

The Procedural Due Process Implications of Involuntary State Prisoner Transfers: *Hewitt v. Helms*¹ and *Olim v. Wakinekona*² — Prisoners' rights have evolved into a discrete area of law within constitutional due process doctrine.³ This body of law began with prisoners deemed "slaves of the state,"⁴ and has progressed to a recognition by the United States Supreme Court that "[t]here is no iron curtain drawn between the Constitution and the prisons of this country."⁵ While developments in prisoners' rights have followed developments in due process clause protections for the general population,⁶ such developments have not been fully extended to prisoners.⁷ Prisoners' due process protections have not reached the level of those set for members of the general public simply because prisoners are *not* members of the general public.⁸ Even though the law on the due process rights of prisoners has a long history, the issues involved are still far from settled.⁹

Within the law on prisoners' rights, a separate line of cases concerning prisoner transfers has evolved. These cases fall into one of two categories: challenges of transfers to more restrictive custody¹⁰ and challenges of transfers to other prisons.¹¹ The Supreme

¹ 459 U.S. 460 (1983).

² 461 U.S. 238 (1983).

³ See generally Aronson, *Prisoners' Rights: Deference and the Declining Role of the Courts in Enforcing the Rights of Prisoners*, 1982 ANN. SURV. AM. L. 79, 79-106 (1982) [hereinafter cited as Aronson, *Prisoners' Rights*] (overview discussion of prisoners' rights). Due process protection arises from the fifth and fourteenth amendments of the U.S. Constitution. The fifth amendment provides in relevant part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. V. The fourteenth amendment provides in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

⁴ *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871).

⁵ *Wolff v. McDonnell*, 418 U.S. 535, 555-69 (1974).

⁶ See *Bell v. Burson*, 402 U.S. 535, 542 (1971) (termination of driver's license); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (revocation of welfare benefits); *Snidach v. Family Finance Corp.*, 395 U.S. 337, 342 (1969) (wage garnishment).

⁷ See *infra* text accompanying notes 167-202 for a discussion of the historical progression of prisoners' rights.

⁸ One court has stated:

[T]he most striking aspect of prison, in terms of Fourteenth Amendment litigation, is that prison is a complex of physical arrangements and of measures, all wholly government, or wholly performed by agents of government, which determine the total existence of certain human beings (except perhaps in the realm of the spirit, and inevitably there as well) from sundown to sundown, sleeping, waking, speaking, silent, working, playing, viewing, eating, voiding, reading, alone, with others. It is not so, with members of the general adult population. State governments have not undertaken to require members of the general adult population to rise at a certain hour, retire at a certain hour, eat at certain hours, live for periods with no companionship whatever, wear certain clothing, or to submit to oral or anal searches after visiting hours, nor have state governments undertaken to prohibit members of the general adult population from speaking to one another, wearing beards, embracing their spouses, or corresponding with their lovers.

Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wisc. 1972), *rev'd*, 489 F.2d 1335, 1344 (7th Cir. 1973).

⁹ See generally Project, *Prisoners' Rights Annual Review*, 70 GEO. L.J. 815, 815-34 (1981) (survey of current developments in prisoners' rights).

¹⁰ *Fierro v. MacDougal*, 685 F.2d 261, 262 (9th Cir. 1982); *Bills v. Henderson*, 631 F.2d 1287, 1290 (6th Cir. 1980).

¹¹ *Shango v. Jurich*, 681 F.2d 1091, 1092 (7th Cir. 1982); *Gorham v. Hutto*, 667 F.2d 1146, 1148 (4th Cir. 1981); *Anthony v. Wilkinson*, 637 F.2d 1130, 1132 (7th Cir. 1980).

