has been suggested that an approach preferable to the reasonableness test would be to limit prison restrictions to those which are essential to institutional security and discipline.[59] However, the most desirable means of evaluating prison regulation of religious exercise would be the rationale derived from Lee v. Washington and developed in Part II. Since we are again dealing with a First Amendment right, only those regulations which can be related to the institutional need for security, discipline and good order should be retained as necessary.

Whatever test is used to guage a particular restriction on religious exercise, the restriction itself should relate to prisoner status rather than the denomination of religious belief.[60] Punishments effected on the basis of religious belief would certainly be held invalid under Cantwell, and the courts have not hesitated to intervene where the practice of religion by all prisoners has been unreasonably curtailed. Conversely, pressuring prisoners to attend religious services by scheduling mandatory physical training or close order drill for those who elect not to attend would violate the Establishment Clause of the First Amendment no matter how closely related to rehabilitative effects.

Much of the litigation in the last decade concerning prison restrictions on the exercise of religion have involved Black Muslim prisoners,[61] and the cases have spawned a considerable amount of commentary.[62] The hostility of prison officials to this sect was somewhat understandable. The racist pronouncements of its leaders could only promote ill feelings between its members and other inmates, increasing the difficulty of maintaining good order. Muslim discipline imposed within the sect and not by prison authority was viewed with suspicion and as inimical to established controls. Various elements of religious practice by the sect, such as its dietary laws, can be difficult if not impossible to accommodate without

incurring substantial expense and possibly inconveniencing other prisoners. Despite these problems, the courts, mindful of the Cantwell case, have forced prison officials to allow the Muslims and other such sects to practice their religion so long as their practice does not interfere with normal prison functioning to the detriment of other prisoners, would not be extremely difficult to administer, or incur substantial prison expense. From these cases and comments it can be stated that prison officials cannot question the legitimacy of a religious sect,[63] they can when necessary tightly circumscribe prisoner activities related to religious practice other than periodic attendance at religious services,[64] and when prisoners have been placed in solitary confinement almost all their religious practice can be eliminated.[65] But even when the prisoners are part of the regular prison population their particular religious practices must not preclude their conforming to prison regulations applicable to all, such as regulations prohibiting inflammatory materials,[66] requiring periodic haircuts and shaving,[67] and requiring prisoners eat the normal prison diet at specified hours,[68] so long as the regulations are themselves reasonable. The courts appear to be divided over the question of whether a chaplain of a given faith must be provided to prisoner members of that religious sect,[69] but provision for a chaplain would seem to depend upon such factors

as the number of prisoners within the prison population who desire such services, the availability of a suitable clergyman, and the total number of all religious services an institution can reasonably be expected to accommodate within its resources.

Under the regulations, the Army has established a policy of encouraging individual religious practice in the confinement system. Religious services for prisoners in general must be provided,[70] but the actual controls which may be imposed upon religious practice are extremely vague, covered by the phrase, "subject to the circumstances and conditions of confinement."[71] This terminology gives commanders and corrections officers considerable discretion. For those prisoners in disciplinary segregation the regulations provide for daily visits by a chaplain[72] and retention of religious books,[73] but not for their attendance at regular religious services. Denying such prisoners the opportunity to attend regular services can be justified under the regulation because of the threat a prisoner may pose to the security and good order of the confinement facility, as demonstrated by his past violent conduct. It can also be viewed as cured by the chaplain's daily visits which in effect substitute one means of religious practice for another.[74] Overall, the regulatory provisions seem to be reasonable and can be

factually related to security, discipline, and good order within a confinement facility. The current case law indicates that bona fide efforts must be made to accommodate religious practice by prisoner members of particular sects, but the future parameters of such accommodation are uncertain because of the lack of controversy within the confinement system concerning religious practice.

Part IV

Medical Treatment

As a general proposition, a prisoner is entitled to reasonable medical care.[75] The rationale for this proposition is that a government has an absolute obligation to treat its convicts with decency and humanity,[76] which is another way of saying that denying a prisoner medical care or furnishing inadequate medical care is a violation of the Eighth Amendment as cruel and unusual punishment,[77] and may violate the Fourteenth Amendment as well.[78] In pursuing a remedy,[79] there must first be a showing that medical treatment for a given ailment could have been provided.[80]

A number of cases have stated that the proper test in determining whether an actionable claim for denial of medical care exists is whether prison officials abused their discretion in denying medical treatment to the inmate.[81] This would seem to place a considerable burden on the prisoner, in view of the complexities of medical proof, unless his complaint is obviously meritorious. Prisoner claims have been denied when they failed to allege facts indicating their health was in jeopardy and essential medical care was both needed and denied.[82] Claims have also been unsuccessful when they showed no more than a difference of opinion between the treating

physician and the prisoner on the adequacy of the medical treatment rendered.[83]

One court has proposed a test for ascertaining whether a prisoner claim in this area rises to constitutional proportions, stating that in all successful cases before it the factual allegations as viewed by a layman have tended to show (1) an acute physical condition, (2) the urgent need for medical care, (3) failure or refusal to provide it, and (4) tangible residual injury.[84] Under this analysis, once the first two elements are present affirmative action by prison officials is constitutionally required.

The rationale of the Stiltner case would also be useful in guaging claims alleging improper medical care after the fact by substituting for the third element failure to alleviate the acute physical condition. The more difficult cases would be those arising while the need for medical care is a continuing one, no residual injury has yet been incurred and the acuteness of the physical condition or the urgency of the need for medical care is disputed by the prison physician or other prison officials. It would seem that an actionable claim for proper medical care would exist when the possibility of tangible residual injury is greater than not, or though improbable, the residual injury if it did occur is of such magnitude (or death is possible) that medical attention is warranted

though the prisoner may be faking.

A medical treatment issue of constitutional proportions arising out of a military confinement facility is extremely doubtful considering the safeguards incorporated in the regulations, including the treatment of prisoners in disciplinary segregation.[85] Since the potential for abuse of prisoner rights to medical care exists in every confinement system along side the potential for abuse of medical facilities by prisoners, the competing interests of protecting the right to medical care and eliminating malingering are best resolved by affording timely medical attention to all who request it. The provision for military sick call implicit in the regulations[86] are undoubtedly the most realistic approach to this problem. The lay opinions of custodial personnel as to the merits of prisoner allegations are not likely to preclude effective medical treatment, because in every case of alleged serious injury or illness a doctor makes a prompt determination as to what treatment, if any, is warranted.

Part V

Prison Discipline and Punitive Proceedings

Prisoners may be forced to work at hard labor during their confinement as a penalty for crime despite the prohibitions of the Thirteenth Amendment against involuntary servitude and the Eighth Amendment forbidding cruel and unusual punishment[87] pursuant to sentencing even though the conviction is being appealed.[88] However, the Eighth Amendment is violated whenever prison officials knowingly compel prisoners to perform physical labor beyond their strength or any labor that constitutes a danger to their lives or health.[89]

Under the provisions of the Eighth Amendment, a prisoner has a right to be free from needless brutality in its various manifestations,[90] but is expected to toe the mark by adhering to prison discipline. Infractions of prison regulations subject a prisoner to further constitutionally permissible punishments imposed by the prison system itself, such as forfeiture of good time,[91] disciplinary segregation and/or a reduced diet for a given period.[92] If the prisoner's conduct is criminal, he is of course also liable to trial in formal criminal proceedings. The cases generally concern themselves with the severity of the punishment which may be imposed by the institution in light of the prisoner's conduct.[93] Not only may a prisoner be segregated

for disciplinary reasons, but for security reasons as well, if by his pattern of conduct he has demonstrated that he is a threat to himself or to other prisoners.[94] Of course there must be a reason for placing a prisoner in a segregated facility or else the courts will order his release and return to the general prison population.[95]

Pursuant to the Eighth Amendment ban on cruel and unusual punishment, incorporated in Article 55 of the Uniform Code of Military Justice,[96] the current regulations list a comprehensive series of measures which are prohibited within confinement facilities,[97] and when considered with authorized disciplinary control measures[98] they provide a detailed framework that precludes any practice that would constitute cruel and unusual punishment under the current state of the law.

The current controversy in the courts centers about whether prison officials must provide any procedural safeguards to a prisoner who is liable to receive some punishment through a prison administrative proceeding as a result of his misconduct. The courts have felt that a formal hearing, although desirable, is not constitutionally required,[99] and if such a hearing is provided it need not be given prior to segregation if the exigencies of the situation require immediate removal of the prisoner from the general population.[100] A recent Supreme Court decision, however, has made the validity of

such precedents doubtful. In Goldberg v. Kelly, [101] the Court held that procedural due process under the Fourteenth Amendment requires that welfare recipients be afforded an evidentiary hearing before the termination of benefits. Justice Brennan, speaking for a majority of five justices, concluded that in the welfare pretermination hearing, rudimentary due process demanded certain minimum procedural safeguards. These safeguards include the following: affording the recipient timely and adequate notice, the opportunity to confront and cross-examine witnesses relied upon by the government, to retain an attorney if he desired, and to present oral evidence to an impartial decision maker. The conclusion of the decision maker must rest solely on the legal rules and evidence adduced at the hearing, and he should state the reasons for his determination and indicate the evidence he relied on. However, Justice Brennan pointed out that the hearing need not take the form of a judicial or quasi-judicial trial, nor include a complete record or comprehensive opinion.