Court recently rendered two decisions concerning involuntary prisoner transfers, one representing each category. In *Hewitt v. Helms*,¹² the prisoner claimed an infringement of due process rights when transferred into solitary confinement, allegedly without a proper hearing.¹³ In *Olim v. Wakinekona*,¹⁴ the inmate charged that his transfer to a prison in a distant state violated his due process rights.¹⁵ The central issue in these two cases was whether the prisoner possessed a substantive right, emanating either from the Constitution or from state law, which could not be taken from him absent procedural due process protections.¹⁶ In each case, the inmate argued that although the state possessed the power to make the transfer, it had not provided him with required procedural protections before the transfer.¹⁷ The inmates relied on the due process clause protection of liberty in their claims for relief.¹⁸ In each case, however, the Court found that no liberty interest was infringed by the transfer.¹⁹

In both *Helms* and *Olim*, the Supreme Court ruled that involuntary prison transfers did not violate due process requirements.²⁰ The Court in *Helms* found that a substantive liberty interest had been created by state law.²¹ Upon deciding that a liberty interest did exist, the Court was obligated to then decide whether the requirements of due process had been met.²² In turning to the second step of its analysis, however, an examination of the procedures provided, the Court held that the procedures afforded *Helms* before his transfer satisfied the due process clause.²³ In *Olim*, the Court found no substantive liberty interest existed.²⁴ As a result, the Court did not consider whether the procedures in question satisfied due process.²⁵

Helms and *Olim* both evince the current attitude of the Court towards prisoners' rights cases. In both cases, a majority of the Court found no liberty interest to be created by the due process clause itself, thereby narrowing this source of procedural protection for the prisoner.²⁶ In *Helms*, the majority, after finding a liberty interest created by state law present, found the adequate level of procedural protection to be lower than in the prisoners' rights cases of a decade ago.²⁷ The *Olim* Court continued this limiting trend by finding no liberty interest rooted in state law to be present.²⁸

This casenote attempts to develop an understanding of the Court's present treatment of involuntary prisoner transfers.²⁹ The first section of the casenote will outline the

¹² 459 U.S. at 460.

¹³ *Id.* at 462.

¹⁴ 461 U.S. at 239.

¹⁵ *Id.* at 240.

¹⁶ *Helms*, 459 U.S. at 466; *Olim*, 461 U.S. at 243-44.

¹⁷ *Helms*, 459 U.S. at 466; *Olim*, 461 U.S. at 243.

¹⁸ *Helms*, 459 U.S. at 466; *Olim*, 461 U.S. at 243.

¹⁹ *Helms*, 459 U.S. at 476; *Olim*, 461 U.S. at 251.

²⁰ *Helms*, 459 U.S. at 476; *Olim*, 461 U.S. at 251.

²¹ *Helms*, 459 U.S. at 472.

²² See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

²³ *Helms*, 459 U.S. at 476.

²⁴ *Olim*, 461 U.S. at 251.

²⁵ *Id.*

²⁶ *Helms*, 459 U.S. at 468; *Olim*, 461 U.S. at 248.

²⁷ *Helms*, 459 U.S. at 476.

²⁸ *Olim*, 461 U.S. at 249.

²⁹ This casenote focuses on the doctrine of procedural due process as applied to involuntary prisoner transfers. Some prisoners' rights cases are also brought under a substantive due process theory. Regarding such cases, the courts apply an analysis similar to the one applied in equal

Court's opinions in the two most recent decisions on the issue, *Helms* and *Olim*.³⁰ In the second section, the current status of the due process rights of the prisoner facing an involuntary transfer will be explained.³¹ This section of the casenote first briefly traces the major developments in prisoners' rights law from the "hands off" era up to the beginnings of the due process expansion of the early 1970's.³² Next, the second section will discuss the first step in the two step process the Court uses to analyze prisoners' rights cases: the determination of whether a substantive liberty interest exists. The major cases since 1970 which have developed the notion of a liberty interest rooted in the due process clause also will be analyzed.³³ In addition, the major cases since 1970 which have developed the concept of a liberty interest created by state law will be discussed.³⁴ The second section will conclude with an analysis of how the *Helms* and *Olim* decisions have affected the existing law regarding prisoner transfers.³⁵ Finally, the third section of the casenote will discuss the second step in the Court's analysis: determining the procedural process due the transferred prisoner after a liberty interest is found.³⁶ The casenote submits that with its decisions in *Helms* and *Olim* the Court has severely restricted the constitutional due process protections of a powerless individual — the transferred prisoner.