Shortly before the Supreme Court decision in Goldberg v. Kelly, Chief Judge Wyzanski, speaking for the federal district court of Massachusetts seemed to anticipate the Court's decision. He decided that, "as a matter of fairness required by the due process clause,"[102] a prison hearing which may place a prisoner in solitary confinement or postpone his release date must

(1) advise the prisoner of the charge of misconduct, (2) inform the prisoner of the nature of the evidence against him, (3) afford the prisoner an opportunity to be heard in his own defense, and (4) reach its determination upon the basis of substantial evidence. But the court decided that a prisoner appearing before a prison hearing does not have the constitutional rights of retaining an attorney, calling witnesses in his own behalf, or cross-examining witnesses, reasoning that affording a prisoner the latter two rights would be inappropriate in a prison setting because they would tend to place the prisoner on a level with prison officials, and have an adverse effect upon prison discipline and security.[103] In view of this opinion, the courts may well have begun to afford some form of rudimentary procedural due process to prisoners in administrative hearings before Goldberg v. Kelly, at least the elements of notice and an opportunity to be heard, which are the main ingredients of Judge Wyzanski's opinion. Subsequent to Goldberg v. Kelly, another district court expanded procedural due process safeguards to prisoners[104] to include those rights not conferred upon prisoners by Judge Wyzanski, which were granted by the Supreme Court to welfare recipients in Goldberg. The district court in Sostre, paraphrasing Justice Brennan's language in Goldberg, stated:

> Very recently the Supreme Court reiterated the firmly established due process principle that where governmental action may seriously injure an individual and the reasonableness of that action depends upon fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. The individual must also have the right to retain counsel. The decision-maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing. In this connection, the decision-maker should state the reasons for his determination and indicate the evidence upon which he relied. Finally, in such cases, the high court ruled, an impartial decision-maker is essential.... Before plaintiff could have been constitutionally "sentenced" to punitive segregation, he was entitled to: 1) written notice of the charges against him (in advance of a hearing) which designated the prison rule violated; 2) a hearing before an impartial official at which he had the right to cross-examine his accusers and call witnesses in rebuttal; 3) a written record of the hearing, decision, reasons therefor and evidence relied upon; and 4) retained counsel or counsel substitute.[105]

The court stated that a prisoner must have the right to the above safeguards in those hearings when he may receive such punishments as punitive segregation, revocation of earned good time credit, or denial of the opportunity to earn good time.[106] It should be noted that the district court assumed that an administrative disciplinary hearing within a prison was one where, in the words of the Supreme Court, "governmental action seriously injures an individual, and the reasonableness of the action depends on fact

findings....,[107] and that Goldberg v. Kelly therefore controls. That such prison hearings do meet the above criteria is not open to serious doubt, since such hearings are predicated upon fact finding and the punishments that may be imposed are substantial.

Considering military disciplinary action procedures in light of Goldberg v. Kelly, the present procedures fail to afford military prisoners those procedural due process safeguards set down by the Supreme Court. Paragraph 2-2e, AR 190-4 provides:

> The imposition of administrative disciplinary measures will be subject to the approval of the commander of the confinement facility in each case. In disciplinary barracks and correctional training facilities, discipline and adjustment boards composed of at least three officers will be established to consider and recommend action to be taken. At installation confinement facilities, discipline and adjustment boards composed of at least three officers will be established to consider and recommend action to be taken. At installation confinement facilities, the correctional officer will perform the function of the discipline and adjustment board and will make recommendations to the installation commander. The use of self-governing prisoner groups is prohibited.

By failing to provide even that rudimentary procedural due process outlined in the Nolan case, that of affording the military prisoner adequate notice and an opportunity to be heard, it would seem that the above provisions of AR 190-4 are in need of immediate revision, so that military prisoners are afforded those procedural safeguards in administrative disciplinary

action proceedings set down in Goldberg v. Kelly. However, some distinctions should be made as to the types of situations in which Goldberg would apply. Relatively minor misconduct[108] for which informal punishment (i.e., an oral reprimand), or a mild authorized punishment[109] would be imposed is not of such magnitude as to require Goldberg safeguards. It should also be noted that, in contrast to the procedure for installation confinement facilities for which paragraph 2-2e of AR 190-4 furnishes the only guidance, the current Disciplinary Barracks procedure is more specific. Under AR 210-170,[110] a prisoner does have a timely opportunity to be heard prior to imposition of formal punishment. If this provision of the Disciplinary Barracks regulation is revised to incorporate the Goldberg safeguards by extending to prisoners the opportunity to confront and cross-examine witnesses, to retain an attorney if desired, and requiring the discipline board to state the reasons for the determination and the evidence relied on, a prisoner will be afforded adequate due process. To insure uniformity and to preclude constitutionally impermissible local deviation, such a revised procedure based on the current Disciplinary Barracks practice should be incorporated in AR 190-4. All military prisoners will thus be assured of having the appropriate procedural safeguards, with the installation commander or his officer designate as the impartial decision

maker.

The differentiation between segregation imposed for security reasons and disciplinary segregation, discussed earlier in this section, should be noted. It would be a constitutionally valid exercise of a corrections officer's authority to segregate a violent prisoner for a reasonable period prior to the administrative determination of appropriate disciplinary measures to be taken so that good order within the confinement facility would be preserved. Institutional necessity warrants unilateral segregation of violent prisoners in the interim without the procedural safeguards of Goldberg, and the current regulations provide the necessary authority.[111]

Apart from the issue of what procedural safeguards are to be furnished in prison disciplinary proceedings is the issue of affording adequate procedural safeguards in those proceedings concerning restoration to duty of military prisoners, or mitigation, remission and suspension of their sentences. Although the present regulations [112] do not provide for hearings of the scope considered essential to administrative due process in Goldberg v. Kelly, an obvious distinction between disciplinary and clemency proceedings is that the latter concern the extension of benefits to the prisoner, rather than the withdrawal of rights or privileges. Whether this distinction is valid is questionable considering the importance of the

benefits that may be conferred, and the fact that prisoner status itself may be terminated as a result of these proceedings. It can be argued that although a prisoner has no right to clemency, he does have a right to full and impartial consideration of his claim for benefits available under the regulations which entitles him to those procedural safeguards necessary to such a hearing under Goldberg.

Part VI

Prisoner and Military Status

Up to this point in the discussion, prisoners have been considered as a homogenous group when in fact they are categorized according the stage in the judicial process at which they are located during incarceration: detained,[113] officer,[114] adjudged,[115] or sentenced[116] are the status terms used for the categories of military prisoners; detained and adjudged prisoners are often referred to as unsentenced prisoners, and are segregated from sentenced prisoners in billets and employment unless they waive the right to segregation.[117] Officer prisoners are quartered and messed separately, perform only those duties normally performed by officers of their rank and in general retain all privileges of rank "except those determined by the commanding officers of the confinement facility to be necessarely denied by reason of confinement."[118] Two recent federal district court decisions suggest that unsentenced prisoners must continue to be segregated from sentenced prisoners, despite the recommendations of a recent study of the Army confinement system.[119] Both cases, from the Western District of Missouri,[120] conclude that treating unconvicted inmates as convicts would violate their constitutional rights, absent an intentional, deliberate policy of being more lenient whenever practical in

the treatment of the unconvicted, particularly as to available institutional privileges:[121]

> While the Constitution authorizes forfeiture of some rights of convicts, it does not authorize treatment of an unconvicted person (who is necessarily presumed innocent of pending and untried criminal charges) as a convict.[122]

If convicted prisoners retain all of their constitutional rights except those withdrawn or diluted by institutional necessity, as the recent trend of judicial authority would seem to suggest, one may well wonder what hazy, shrinking middle ground the unconvicted prisoner may occupy between the unaccused and the convicted. The unsentenced military prisoner's niche is more readily apparent than that of his civilian counterpart,[123] being subject to military control and discipline.