I. THE COURT'S DECISIONS IN *HEWITT V. HELMS* AND *OLIM V. WAKINEKONA*

A. *Hewitt v. Helms*

In 1978, Aaron Helms was serving a term in the State Correctional Institute at Huntington, Pennsylvania.³⁷ On December 3, 1978, a riot occurred during which a group of prisoners attempted to seize the prison's "control center."³⁸ Several hours after officers and prison officials had quelled the riot, state police removed Helms from his cell, questioned him about his role in the riot, and then placed him in "administrative confinement."³⁹

The next day, prison officials gave Helms a "misconduct report" charging him with assaulting an officer and taking part in the riot, and detailing the institution's disciplinary hearing procedure.⁴⁰ A "hearing committee" consisting of three prison officials convened

protection cases, that is, an application of tests ranging from "strict scrutiny" to "rational basis." See *Block v. Potter*, 631 F.2d 233, 235-41 (3rd Cir. 1980); Henak, *Prisoners' Rights*, 1981 ANN. SURV. AM. L. 291, 292 n.7 (1981). For a discussion of the overlap between substantive and procedural due process, see Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89, 94-95 nn.22-29 (1974).

³⁰ See *infra* notes 37-166 and accompanying text.

³¹ See *infra* notes 167-351 and accompanying text.

³² See *infra* notes 167-202 and accompanying text.

³³ See *infra* notes 203-87 and accompanying text.

³⁴ See *infra* notes 288-351 and accompanying text.

³⁵ See *infra* notes 246-87, 319-51 and accompanying text.

³⁶ See *infra* notes 352-83 and accompanying text.

³⁷ *Helms*, 459 U.S. at 462 (1983).

³⁸ *Id.* at 463.

³⁹ *Id.* at 463-64. The Court noted that Pennsylvania regulations establish two types of restricted housing — disciplinary and administrative segregation. According to the Court, disciplinary segregation may be imposed when an inmate is found to have committed a misconduct violation, whereas administrative segregation may be imposed when an inmate poses a threat to security, when disciplinary charges are pending, or when an inmate requires protection. *Id.* at 461 n.1. For the purposes of its opinion, the Court assumed that the two types of confinement were identical. *Id.*

⁴⁰ *Id.* at 464.

four days later to consider the charges against Helms.⁴¹ The committee made no finding of guilt at this time, due to "insufficient information." The committee then ordered that Helms be kept in administrative confinement.⁴² Three days after the hearing, the Commonwealth of Pennsylvania filed state criminal charges of assault and riot against Helms.⁴³ Three weeks later, a "program review committee" consisting of three prison officials reviewed Helms' confinement and concluded that he should remain in segregation until further proceedings were held.⁴⁴

On January 19, 1979, prison officials issued Helms a second misconduct report, charging him with assault on another officer in the riot.⁴⁵ Three days later a hearing committee composed of three prison officials heard testimony from one guard and Helms.⁴⁶ Based on this evidence, the committee found Helms guilty of assault and ordered him confined to disciplinary segregation for six months, effective December 3, 1978.⁴⁷

Helms filed suit in the United States District Court for the Middle District of Pennsylvania claiming denial of due process under the fourteenth amendment.⁴⁸ Helms sought damages and injunctive and declaratory relief against Lowell D. Hewitt, the Superintendent of the State Correctional Institution at Huntingdon, Pennsylvania, and other prison officials on the theory that he was placed in administrative confinement for 51 days without adequate procedural safeguards.⁴⁹ The district court granted summary judgment to the prison officials, and Helms appealed to the United States Court of Appeals for the Third Circuit.⁵⁰

The Court of Appeals reversed the decision of the district court, concluding that Helms' segregation and continuation in administrative custody infringed upon a protected liberty interest.⁵¹ The court reasoned that Pennsylvania had created a liberty interest by promulgating comprehensive regulations governing prison operations in general and administrative segregation in particular.⁵² According to the court, Helms' liberty interest was impinged because he was not afforded a hearing within a reasonable time of his initial confinement to determine whether his detention was proper.⁵³

Hewitt and the other prison officials appealed the Third Circuit's decision to the Supreme Court of the United States.⁵⁴ In a five to four decision, the Court reversed the judgment of the court of appeals.⁵⁵ The Court found that although the relevant Pennsyl-

⁴¹ *Id.* The Court was unable to determine from the record whether Helms was present at this hearing. *Id.*

⁴² *Id.*

⁴³ *Id.* at 465.

⁴⁴ *Id.* Helms was seen by the committee as "a danger to staff and to other inmates if released back into the general population." *Id.* In addition, Helms was to be arraigned the next day on state criminal charges, and his role in the riot was still under investigation. *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Helms v. Hewitt*, 655 F.2d 487, 489 (3rd Cir. 1981), *rev'd*, 459 U.S. 460, 478 (1983).

⁴⁹ *Helms*, 655 F.2d at 489.

⁵⁰ *Id.*

⁵¹ *Id.* at 497.

⁵² *Id.* at 496.

⁵³ *Id.* at 500.

⁵⁴ *Helms*, 459 U.S. at 462.

⁵⁵ *Id.* at 478.

vania statutes did create a liberty interest protected by the due process clause, the procedures afforded Helms satisfied constitutional requirements.⁵⁶

In its examination of the case, the Court identified two possible sources of substantive liberty interests — the due process clause itself and state law.⁵⁷ The Court rejected Helms' argument that the Constitution provided him a liberty interest in remaining in the general prison population.⁵⁸ In reaching its decision, the Court noted that prison administrators are given broad discretion because of the difficulties inherent in managing a prison and that prisoners retain only a narrow range of protected liberty interests.⁵⁹ To support its first contention, the Court cited an earlier opinion dealing with prisoners' rights in which it stated that deference to prison officials was necessary to avoid placing a "wide spectrum of discretionary actions that traditionally have been the business of prison administrators" under judicial review.⁶⁰ The Court supported its second contention by citing a number of its earlier decisions stating the principle that the due process clause is not violated as long as the conditions of a prisoner's confinement are within the sentence imposed on the prisoner and do not otherwise violate the Constitution.⁶¹

In applying these principles derived from past decisions to the case before it, the Court held that no liberty interest from within the due process clause itself existed in Helms' case.⁶² According to the Court, administrative segregation has a variety of uses⁶³ — protecting the prisoner,⁶⁴ protecting other prisoners,⁶⁵ breaking up disruptive groups,⁶⁶ or simply separating inmates awaiting classification or transfer.⁶⁷ Administrative segregation, the Court found, is something every prisoner can expect to face at some point in his imprisonment,⁶⁸ and was therefore within the terms of Helms' sentence.⁶⁹

Having rejected the federal constitutional argument, the Court next turned to Helms' claim that Pennsylvania had created a liberty interest in his case by enacting statutes and regulations governing the use of administrative segregation.⁷⁰ The Court first drew a distinction between this case and its earlier decisions in which a state-created liberty interest had been found.⁷¹ The Court concluded that in those cases where liberty interests rooted in state law were found, radical changes in the nature of the custody were at issue.⁷² In Helms' case, by contrast, the Court found that the relevant state law

⁵⁶ *Id.* at 477.

⁵⁷ *Id.* at 466.

⁵⁸ *Id.* at 468.

⁵⁹ *Id.* at 467.

⁶⁰ *Helms*, 459 U.S. at 467 (quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

⁶¹ *Helms*, 459 U.S. at 467-68. The Court relied on *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979); *Meachum v. Fano*, 427 U.S. 215, 225 (1976); and *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974).

⁶² *Id.*

⁶³ To support this proposition, the Court cited CHAPTER 37 of the PA. CODE § 95 (1979) (governing correctional institutions).