Under Article 13 of the Code[124] and the Manual for Courts-Martial,[125] no person may be subjected to punishment while being held for trial, or whose sentences have not been approved and ordered executed. In United States v. Bayhand[126] the Court of Military Appeals concluded that Article 13 requires stockade officials to respect the rights of the unsentenced by distinguishing between unsentenced and sentenced prisoners with respect to their treatment. Because the only valid ground for ordering confinement prior to trial is to insure the continued

presence of the accused, imposing punitive work assignments on unsentenced prisoners is illegal. Persons awaiting trial, however, need not remain unemployed and can be legally required to perform military duties to the same as those soldiers available for general troop duty. The Court recognized that certain work assignments would be proper for both the unsentenced and the sentenced, and listed several factors to consider in determining whether work is intended as punishment:

> (1) Was the accused compelled to work with sentenced prisoners?
> (2) Was he required to observe the same work schedules and duty hours?
> (3) Was the type of work assigned to him normally the same as that performed by persons serving sentences at hard labor?
> (4) Was he dressed so as to be distinguishable from those being punished?
> (5) Was it the policy of the stockade officers to have all prisoners governed by one set of instructions?
> (6) Was there any difference in the treatment accorded him from that given to sentenced prisoners?[127]

So long as confinement authorities enforce the distinction between sentenced and unsentenced prisoners in work assignments, the Court has permitted commingling of the categories in certain extraordinary or unusual work situations that are normally non-recurring, such as using both sentenced and unsentenced prisoners to fill in a secret escape tunnel in the stockade.[128] When the factors listed in Bayhand are applied to

a factual situation and it can be determined that confinement authorities have failed to treat sentenced and unsentenced prisoners differently, the Court has held that such treatment of a prisoner in pre-trial confinement amounts to punishment without due process of law in violation of Article 13 of the Code.[129]

For the military prisoner, the dual status of soldier and prisoner continues during incarceration until he is restored to duty, when he loses his prisoner status, or until a punitive discharge imposed by court-martial is executed when he loses his soldier status but continues to be subject to the Uniform Code of Military Justice[130] though no longer a member of the armed forces. Since court-martial jurisdiction continues as prisoners are persons "in custody of the armed forces serving a sentence imposed by a court-martial"[131] it has been held that interrupting this military status by transferring a prisoner to a federal peritentiary does not terminate the status permanently; military status again attaches should the prisoner be returned to a military confinement facility to serve a second court-martial sentence,[132] since he is returned to military custody and again falls within the classification of Art 2 (7), UCMJ.

Female prisoners, of course, are not confined in facilities used for confinement of male prisoners. Their initial temporary custody when necessary is secured within either a suitable

military or civilian facility.[133] Female military prisoners whose approved sentences are at least one year are normally transferred to the federal women's penitentiary at Alderson, West Virginia. In view of the fact that the sentences of female military prisoners which as approved adjudge confinement for less than one year are normally remitted,[134] one may well speculate as to whether this policy is inherently discriminatory and a denial of the equal protection of the laws to their male counterparts or violative of due process under the Fifth Amendment.[135]

Conclusions and Recommendations

Too frequently the prisoner is viewed as placed in an institutional purgatory in which he can only hope for some limited "privileges" since his constitutional protections have been withdrawn between conviction and exhaustion of appellate review as part of his punishment. Although the Army has disavowed a strict punitive policy and ostensibly committed itself to the concept of rehabilitation, the military prisoner is denied certain vital uses of citizenship, such as the right to mail a letter to anyone he chooses, which are enjoyed by all others. This is a doubtful starting point on the road to release and participation in society as a functioning citizen. Confinement personnel must be made aware of the fact that their discretion is limited because prisoners retain those constitutional rights in confinement that can be accommodated to institutional necessity. In addition, present regulations governing the operation of military confinement facilities should be carefully examined and revised to include safeguards against the deprivation of the constitutional rights of prisoners under the new and developing case law. Specific changes in the confinement regulations are warranted in view of the new judicial philosophy.

Specific authority should be granted to corrections officers to segregate the prison population racially when violence is imminent.

Censorship and inspection of all outgoing mail, and restrictions on the number and type of correspondents, should be eliminated, because they serve no particular institutional purpose of any magnitude that would justify retention in the face of the First Amendment. Even in those cases where prisoner's correspondence could be labeled as obscene, considering the difficulty that both lawyers and courts have had with this problem, confinement personnel are not adequately equipped to deal with the problem. They should focus their attention on the prison population rather than concern themselves with the sensitivities of society at large. Postal inspectors would be in a better position to screen such writings, assuming that they have the authority. Should a correspondent complain that he has been subjected to threats by a prisoner, this can best be handled by disciplinary action under Article 134 of the Code. Unfounded allegations of mistreatment and inadequate facilities, whether addressed to officials, news media, or private citizens can be refuted, and are an inconvenience mandated by the First Amendment right to petition for redress of grievances, freedom of the press, and the right of free speech. The inspection of incoming mail, however, is

justified by the need to maintain prison security and eliminate drugs, weapons, escape implements and inflammatory writings.

Limitations on the type of visitors should be eliminated. In the usual case, a person who wants to visit a prisoner has a genuine interest in his welfare and can aid rehabilitative efforts. Specific individuals could be prevented from visiting when qualified medical personnel can show that, in view of the prisoner's emotional immaturity or other mental factor the visitor would seriously hamper rehabilitation.

The current procedures for imposition of punitive measures should be amended so that whenever a serious infraction of the rules has been committed, a prisoner could not be subjected to punishment by confinement authorities without due process of law. Certainly no punishment at an installation stockade should be effected by a terse recommendation to the commander by the corrections officer on a Disposition Form resulting in rubber stamp approval. In practice, Goldberg would allow a prisoner to present his version of an incident and require a reasoned elaboration by the commander or his designee of the grounds for punishment. The local Staff Judge Advocate would not be called into play except in the occasional case when a prisoner desires to retain an attorney at his own expense.

Provisions pertaining to sentenced females should be amended so that in the event a sentence of less than one year

is adjudged the sentence would be actually served at an appropriate civilian institution. This would eliminate the present discrimination based on the sex of the offender.

As developed in the analysis of Lee v. Washington in the area of racial segregation, the basis of any restriction on prisoners' rights should be necessity: the need of maintaining security, discipline and good order. Necessity can also be said to encompass any valid institutional objective, such as rehabilitation. If these terms are too elusive, perhaps "necessity" can be paraphrased as what is required properly to manage large groups of people in a limited area when freedom of movement has been withdrawn and there must be strict compliance with authority. For example, is it essential to the proper management of a stockade that the corrections officer act as a postal inspector? Is the discipline of a confinement facility undermined by allowing a prisoner to complain to a newspaper, or is a prohibition against such a communication based on no more than tradition? In the analysis not only must prisoners' rights be accommodated to institutional need, but the rights of other persons in society in contact with the institution as well.

In light of the issues which have been discussed, military lawyers must extend the scope of their functions in criminal matters beyond the formal judicial process and GRASP the legal framework governing the military prisoner within the

stockade fenceline. As part of a comprehensive preventive law program, a reexamination of local confinement practices is necessary to insure installation facilities are operating within constitutional limits and determine where such practices may be liable to judicial attack in light of the issues discussed in this paper. A real challenge exists in this area because military confinement practices can be expected to receive attention from the courts wherever the constitutional rights of prisoners are even tangentially affected. Because the older court decisions may no longer be valid, and the present guidelines are recent innovations, the military lawyer must call into play the most unique resource of his profession: the ability to predict the outcome of future litigation and advise others to plan accordingly.

Footnotes

[1]The Army Correctional System, Office of the Adjutant General, Department of the Army (1952) (information booklet).

[2]Id. The reasons for establishing the system were reported by the Military Committee of the House of Representatives in recommending passage of its bill in 1871: "As a measure of economy it will be beneficial. These even have been guilty of some little crime, some violation of orders of superior officers, offenses not stained with any great amount of moral turpitude, not in the nature of a felony. But they are cast into prison, and stay there very frequently years and years by the side of men of the blackest character, who have committed robbery and murder, or other felonies. Now, it is very improper that these soldiers should be put there, and we feel that as a matter of economy -- as a matter of humanity -- as a matter of reformation, they should have a place of their own, subject to the inspection of the higher officers of the Army, where the discipline of military men can be in a measure enforced and a uniformity of treatment tempered with humanity may be observed and enforced." History of the United States Military Prison, Henry Schendler. The Army Service Schools Press (1911).

[3]Thirty Years of Prison Progress, United States Penitentiary, Atlanta, Georgia.

[4]The number of military prisoners in federal institutions has varied from 155 in 1915 to 3,631 in 1947. The Army Correctional System, supra, note 1. Pursuant to 18 U.S.C. § 4083, persons convicted of offenses against the United States or by courts-martial punishable by imprisonment for more than one year may be confined in any United States penitentiary. But a sentence for an offense punishable by imprisonment for one year or less shall not be served in a penitentiary without the prisoner's consent. For the purposes of this section, whether a military prisoner can be confined in a United States penitentiary is resolved by looking to the length of sentence he could have received, rather than that which he actually received. Dorssart v. Blackwell, 277 F. Supp. 399 (1967).

[5]See generally. Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963) for a complete discussion of the doctrine.