⁶⁴ 37 PA. CODE § 95.104(3) (1979).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ 37 PA. CODE § 95.106(1) (1979).

⁶⁸ *Helms*, 459 U.S. at 468.

⁶⁹ *Id.*

⁷⁰ *Id.* at 469.

⁷¹ *Id.* The Court cited the earlier cases of *Vitek v. Jones*, 445 U.S. 480 (1980); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); and *Wolff v. McDonnell*, 418 U.S. 539 (1974).

⁷² The interests involved in those cases were the transfer to a mental hospital in *Vitek*, 445 U.S. at 482-83; parole possibilities in *Greenholtz*, 442 U.S. at 3; and good time credits in *Wolff*, 418 U.S. at 546.

governed the daily operation of the prison system — the use of administrative segregation.⁷³ While warning that this distinction could warrant different treatment for Helms' claim, the Court nonetheless concluded that Helms did acquire a protected liberty interest in remaining in the general prison population from the Pennsylvania regulations involved.⁷⁴ The Court reasoned that Pennsylvania went beyond simple procedural guidelines by using mandatory language requiring that certain procedures "shall," "will," and "must" be employed.⁷⁵ In addition, the Court noted, the regulations provided that administrative segregation would not occur absent specified substantive predicates — "the need for control," or "the threat of a serious disturbance."⁷⁶

Finding a protected liberty interest, the Court then considered whether the process afforded Helms satisfied the due process clause.⁷⁷ The Court acknowledged that the requirements of due process are flexible and dependent on the particular situation.⁷⁸ Applying the balancing approach developed in *Mathews v. Eldridge*,⁷⁹ it ruled that the due process requirements were satisfied in this case.⁸⁰ The *Eldridge* Court considered the private interests at stake, the government interests involved, and the value of additional procedural requirements.⁸¹ Regarding the first factor, the Court concluded that Helms had a low level of private interest in the matter.⁸² The majority noted that Helms was merely transferred from one restrictive environment to a more restrictive one, with no stigma attached and no effect on parole opportunity.⁸³ Effecting the transfer, on the other hand, promoted the state's interest in protecting the prison guards and other prisoners as well as Helms himself.⁸⁴ Finally, addressing the third factor, the Court found that additional procedures would have little effect because the decision to place an inmate in administrative confinement requires very subjective decisionmaking by prison administrators.⁸⁵

In turning to the actual procedures provided for Helms, the Court held that due

⁷³ *Helms*, 459 U.S. at 469-70.

⁷⁴ *Id.* at 470-71.

⁷⁵ *Id.* at 471-72.

An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

37 PA. CODE § 95.104(b)(3).

⁷⁶ *Helms*, 459 U.S. at 471-72.

⁷⁷ *Id.* at 472.

⁷⁸ *Id.* Helms was given written notice of the charges against him and his transfer was reviewed by a hearing committee five days after he was placed in administrative segregation. *Id.* at 477.

⁷⁹ 424 U.S. 319 (1976). The due process issue in *Mathews* was whether an evidentiary hearing was required prior to termination of Social Security disability benefits payments. *Id.* at 349. The Court found no hearing to be required, using the formula outlined above. *See id.* at 335.

⁸⁰ *Helms*, 459 U.S. at 477.

⁸¹ *Mathews*, 424 U.S. at 335.

⁸² *Helms*, 459 U.S. at 473.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 473-74.

process was satisfied.⁸⁶ Helms had received notice of the charges against him five days before the hearing committee reviewed the existing evidence against him.⁸⁷ According to the Court, an informal, nonadversary review was sufficient both for the decision that Helms was a security threat and for the decision to confine him in administrative segregation pending completion of an investigation.⁸⁸