[6]Coffin v. Reichard, 143 F.2d 443 (6th Cir 1944) at 445.

[7]Sostre v. McGinnis, 334 F.2d 906, (2nd Cir 1964), cert. den, 379 U.S. 892, 85 S. Ct. 168, 13 L. Ed. 2d 96 (1964).

[8]Jackson v. Godwin, 400 F.2d 529 at 532 (5th Cir. 1968).

[9]Marsh v. Alabama, 326 U.S. 501 (1946), the "company town" is state action.

Shelley v. Kramer, 334 U.S. 1 (1948) judicial enforcement of restrictive covenants is state action.

Terry v. Adams, 345 U.S. 461 (1953) the Jaybird "primary" as state action.

Gamer v. Louisiana, 368 U.S. 157 (1961) licensing is state action.

See also Burton v. Wilmington Parking Authority, 364 U.S. 810 (1961); Reitman v. Mulkey, 387 U.S. 369 (1967).

[10]390 U.S. 333, 88 S. Ct. 994, 19 L. Ed.2d 1212 (1968).

[11]Washington v. Lee, 263 F. Supp. 327 (1967).

[12]Lee v. Washington, supra, note 10 at 1213.

[13]Ibid at 1214.

[14]Wilson v. Kelley, 294 F. Supp. 1005 (1968); Rentfrow v. Carter, 296 F. Supp. 301 (1968).

[15]Rentfrow v. Carter, supra, note 14 at 303.

[16]Roy v. Brierly, 316 F. Supp. 1057 (1970).

[17]See generally, Comment, Constitutional Law - Enforcement of Prison Discipline and its Effect upon the Constitutional Rights of Those Imprisoned, 8 Vill. L. Rev. 379 (1963); Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 983 (1962); Note, The Problems of Modern Penology: Prison Life and Prisoner Rights, 53 Iowa L. Rev. 671 (1967);

[18]110 U. Pa. L. Rev. 983, supra, note 17 at 996 (1962).

[19]8 Vill. L. Rev. 379, supra, note 17 at 385 (1963), and cases cited therein.

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[20] Lee v. Tahash, 352 F.2d 970 (8th Cir 1965).

[21] Id. at 972. The court speculated as to what factual circumstances would meet this standard and concluded that restricting correspondence where a serious family illness emotionally affected a prisoner would suffice, or where the refusal to allow mailing of some particular letter affects an absolute right by discriminating against a prisoner's race or religion.

[22] E.g., Fulwood v. Clemmer, 206 F. Supp. 370; Dayton v. Hunter, 176 F.2d 108 (10th Cir. 1949) cert. den., 338 U.S. 888 (1949); Numer v. Miller, 165 F.2d 986 (9th Cir. 1948); Fussa v. Taylor, 168 F. Supp. 302 (1958). In United States v. Myers, 237 F. Supp 852 (1965) the denial to a state prisoner of the privilege of receiving mail written in Hungarian from his only relative when the privilege was afforded English - speaking prisoners and an interpreter was available was held to be unconstitutional discrimination under Korematsu v. United States, for which relief was available under the civil rights statute.

[23] E.g., Gerrish v. State of Maine, 89 F. Supp. 244 (1950); Reilly v. Hiatt, 63 F. Supp. 477 (1945); State ex. rel. Jacobs v. Warden of Maryland Penitentiary, 190 Md. 755, 59 A.2d 753 (1948); Ortega v. Ragen, 216 F.2d 561 (7th Cir. 1954); Fulwood v. Clemmer, supra.

[24] McCloskey v. State of Maryland, 337 F.2d 72 at 74 (4th Cir. 1964). The specific holding of the case was that an anti-

Semitic prisoner attempting to enter into correspondence to express anti-Semitic beliefs has no judicially enforceable right to propagandize, whether his propaganda be directed to other inmates or outsiders.

[25] 360 F.2d 592 (4th Cir 1966). Accord: Jackson v. Godwin, 400 F.2d 529 (9th Cir. 1968) (arbitrary enforcement and application of prison newspaper and magazine regulations applied to publications aimed at the Negro reader is racial discrimination in violation of the 14th Amend.). See also Dayton v. McGranery, 201 F.2d 711 at 712 (D.C. Cir. 1953) (dictum).

[26] Coleman v. Peyton, 340 F.2d 603 (4th Cir. 1965); McCloskey v. State of Maryland, note 24 supra. "That prison inmates do not have all the constitutional rights of citizens in society--and may hold some constitutional rights in diluted form--does not permit prison officials to frustrate vindication of those rights which are enjoyed by inmates, or to be the sole judge--by refusal to mail letters to counsel--to determine which letters assert constitutional rights." Nolan v. Scafati, 430 F.2d 548 at 551 (1st Cir. 1970).

[27] A state and its officers may not abridge or impair a prisoner's right to apply to a federal court for a writ of habeas corpus. Johnson v. Avery, 393 U.S. 483, 89 S.G. 747, 21 L.Ed. 2d

Coleman v. Peyton, 362 F.2d 905 (4th Cir. 1966) cert. den., 385 U.S. 905, 87 S. Ct. 216, 17 L.Ed. 2d 135 (1966), (censorship

not permitted); Prevention of timely appeal by suppression of appeal papers violates the Equal Protection clause of the 14th Amend. Dowd v. United States ex. rel. Cook, 340 U.S. 206, 71 S. Ct. 262 (1951);

Mail censorship is a universally accepted practice so long as it does not interfere with the inmates access to the courts. Prewitt v. State of Arizona ex. rel. Eyman, 315 F. Supp. 793 (1969);

Prisoners in isolation are not denied reasonable access to attorneys and the courts when their correspondence to these parties is restricted to cases already pending. Hatfield v. Bailleux, 290 F.2d 632 (9th Cir. 1962).

[28] 376 F.2d 824 (10th Cir. 1967) cert. den., 389 U.S. 865, 88 S. Ct. 128, 19 L.Ed. 2d 136.

[29] 314 F. Supp. 81 (1970). Accord Smith v. McGinnis 6 Crim L R 2437

[30] E.g., Hatfield v. Bailleux, note 27 supra.

[31] But see McDonough v. Director of Patuxent, 429 F.2d 1189 (4th Cir. 1970) permitting prisoner correspondence with Playboy Magazine in order to obtain psychiatric, financial and legal assistance, but not if correspondence is to effect publication of a critique of penal laws or about the prisoner himself.

[32] E.g., Lee v. Tahash supra, note 4 (12 correspondents); Fussa v. Taylor, 160 F. Supp. 302 (1958) (refusal of authorities

to forward inmate's mail to his common-law wife incarcerated in state reformatory upheld).

[33] E.g., Carey v. Settle, 351 F.2d. 483 (8th Cir. 1965) (5 books); United States ex. rel. Robert M. Lee, Jr. v. Illinois, 343 F.2d 129 (7th Cir. 1965) (15 letter limit held justified because of potential fire hazard).

[34] 356 F.2d 502 (7th Cir. 1966) cert. den., 384 U.S. 966, 86 S. Ct. 1598, 16 L.Ed. 2d 678.

[35] E.g., United States v. Rundle, 276 F. Supp. 637 (1967): prison regulations circumscribing visitation rights of state prisoners under death sentence, a standard practice with regard to all similarly situated capital inmates, were reasonable in view of necessity of greater supervision though less than enjoyed by other prisoners.

[36] 53 Iowa L. Rev. 671, supra, note 17, at 677.

[37] Palmigiano v. Travisono, 317 F. Supp. 776 (1970).

[38] Id.

[39] Another federal district court has recently held the belief of prison authorities that a publication contains inaccuracies about maladministration of the New York prisoner system is not a legally sufficient ground for curtailing a convict's First Amendment rights. "[Prison authorities] possess no power of censorship simply because they have the power of prison discipline...only a compelling state interest centering about prison

security, or a clear and present danger of a breach of prison discipline, or some substantial interference with orderly institutional administration can justify curtailment of a prisoner's constitutional rights." Fortune Society v. McGinnis, 319 F. Supp. 901 (1970).

[40] 8 Vill. L. Rev. 379, supra, note 1, at 385.

[41] Palmigiano v. Travisano, supra, note 37.

[42] Fortune Society v. McGinnis, supra, note 23.

[43] Compare Davis v. Superior Court, 175 Cal. App. 2d 513 with Walker v. Pate, 356 F.2d 502 (7th Cir. 1966) cert. den., 384 U.S. 966, 86 S. Ct. 1598, 16 L.Ed. 2d 678, and see United States v. Rundle 276 F. Supp. 637 (1967) (greater restrictions on visitation rights of prisoners sentenced to death are reasonable in view of the need for closer supervision).