Justice Blackmun concurred in part and dissented in part from the majority.⁸⁹ The Court was correct, Justice Blackmun asserted, in finding that while the due process clause itself did not hold a liberty interest, state law had created a liberty interest in Helms' case.⁹⁰ To support this proposition, Justice Blackmun pointed to earlier decisions of the Court which dealt with state-created liberty interests.⁹¹ Justice Blackmun dissented from the majority, however, in its discussion of whether Helms had been given due process.⁹² Without explaining his reasoning, Justice Blackmun stated that he could not agree with the Court that the procedures provided Helms satisfied due process.⁹³

Justice Stevens, joined by Justice Brennan and Justice Marshall, dissented.⁹⁴ Justice Stevens objected to the majority's view that Helms' liberty interest was created by state law.⁹⁵ According to Justice Stevens, Helms' liberty interest existed apart from the relevant written regulations.⁹⁶ The severity of Helms' transfer, in his view, impaired Helms' "residuum of liberty" as a prisoner and triggered due process safeguards.⁹⁷ Justice Stevens interpreted the state regulations as an indication of the State's recognition of the substantiality of the deprivation, but not as the source of Helms' liberty interest.⁹⁸

Turning to the procedures necessary to protect Helms' liberty interest, Justice Stevens again disagreed with the majority's conclusions.⁹⁹ Justice Stevens conceded that important government interests may be at stake in initially deciding to contain a prisoner in administrative confinement.¹⁰⁰ According to Justice Stevens, however, more than the majority's minimal review procedures should be required to confine an inmate indefinitely.¹⁰¹ He would require a periodic review at which the prisoner is allowed to make an oral statement about the need for, and consequences of, continued confinement.¹⁰² In addition, should the prison administrators decide to continue to confine the inmate in administrative segregation, Justice Stevens would require the administrators to file a brief written statement supporting that decision and to provide that statement to the prisoner.¹⁰³ These procedures, in Justice Stevens' view, would protect against arbitrary continuation in administrative confinement.¹⁰⁴

⁸⁶ *Id.* at 477.

⁸⁷ *Id.*

⁸⁸ *Id.* at 476.

⁸⁹ *Id.* at 478 (Blackmun, J., concurring in part and dissenting in part).

⁹⁰ *Id.* at 478-79 (Blackmun, J., concurring in part and dissenting in part).

⁹¹ *Id.* at 479 (Blackmun, J., concurring in part and dissenting in part).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 479 (Stevens, J., dissenting).

⁹⁵ *Id.* at 488 (Stevens, J., dissenting).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 491 (Stevens, J., dissenting).

¹⁰¹ *Id.*

¹⁰² *Id.* at 493-94 (Stevens, J., dissenting).

¹⁰³ *Id.* at 494 (Stevens, J., dissenting).

¹⁰⁴ *Id.* at 493-94 (Stevens, J., dissenting).

In summary, then, Helms was successful in his claim that a liberty interest existed in his case, protected by the due process clause.¹⁰⁵ He was unsuccessful, however, in obtaining any further relief.¹⁰⁶ The Court found no liberty interest present from the due process clause itself, but did find that Pennsylvania had created a liberty interest with its comprehensive prison regulations governing administrative transfers.¹⁰⁷ In the majority's view, the informal, nonadversary review provided Helms satisfied the requirements of the due process clause.¹⁰⁸ The issue of whether a state prisoner had been denied a constitutionally protected liberty interest was again addressed by the Court just months after the *Helms* decision, in *Olim v. Wakinekona*,¹⁰⁹ a case involving the transfer of a prisoner to a prison in a distant state.

B. *Olim v. Wakinekona*

In 1976, Delbert Kaahanui Wakinekona was an inmate of the Hawaii State Prison, sentenced to life imprisonment and confined to the maximum control unit.¹¹⁰ On August 2, Wakinekona appeared before a board designated as the "program committee" of the prison for a hearing.¹¹¹ The purpose of this hearing was to determine the reason for failure of programs at the maximum control unit.¹¹² Three days later, the committee notified Wakinekona in writing that he would be given a further hearing to determine his program designation, which included a possible transfer to a prison on the mainland.¹¹³ On August 10, the second hearing was held before the same members of the program committee.¹¹⁴ The following day the committee rendered its decision, and provided Wakinekona with a written copy.¹¹⁵ The committee recommended that Wakinekona remain classified as a maximum security risk and that he be transferred to a prison on the mainland.¹¹⁶ On the authority of this administrative decision and its acceptance by the prison administrator, Wakinekona was then transferred to Folsom State Prison in California.¹¹⁷