[44] A prisoner may be punished for uttering words which tend to incite a breach of prison discipline or a riot. Fulwood v. Clemmer, 206 F. Supp. 370. Attempts of prisoners to speak in a milieu where such speech may incite insurrection must be tempered; in a prison environment strong restraint of speech and heavy penalties for violation of these restraints are in order. Roberts v. Pepersack, 256 F. Supp. 415 (1965), cert. den., 389 U.S. 877, 88 S. Ct. 175, 19 L.Ed. 2d 165 (1965).

[45] para. 5-4. AR 190-4, Correspondence, publications, and visits;

"The maintenance of wholesome and frequent contacts with their families and others genuinely interested in their welfare is a vital factor in the correction of prisoners. The right of prisoners to mail and visiting privileges will be limited only by security control, and correctional requirements as provided herein, and the facilities available for proper inspection, handling, and supervision. Restrictions on mail or visiting privileges will not be imposed as a disciplinary measure.

a. Authorized correspondents and visitors.

No limitations will be imposed as to the number of persons who may be approved for the purpose of visiting or corresponding with a prisoner except as necessary to maintain security and control. The prisoner's wife, children, parents, brothers and sisters should uniformly be approved unless disapproval is required in the interest of safe administration or the prisoner's welfare. Other prisons may be approved as correspondents and visitors when this appears to be in the best interest of the prisoner.

b. Mail.

(1) Restrictions will not be placed on the number of letters to or from authorized correspondents, except as necessary for security and control, prevention of unreasonable individual excesses, or to prevent delays in processing mail. Prisoners will be authorized to retain reasonable quantities of

mail in their immediate possession; they will not be required to destroy excess retained mail, but will be given the opportunity to authorize deposition [sic] by storage at the confinement facility or forwarding it at his expense to an authorized correspondent for retention.

(2) Prisoners' incoming mail, except privileged correspondence, will be inspected by the officer in charge of the confinement facility, or his designated assistant, solely for the purpose of properly controlling contraband, moneys, and valuables. The opening of prisoners' incoming mail will be witnessed by a designated bonded person. The written content of letters will not be used as the basis for rejection of incoming mail.

(3) Prisoners' outgoing mail will not be inspected, except in specific individual cases, as approved by the officer in charge of the confinement facility, where the inspection of the prisoner's outgoing mail, other than privileged correspondence, is considered necessary for the adequate security, control, or correctional treatment of the prisoner concerned. In such specific cases, the prisoner's outgoing mail will be delivered to the officer in charge of the confinement facility before it is introduced into postal channels; the written content of prisoners' outgoing mail will not be used as the basis for its rejection. Any outgoing mail, however, which upon

such inspection, is found to contain vulgar or obscene language, or which would constitute a violation of postal laws, will be rejected. In all other cases, prisoners' stamped outgoing mail will be deposited by the prisoner in mailboxes....

(4) (a) When a prisoner has not authorized the inspection of outgoing mail in the specific individual cases provided for in (3) above, such mail will not be introduced into postal channels but will be returned to the prisoner with an explanation of the necessity for inspection of the mail in his particular case.

(b) When a prisoner has not authorized inspection of his incoming mail, such mail will be shown to him unopened and he will be afforded an opportunity to receive it subject to inspection. If he refuses inspection, he may elect to have such mail retained unopened in his personal effects or, if a return address is shown, to have it returned to the sender unopened with an explanation by the correctional officer as to why it was not delivered to the prisoner. The sender will be advised that any information of an emergency nature contained in returned mail may be furnished directly to the correctional officer for transmission to the prisoner....

(7) Privileged correspondence —

(a) All correspondence between a prisoner and the President, Vice President, Members of Congress, Attorney

General, The Judge Advocates General or their representative, his defense counsel, or any military or civilian attorney of record. Initial correspondence with any other attorney listed in professional or other directories for the purpose of establishing an attorney-client relationship, and all correspondence between a prisoner and inspectors general, chaplains and/or his clergyman will be regarded as privileged correspondence not subject to inspection; except...solely to insure the authenticity of the correspondence.

(b) Correspondence addressed to or received from the appropriate appellate agency of The Judge Advocate General of the Department concerned will be delivered or forwarded without inspection except...when there is reason to doubt its authenticity.

(c) Reading material. Prisoners will be permitted to subscribe to newspapers, periodicals, magazines, and books approved by the commander of the confinement facility; however, he must receive the publication directly from the publisher.

(d) Telegraphic or telephone communication. Telegraphic communications may be authorized when warranted by existing circumstances. Telephone calls to or by prisoners, at the expense of the caller, may be permitted in emergencies or when the correctional officer or officer designated by the commander of a disciplinary barracks or correctional training facility

deems it essential for the prisoners' welfare. These calls may be monitored if considered necessary.

(e) Visits.

(1) General. General restrictions on the number and length of visits and on the number of authorized persons permitted to visit at any one time will be limited to those which are necessary for the safe handling of visits, prisoner control, and those made necessary by operational routines or limited facilities. In determining the need for exceptions, consideration should be given to the distance traveled by visitors, the frequency of visits, and other pertinent factors. Reasonable exceptions as to the time and length of visits will be made for military and civilian counsel to interview their clients regarding pending legal affairs.

(2) Supervision and control.

(a) All visits to prisoners will be supervised.

(b) Communication between the prisoner and his military or civilian counsel will be respected as confidential..."

[46] Id.

[47] Prison Mail Procedures, para. 43 AR 210-170: Unauthorized correspondents. "d. Prisoners normally will not be permitted to correspond with married women other than their own personal relatives; with relatives or friends who are confined in other military, Federal or State penal or correctional institution;

former prisoners, their friends or relatives; or friends or relatives of other prisoners confined in the United States disciplinary barracks. Married prisoners will not be permitted to correspond with single women other than their own personal relatives."

Para. 37, Manual for the Guidance of Prisoners, U. S. Disciplinary Barracks (1970 Ed.):

"a. During the reception period you will be permitted to complete a correspondence form authorizing inspection of all mail and listing individuals with whom you wish to correspond. This initial selection of correspondents should be made with care as subsequent changes will not be authorized for a period of three months — thereafter only those changes that are fully justified in writing will be authorized.

b. Individuals listed on the Authorized Correspondent Form are normally limited to the following:

(1) Immediate family...

(2) Relative...

(3) Friends: male and one unrelated female. In the case of female correspondents, both you and the correspondent must be single or divorced. You may write to a married couple providing they are listed as one correspondent (Mr. and Mrs.) and reside at the same address.

c. Prohibited correspondents are as follows:

(1) Strangers, pen pals, persons who have been released from the U.S.D.B., family members of persons confined here and family members of persons who have been released from here.

(2) Persons confined in other institutions. You may correspond with members of your immediate family elsewhere if approved..."

[48]para. 43, AR 210-170, governing the U.S. Disciplinary Barracks is similar to AR 190-4 in this regard, but more restrictive:

"b. Purpose of inspection. Except as modified by c below [correspondence with attorneys], main [sic] will be inspected to insure that —

(1) There are no violations of postal laws.

(2) Vulgar, obscene, or threatening language is not used.

(3) Unauthorized articles are not sent or received.

(4) Mail is addressed to or received only from authorized correspondents.

(5) Mail originating from a prisoner which contains accusations or complaints against the Government, the Department of The Army or its agencies, courts, or the disciplinary barracks staff, is referred to the commandant for appropriate action prior to forwarding or rejecting such correspondence...

(6) Letters do not contain reference by name to military or civilian personnel of the disciplinary barracks staff, or reference to other prisoners.

(7) Letters do not contain reference to any criminal happenings or any description of events in or about the disciplinary procedures, deaths, or other similar events."

Under para. 45C which complements para. 43, Disciplinary Barracks prisoners are prohibited from complaining to any outsiders except those impowered to correct deficiencies:

"The commandant or his designated representative will discuss with the prisoner concerned all subject matter contained in letters upon which complaints, accusations, or charges are based... When there is no apparent basis for the complaint or accusation, the gravity of making false complaints will be explained to the prisoner. If after such explanation the prisoner still desires to forward the letter containing the complaint or accusation, action will be taken as follows:

(1) Letters addressed to the President and members of Congress, and petitions or writs for release will be forwarded directly to the addressees without comment.

(2) Except as provided in (1) above, letters addressed to Federal officials, higher military authorities or inspectors general will be forwarded through proper channels with appropriate comments as to what action was taken...

(3) All other letters containing accusations or complaints will be returned to the prisoner; he is not permitted to write letters of complaint or accusation to other than the President, members of Congress, and Federal Officials who have authority to correct the complaint or alleged wrong. In each such instance, the prisoner will be informed of the name and position of the official authority with whom he may lodge the written complaint or accusation."

[49]Fortune Society v. McGinnis, supra, note 23.

[50]Note 45, supra.

[51]Note 48, supra.

[52]Note 27, supra.

[53]paras. 2-4 b and c. AR 190-4:

"Press interviews. Press interviews with military prisoners are not authorized under any circumstances. For the purpose of this regulation, the term 'press interview' includes any medium whereby military prisoners release information or statements for general publication. It includes, but is not limited to, interviews between prisoners and reporters of the public press or other writers, either in prison or by other means of communication...for release to the general public, and telephone, radio, or television interviews or appearances.

Release of material prepared by prisoners for publication.

(1) Material written by prisoners will not be

approved for publication, in other than local confinement facility media. Exceptions to this policy may be recommended by the commander concerned when the material, after screening, is deemed suitable for publication in outside media and meets the following requirements:

(a) It is not considered inimical to the interests of the U. S. Government.

(b) It is not concerned primarily with confinement facilities, confinement procedures, or routines, the prisoner's individual case, or the cases of other prisoners.

(2) Material believed appropriate to warrant an exception to policy will be forwarded by the commander of the confinement facility concerned, with his recommendations, through normal command channels to The Provost Marshall General..."

AR 210-170, note 32, supra, is equally restrictive.

[54] AR210-170, note 48, supra.

[55] Ibid.

[56] 310 U.S. 296, 84 L.Ed. 1213 (1940). See also.

[57] Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1879);

United States v. Ballard, 322 U.S. 78, 88 L.Ed. 1148 (1944).

[58] See Note, Constitutional Rights of Prisoners: The Developing Law, 110 U. Pa. L. Rev. 383 (1962) at 1502.

[59]Note, The Problems of Modern Penology: Prison Life and Prisoners Rights, 53 Iowa L. Rev. 691 (1967) at 695.

[60]McBride v. McCorkle, 44 N. J. Super. 467, 130 A.2d 881; Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1942) (prisoner must demonstrate deprivation of a right by discrimination).

[61]The leading cases in this area are:

Brown v. McGinnis, 10 N.Y. 2d 531, 180 N.E.2d 791, 225 N.Y.S.2d 497

In re Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 cert. den., 368 U.S. 864.

Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961).

Pierce v. La Vallee, 293 F.2d 233 (2nd Cir. 1961).

Sostre v. McGinnes, 334 F.2d 906 (2nd Cir. 1964) cert. den., 379 U.S. 892, 85 S.CT. 168, 13 L.Ed. 2d 96 (1964).

[62]Note, Suits by Black Muslim Prisoners to Enforce Religious Rights, 20 Rutgers L. Rev. 528 (1966); Brown, Black Muslim Prisoners and Religious Discrimination: The Developing Criteria for Judicial Review, 32 Geo. Wash. L. Rev. 1124 (1964); Comment, Black Muslims in Prison: Of Muslim Rites and Constitutional Rights, 62 Colum. L. Rev. 1488 (1962); Comment, Constitutional Law -la General - Right to Practice Black Muslim Tenets in State Prisons, 75 Harv. L. Rev. 837 (1962); Yaker, The Black Muslims in the Correctional Institutions, 13 The Welfare Reporter 158 (1962).

[63]See footnotes 61 and 62 supra.

[64]Evans v. Ciccone, 377 F.2d 4 (8th Cir. 1967); Sharp v. Segler, 408 F.2d 966 (8th Cir. 1969) "Preservation of order and protection of the rights of others are controlling factors" (Blackmun, circuit judge); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963) cert. den., 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed. 2d 652 (1963); "...Potential prison violence dictates that any breach of discipline presents a 'clear and present danger justifying severe repression...upon clear demonstration of the imminent and grave disciplinary threat of the Black Muslims as a group in a particular prison, proscription of their activities seems constitutionally permissible..." 62 Colum L. Rev. 1488 at 1503, 1504 (1962).

[65]Depriving those in temporary solitary confinement of prayer book not cruel and unusual punishment, Wright v. McMann, 257 F. Supp. 739 (1966); Prohibiting an inmate from attending mass while in disciplinary segregation not cruel and unusual punishment and not an unreasonable restriction on exercise of religion where chaplain could visit prisoner, McBride v. McCorkle, 44 N.J. Super. 468, 130 A.2d 881 (1957); Providing chaplain to prisoners in solitary within discretion of authorities, Belk v. Mitchell, 294 Fed. Supp. 800 (1968).

[66]Inflammatory materials may not be received, even though religious in nature, Desmond v. Blackwell, 235 F. Supp. (1964),

and may be confiscated, In re Ferguson, 55 Cal. 2d 663, 361 P.2d 417, 12 Cal. Rptr. 753 Cert. den., 368 U.S. 864; but a religious publication may be received on a regular basis and only specific inflammatory issues may be withheld, Northern v. Nelson, 315 F. Supp. 687 (1970); Antipathy caused by antiwhite statements in religious literature do not justify suppression; the probability of igniting a riot is too speculative, Long v. Parker, 390 F.2d 816 (3rd Cir. 1968); there is no unlimited right to take correspondence course from a bible school, Diehl v. Wainright, 419 F. 2d 1309 (5th Cir. 1970).

[67]Not a violation of free exercise of religion Brooks v. Wainwright, 428 F.2d 652 (5th Cir. 1970); Brown v. Wainwright, 419 F.2d 1377 (5th Cir. 1970) (mustache alleged by prisoner to be a gift of his creator).

[68]Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Childs v. Pegelow, 321 F.2d 487 (4th Cir. 1963) cert. den., 376 U.S. 932, 84 S. Ct. 702, 11 L.Ed. 2d 652. (1963).

[69]Prison authorities required to pay an available Muslim minister to perform services in accordance with institutional rules at a rate of pay comparable to that received by ministers of other faiths, Northern v. Nelson 315 F. Supp. 687 (1970); Walker v. Blackwell, 411 F. 2d 23 (5th Cir. 1969); contra: Gittlemacker v. Prasse, 428 F. 2d 1 (3rd Cir. 1970) (no violation of Free exercise clause in failing to supply inmate with

clergyman of his choice because of the problem of the sheer number of religious sects).

[70]para. 3-4b, c1, AR 190-4: "Religious services will be provided for prisoners, and they will be allowed to worship according to their faiths, subject to the circumstances and conditions pertaining to their confinement. Commanders will endeavor to provide all prisoners the opportunity to receive the ministration that the denominations of which they are members require, as necessarily modified by the conditions and circumstances pertaining to confinement."

para. 8 (9), c1, AR 210-170: "The chaplain will function under the direct supervision of the commandant, and will have direct access to all members of the disciplinary barracks staff and to prisoners."

[71]Ibid.

[72]para. 2-2c (3), c3, AR 190-4: "...Prisoners in disciplinary segregation will be visited once each day by a medical officer, a chaplain, and the prisoner's counselor..."

[73]para. 2-2c (2), AR 190-4: "Prisoners in disciplinary segregation will be provided...religious books appropriate to the prisoner's faith as requested by him and approved by the confinement facility chaplain, except when it is determined by the correctional officer that the temporary removal of such articles or equipment is necessary to prevent damage to

property or injury to the prisoner or others..."

[74]Considering the restrictions upon prisoners in this category that have been upheld by the courts (see footnote 40, supra), the present regulation is an acceptable approach.

[75]Blanks v. Cunningham, 409 F.2d 220 (4th Cir. 1969); Grear v. Maxwell, 355 F.2d 991 (6th Cir. 1966); Coleman v. Johnston, 247 F.2d 273 (7th Cir. 1957); see also Smedman, Prisoners and Medical Treatment, 4 Crim L. Bull 450 (1968).

[76]Johnson v. Dye, 175 F.2d 250 (3rd Cir. 1949) at 256 rev'd on other grounds, 338 U.S. 864 rehearing denied, 338 U.S. 896 (1949).

[77]Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968); Gittlemacker v. Prasse, 428 F.2d 1 (3rd Cir. 1970) (improper or inadequate medical treatment may violate the 8th Amendment); Oaks v. Wainwright, 430 F.2d 24 (5th Cir. 1970) (improper/inadequate dental treatment).

[78]Riley v. Rhay, 407 F.2d 496 (9th Cir. 1969).

[79]Once administrative remedies have been exhausted, a prisoner can seek injunctive relief or mandamus. Damage awards under either the Federal Civil Rights Act or the Federal Tort Claims Act are also possible when the prisoner litigant can overcome the difficult problems of proof.

[80]Smith v. Schneckloth, 414 F.2d 680 (9th Cir. 1969) failure to treat prisoner for narcotic addiction not cruel

and unusual punishment; no showing such treatment could have been provided.

[81] E.g., Weaver v. Beto, 429 F.2d 505 (5th Cir. 1970); Haskew v. Wainwright, 429 F.2d 525 (5th Cir. 1970); Coppinger v. Townsend, 398 F.2d 392 (10th Cir. 1968); Stiltner v. Rhay, 371 F.2d 920 (9th Cir. 1967) cert. den., 387 U.S. 922, 87 S. Ct. 2038, 18 L.Ed. 2d 977 (1967); Lawrence v. Ragen, 323 F.2d 410 (7th Cir. 1963).