Wakinekona sought relief in the federal district court of Hawaii, claiming that prison officials had violated his constitutional right to procedural due process.¹¹⁸ Wakinekona argued that he was denied a hearing by a fair and impartial board because the transfer recommendation was made by the same members of the program committee which sent him to the hearing, in violation of state regulations.¹¹⁹ The district court held that a liberty

¹⁰⁵ *Helms*, 459 U.S. at 472.

¹⁰⁶ *Id.* at 477.

¹⁰⁷ *Id.* at 472.

¹⁰⁸ *Id.* at 477.

¹⁰⁹ 461 U.S. 238 (1983).

¹¹⁰ *Olim*, 461 U.S. at 240.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at 241.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Wakinekona v. Doi*, 421 F. Supp. 83, 84 (D. Hawaii 1976), *rev'd*, *Olim v. Wakinekona*, 459 F. Supp. 473 (D. Hawaii 1978), *rev'd*, 664 F.2d 708 (9th Cir. 1981), *rev'd*, 461 U.S. 238 (1983).

¹¹⁹ *Doi*, 421 F. Supp. at 85. Article IV of the Hawaii "Supplementary Rules and Regulations of the Corrections Division," entitled "The Classification Process," declares that "classification is intended to be in the best interests of the individual, the State, and the community." The inmate is

interest involving a right to a hearing before a fair and impartial board had been created by the regulations of the state of Hawaii.¹²⁰ Because the same committee that had singled Wakinekona out as a disruptive inmate also ruled on his transfer, the court held that his right to due process had been violated and ordered a new hearing before an impartial board.¹²¹

On request by the defendants to reconsider their original motion to dismiss Wakinekona's complaint, the district court reversed itself.¹²² In light of a recently released First Circuit opinion,¹²³ the district court held that regulations, as opposed to state statutes, do not create the kind of substantive interest required to establish a state-created "liberty" interest.¹²⁴

Wakinekona appealed the district court's dismissal of his complaint, and the United States Court of Appeals for the Ninth Circuit reversed.¹²⁵ The Ninth Circuit disagreed with other circuits which had held that prison transfer regulations do not create a liberty interest protected by the due process clause unless the events which cause the transfer are specified in the regulations.¹²⁶ The relevant question, according to the Ninth Circuit, was whether the transfer regulations create an entitlement to procedural protections.¹²⁷ In Wakinekona's case, the circuit court stated, the substantive content of the regulations involved created a justifiable expectation that he would not be transferred absent the specified procedure.¹²⁸ This expectation, according to the Ninth Circuit, created a constitutionally protected liberty interest.¹²⁹

Olim and the other prison officials involved petitioned the United States Supreme

granted the right to appear during the Program Committee hearing "if a change, modification, or transfer is planned which would result in a grievous loss." The "impartial Program Committee [is to be] composed of at least three members who were not actively involved in the process by which the inmate/ward was brought before the Committee." *Olim*, 461 U.S. at 242 n.1. In *Olim*, the state conceded that Wakinekona suffered a "grievous loss" within the meaning of the statute. *Olim*, 461 U.S. at 242 n.2.

¹²⁰ *Doi*, 421 F. Supp. at 85.

¹²¹ *Id.*

¹²² *Olim*, 459 F. Supp. at 473-76.

¹²³ *Lombardo v. Meachum*, 548 F.2d 13 (1st Cir. 1977).

¹²⁴ *Olim*, 459 F. Supp. at 475. The court relied on the fact that the Hawaii state regulations do not govern the discretion of the administrator in ultimately deciding on a transfer. As a result, according to the court, no liberty interest was created. Without a liberty interest, due process did not attach, hence Wakinekona no longer had a claim in federal court and his complaint was dismissed pursuant to Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE. *Id.* at 475-76.