[82] Weaver v. Beto, supra.

[83] Coppinger v. Townsend, supra.

[84] Stiltner v. Rhay, supra, at 421 N. 3.

[85] para. 3-4 (d), AR 190-4: "Medical attention will be furnished as indicated below:

(1) Prisoners reporting sick will receive medical attention at the confinement facility, where practicable, and those segregated for disciplinary reasons will be visited daily by a medical officer.

paras. 2-2 (3), c3 AR 190-4: "Disciplinary segregation will not be imposed as a disciplinary measure unless a medical officer renders a written opinion immediately prior thereto that the physical and mental health of the prisoner concerned does not preclude such action. Should a reduced diet be authorized in conjunction with the sedentary conditions of the prisoner in disciplinary segregation, the medical officer will also render

a written opinion that such a diet will not be injurious to the health of the prisoner. Prisoners in disciplinary segregation will be visited once each day by a medical officer..."

para. 49, AR 210-170:

Medical attention. At least minimum medical facilities, equivalent to an outpatient dispensary, will be established. Prisoners reporting sick will receive medical attention, and those in administrative or disciplinary segregation will be visited daily by a medical officer. If more extensive medical treatment is required than is available locally, the prisoner will be transferred to a hospital facility..."

[86] Ibid.

[87] United States v. Reynolds, 235 U.S. 133, 35 S. Ct. 86, 59 L.Ed. 162 (1914);

Butler v. Perry, 240 U.S. 328, 36 S. Ct. 258, 60 L.Ed. 672 (1916).

[88] Wilson v. Kelley, 294 F. Supp. 1005 (1968); Draper v. Rhay, 315 F.2d 193 (9th Cir. 1963) cert. den., 375 U.S. 915, 84 S. Ct. 214, 11 L.Ed. 2d 153 (1963).

[89] Talley v. Stephens, 247 F. Supp. 683 (1965). See Holt v. Sarver, 309 F. Supp. 362 (1920) where the court felt that conditions in the Arkansas penitentiary were so poor that confinement alone was cruel and unusual punishment.

[90]See Comment, Constitutional Law -- Enforcement of Prison Discipline and its Effect upon the Constitutional Rights of Those Imprisoned, 8 Vill. L. Rev. 372 (1963) at 381 (torture, beatings by hand or rubber hose held to constitute cruel and unusual punishment under the cases cited therein). See generally, Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966), and Sutherland, Due Process and Cruel Punishment, 64 Harv. L. Rev. 271 (1950).

[91]E.g., Smoake v. Willingham, 359 F.2d 386 (10th Cir. 1966); the courts will not consider lost good time claims unless restoration would entitle the prisoner to immediate release, Graham v. Willingham, infra footnote 64.

[92]E.g., Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970).

[93]E.g., Graham v. Willingham, 265 F. Supp. 763, aff'd, 384 F.2d 367 (10th Cir. 1967), where the court held that continuous segregation in maximum security for more than two years was both proper and lawful and did not constitute cruel and unusual punishment under the Eighth Amendment considering the prisoner's participation in extremely violent conduct during three separate periods of confinement. But see Sostre v. Rockefeller, 312 F. Supp. 863 (1970), where the court stated that, in order to be constitutional, considering the person involved, punitive segregation must be limited to 15 days and may be imposed only

The validity of the latter two cases is open to doubt considering the recent ruling of the Second Circuit in Sostre v. McGinnis, 8 Cr L Rptr 2437 (1971), reversing the lower court's holding that solitary confinement for over 15 days is cruel + unusual punishment

for serious infractions of the rules, and Carothers v. Follette, 314 F. Supp. 1014 (1970) holding that a deprivation of 60 days accumulated good time because the prisoner criticized the prison management in a letter to his parents was unreasonable and disproportionate punishment.

[94] Burns v. Swenson, supra, footnote 1.92.

[95] E.g., Dabney v. Cunningham, 317 F. Supp. 57 (1970).

[96] 10 U.S.C. § 855 (1950): Cruel and unusual punishments prohibited. "Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel and unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited."

[97] para. 2-2d, AR 190-4: "Prohibited measures. The following measures and those of a similar nature are prohibited.

(1) Clipping prisoner's hair to an excessive extent.

(2) The lock-step.

(3) Requiring silence at meals except while at attention or as a temporary control measure.

(4) Breaking rocks as a means of punishment or 'made' work.

(5) The use of the ball and chain.

(6) The use of irons, single or double, except for

the purpose of safe custody.

(7) Removing prisoner's clothing or other debasing practices.

(8) Punishment by flogging, branding, tattooing on the body, or any other cruel or unusual punishment.

(9) Confinement in a tent as a means of punishment.

(10) Any strenuous physical activity or body position designed to place undue stress on the prisoner as a punitive measure."

[98] para. 3-2, AR 190-47: "Administrative disciplinary and control measures. Administrative disciplinary measures prescribed herein will be used for the purpose of insuring orderly administration and control; for protection of Government property; for the safety and well-being of prisoners and others; and for the correction of recalcitrant prisoners. The type and severity of administrative disciplinary measures imposed will be limited to those required to accomplish the foregoing purposes. Disciplinary segregation should be imposed for indefinite periods and prisoners will be released therefrom at any time it is apparent that control and correction of the individual has been accomplished. Disciplinary segregation and forfeiture of good time are major disciplinary measures, and will be imposed only for the more serious infractions or in the cases where lesser disciplinary measures have been found to be ineffective.

Excessive use of disciplinary segregation as an administrative disciplinary measure serves to decrease its effectiveness. Imposition of administrative disciplinary measures will preclude trial by court-martial for the same infraction only if the infraction was minor in nature.

a. Authorized administrative disciplinary measures. Commanders of confinement facilities are authorized to impose one or more of the following administrative disciplinary measures upon persons confined under their jurisdiction for misconduct, action prejudicial to good order and discipline, or violations of rules and regulations.

(1) Reprimand or warning.

(2) Deprivation of one or more privileges.

(3) Extra duty on work projects not to exceed 2 hours per day and not to exceed 14 consecutive days. Extra duty will not conflict with regular meals, regular sleeping hours, or attendance at scheduled religious services.

(4) Disciplinary segregation normally not to exceed 15 days at any one period. A restricted diet may be imposed in conjunction with disciplinary segregation. Such restricted diet will not be imposed for more than 14 days at any one period, will not be repeated until an interval of 14 days will have elapsed, and will not be imposed for more than 84 days in any period of 12 consecutive months. Should the restricted

diet be canceled before the full 14 days expire, subsequent impostion [sic] of a restricted diet for separate offenses will not be accomplished until a 14-day interval has elapsed. The restricted diet will consist of not less than 2,100 calories daily, and will include balanced portions of all items in the regular daily ration prepared and served other prisoners, except meats, fish, poultry, eggs, butter, sweets, desserts, milk and milk products, fruit, fruit and vegetable juices, and the additional condiments usually placed on mess tables for individual use such as sugar, salt, pepper, catsup, mustard, etc., this limitation is not intended to require special preparation of food items for restricted diets. Normal food standards, including a 3-meal daily schedule, will be observed in preparing and serving restricted diet rations. Water will be the only drink furnished. The officer in charge of the confinement facility or his designated officer representative will daily examine restricted diet menus and sample portions of such food to be served.

(5) Earned good conduct time and, where applicable, extra good time may be forfeited in accordance with AR 633-30.

A1. A reduced diet is authorized for use by commanders of confinement facilities in conjunction with the sedentary conditions of prisoners in disciplinary segregation. The reduced diet will include balanced portions of all items in the

regular daily ration prepared and served other prisoners, with reduced amounts but not less than 2,100 calories daily, and with desserts omitted. The commander of the confinement facility or his designated officer representative will daily examine the serving of reduced diet menus to assure compliance with these requirements.

C. Protection of health and welfare of prisoners in close confinement.

(1) The detention of prisoners under conditions of close confinement for long periods of time is considered undesirable and will be avoided. Prisoners in disciplinary segregation or administrative segregation will be kept under close supervision. Special precautions will be taken in the preparation, equipping, inspection, and supervision of close confinement cells to prevent escapes, self-injury, and other serious incidents or unhealthy conditions of confinement..."

[99] E.g., Burns v. Swenson, supra, footnote 92

[100] Ibid. The timing of such a hearing, if initiated within a reasonable time after a prisoner has been unilaterally segregated would not be an issue of any importance, since the period of segregation prior to a hearing could be viewed as imposed for security purposes, necessary for the preservation of security and good order, as opposed to segregation imposed by the hearing as a disciplinary measure.

[101]397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed. 2d 287 (1970).

[102]Nolan v. Scafati, 306 F. Supp. 1 (1969). The Court distinguished between disciplinary actions when such hearings would be required, and summary actions imposed to quell a disturbance or a protective order against immediate risks. Accord: Kritsky v. McGinnis, 313 F. Supp. 1247 (1970). See also Morris v. Travisono, 310 F. Supp. 857 (1170); Rodriguez v. McGinnis, 307 F. Supp. 627 (1969).

[103]Ibid at 4: "There are types of authority which do not have as their sole or even principal constituent, rationality. Parents, teachers, army commanders, and above all, prison wardens have the right to depend to a large extent (though not arbitrarily) upon habit, custom, intuition, common sense not reduced to express principles, and other forms of judgement based more on experience than on logic."

[104]Sostre v. Rockefeller, 312 F. Supp. 863 (1970).

[105]Ibid at 872.

[106]Ibid.

[107]397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed. 2d 287 at 300 (1970).

[108]para. 62c, AR 210-170 (applicable to the Disciplinary Barracks) sets forth several examples of major and minor violations:

"C. Violations. Many violations of disciplinary

barracks rules by prisoners can be corrected by a warning from the guard or immediate supervisor without the necessity of formal disciplinary action. A local record may be maintained of such warnings, but they will not be entered on the Record of Conduct.... When prisoners fail to heed such warning or commit a series of minor violations, or where it is apparent that the minor violation is connected with some more serious situation, it is necessary that the matter be referred by official report for disciplinary action. Examples of minor violations are:

(a) Boisterousness

(b) Evading work

(c) "Horseplay"

(d) Loitering

(e) Out of bounds

(f) Personal untideness

(g) Unsanitary condition of cells

(h) Withholding library books.

(2) Major Violations. When a prisoner commits a major violation, a disciplinary report covering the violation, in complete detail will be submitted, in writing, in each instance. Examples of major violations are:

(a) Attempting to escape

(b) Fighting

(c) Homosexual assault

(d) Insolence

(e) Insubordination

(f) Missing count

(g) Possession of weapons

(h) Racketeering

(i) Refusing to work

(j) Stealing"

[109]A reprimand or warning, or deprivation of privileges (para 2-2, AR 190-4, footnote 69 supra).

[110]para. 62c(5), AR 210-170: (a)Discipline and adjustment board procedures. The rules and procedures of the discipline and adjustment board will be established by the commandant, consistent with the provisions of AR 633-5 [now AR 190-4] and this regulation. Prisoners will be called before the board, and charges will be read to them. Each prisoner will be given an opportunity to be heard in detail in his own defense. When necessary, other witnesses will be heard by the board. It is the duty and the responsibility of the board to obtain and consider all relevant facts in each case. The prisoner will be removed from the board room during discussion and determination of guilt or innocence and penalties to be imposed, if any. In the imposition or disciplinary action, the prisoner's previous conduct, mental and physical condition, attitude, and other

pertinent factors will be fully considered. The severity of penalties imposed should be applied progressively in order that there remain more severe penalties which can be imposed for future misconduct. Normally, maximum penalties will not be imposed upon first offenders. Members of the discipline and adjustment board will be extremely careful to be impartial and to impose fair, just, and reasonable penalties of a corrective rather than punitive nature...

(b) Expediting action. Investigation or other action necessary to bring the prisoner before the discipline and adjustment board, court-martial, or other disposition will be completed expeditiously. In order that corrective action may be taken with minimum delay, normally all cases refered [sic] to the discipline and adjustment board will be considered and acted upon within 24 hours after disciplinary reports have been received by the director of custody (Sundays and holidays not included)..."

[111]para. 62 (c), AR 210-170: "(4) Segregation pending disciplinary action. Temporary detention of prisoners in administrative segregation may be authorized by the director of custody, or other commissioned officer designated by the commandant, where such action is necessary for the control and safekeeping of prisoners pending investigation and disposition. At times, it may be necessary for guard personnel to bring

violators direct to the director of custody, especially where serious violations are involved."

para. 2-2 (b), AR 190-4: "(3) A prisoner may be placed in administrative segregation during the preliminary investigation of a case in which he is involved only when the commander of the confinement facility deems such action essential to the expeditious conduct of the investigation. In such cases the individual will be released from administrative segregation immediately after the purpose of such restraint has been served."

[112] See para. 3, AR 633-35, Restoration of military prisoners sentenced to confinement and discharge, which permits prisoners desiring restoration to duty to make an oral or written presentation to the restoration board, and AR 633-10, Mitigation, remission, and suspension of sentences, which contemplates an ex parte procedure.

[113] para. 2-1 (1), AR 190-4: "An enlisted military person or civilian held at an installation confinement facility awaiting filing of charges, disposition of charges, trial by court-martial, or action by the convening authority on the sentence adjudged by a court-martial."

[114] para. 2-1 (2), AR 190-4: "A commissioned or warrant officer of the Armed Services of the United States on active duty as a commissioned or warrant officer, who is confined prior to any court-martial sentence being ordered into

execution..."

[115]para. 2-1 (3), AR 190-4: "An enlisted military or civilian in confinement pursuant to sentence by a court-martial which, as approved by the convening authority, includes confinement which has not been ordered executed and is awaiting completion of appellate review."

[116]para. 2-1 (4), AR 190-4: "A prisoner whose sentence to confinement has been ordered into execution by appropriate authority."

[117]C3 para. 2-1 d, AR 190-4.

[118]para. 2-1 (2), AR 190-4.

[119]Report of the Special Civilian Committee for the Study of the United States Army Confinement System (1970), p. 33.

[120]Tyler v. Ciccone, 299 F. Supp. 684 (1969).

Parks v. Ciccone, 298 F. Supp. 805 (1968).

[121]Id.

[122]Tyler v. Ciccone, supra, note 120 at 687 (federal unconvicted prisoner).

[123]See Parks v. Ciccone, supra, note 120 which suggests that forcing an unconvicted civilian prisoner to work would be involuntary servitude prohibited by the Thirteenth Amendment and a violation of the Eighth Amendment.

[124]Article 13, 10 U.S.C. § 813, Punishment prohibited before trial.

"Subject to section 857 of this title (article 57), no person while being held for trial or the result of trial, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against him, nor shall the arrest or confinement imposed upon him be any more rigorous than the circumstances require to insure his presence, but he may be subjected to minor punishment during that period for infractions of discipline."

[125]paras. 18 b (3), and 125, MCM 1969 (Rev). Pursuant to Article 57 (d) of the Code, 10 U.S.C. 857 (d) § 813, the Manual provides for deferral of a sentence to confinement which has not been ordered executed in para. 88 f.

[126]6 U.S.C.M.A. 762, 21 CMR 84 (1956).

[127]Id. at 92.

[128]United States v. Phillips, 18 U.S.C.M.A. 230, 39 CMR 230 (1969).

[129]United States v. Nelson, 18 U.S.C.M.A. 177, 39 CMR 177 (1969).

[130]United States v. Nelson, 14 U.S.C.M.A. 93, 33 CMR 305 (1963); Kahn v. Anderson, 255 U.S. 1, 41 S. Ct. 224, 65 L.Ed. 469 (1921); Art. 2 (7), U.C.M.J., 10 U.S.C. § 802.

[131]Art. 2 (7) U.C.M.J., 10 U.S.C. § 802.

[132]United States v. Ragan, 14 U.S.C.M.A. 119, 33 CMR 331 (1963), holding Art. 2 (7) of the Code a constitutional

exercise of Congressional power to make rules and regulations for the government of the armed forces.

[133]para. 1-3 (6), Ar 190-4: "Female prisoners will not be confined in facilities used for confinement of male prisoners.

(a) If confinement of female persons is necessary, the apprehending authority will communicate with his next higher headquarters for disposition instructions. Normally, such disposition will be one or a combination of the following:

1: Immediately place such female persons in the custody of the commanding officer of the nearest activity of the Army where there is adequate housing and supervision of female persons; or,

2: If no such activity is within reasonable distance, request for assumption of temporary custody will be made to the nearest organization of the Armed Service where female persons are housed; or,

3: If neither of the foregoing is applicable, arrangement for temporary custody on a reimbursement basis will be made with civilian authorities having suitable approved facilities for the detention of female persons..."

[134]para. 1-3 (6), AR 190-4: "(b) The confinement portion of a court-martial sentence of a female person which, as approved by the convening authority, adjudges confinement for less than 1 year, should be remitted by the convening authority."

[135]Equality of protection under the law implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances. Pace v. Alabama, 106 U.S. 583, 27 L.Ed. 207 (1883), and forbids all invidious discrimination though it does not require identical treatment for all persons without recognition of differences in relevant circumstances. Yick Wo v. Hopkins, 118 U.S. 356 (1886). Although the equal protection clause as part of the Fourteenth Amendment refers to state action, the Supreme Court has stated that discrimination may be so unjustifiable as to be violative of Fifth Amendment due process, it being unthinkable that the federal government could be under a lesser duty, Bolling v. Sharpe, 347 U.S. 497 (1954).