¹²⁵ *Olim*, 664 F.2d 708, 712 (9th Cir. 1981), *rev'd*, 461 U.S. 242, 251.

¹²⁶ *Id.* at 711. The court cited the First, Second, and Sixth Circuit decisions of *Lombardo v. Meachum*, 548 F.2d 13, 15 (1st Cir. 1977); *Cofone v. Manson*, 594 F.2d 934, 938 (2d Cir. 1979); *Bills v. Manson*, 631 F.2d 1287, 1298-99 (6th Cir. 1980).

¹²⁷ *Olim*, 664 F.2d at 711.

¹²⁸ *Id.* at 711-12. The "substantive content" referred to by the court was the procedural protections found in the regulations: that transfers involving a grievous loss be considered by an impartial committee, that the prisoner be given prior notice of the hearing at which the committee will consider his transfer, that the notice state what the committee will consider at the hearing and any recent specific facts which may weigh significantly in the classification process, that the prisoner have the right to cross-examine and confront witnesses, the right to retain counsel, and the right to offer evidence on his own behalf. In addition, the regulations require that the committee "render a recommendation based only upon evidence presented at the hearing to which the individual had an opportunity to respond or any evidence which may subsequently come to light after the formal hearing." *Id.*

¹²⁹ *Id.*

Court for a writ of certiorari, which the Court granted.¹³⁰ The Supreme Court reversed, holding that the transfer did not deprive Wakinekona of any liberty interest in violation of his constitutional due process rights.¹³¹ In the majority opinion, written by Justice Blackmun and joined by five other Justices, the Court found that no liberty interest had been created by either the due process clause or the state regulations of Hawaii.¹³²

First, the Court addressed the issue of whether an interstate prison transfer deprives an inmate of any liberty interest protected by the due process clause itself.¹³³ The Court acknowledged its holding in *Wolff v. McDonnell*¹³⁴ that prisoners retain a residuum of liberty, but relied on two later companion cases to repudiate the notion that any grievous loss inflicted upon a prisoner by the state necessarily implicates the due process clause.¹³⁵ According to the Court, *Meachum v. Fano*¹³⁶ and *Montanye v. Haymes*,¹³⁷ which dealt with intrastate transfers, stood for the proposition that an inmate has no justifiable expectation that he will be incarcerated in any particular prison within a state.¹³⁸ From this interpretation of these cases, the Court reasoned that Wakinekona had no justifiable expectation that he would be incarcerated in any particular state.¹³⁹ The Court pointed to overcrowding, the need to separate particular prisoners, and "any number of reasons" as sometimes necessitating interstate transfers.¹⁴⁰

The Court distinguished the instant case from *Vitek v. Jones*,¹⁴¹ where the Court held that the transfer of an inmate from a prison to a mental hospital did implicate a liberty interest.¹⁴² The distinguishing factor in *Vitek*, the Court noted, was that "[p]lacement in the mental hospital was not within the range of conditions of confinement to which a prison sentence subjects an individual, because it brought about 'consequences . . . qualitatively different from the punishment characteristically suffered by a person convicted of crime.'"¹⁴³ By contrast, the Court stated that Wakinekona's transfer, even though it involved great distance and an ocean crossing, differed from an intrastate transfer only in degree, not in kind.¹⁴⁴ Invoking the rule of *Meachum v. Fano* that the "determining factor is the nature of the interest involved rather than its weight," the Court held that no liberty interest was present.¹⁴⁵

Having concluded that no liberty interest existed from the due process clause itself, the Court turned to state law.¹⁴⁶ The Court reversed the court of appeals' holding that the Hawaii prison regulations created a constitutionally protected liberty interest.¹⁴⁷ The Court relied on previous decisions, where it held no state-created liberty existed because

¹³⁰ *Olim*, 461 U.S. at 243-44.

¹³¹ *Id.* at 251.

¹³² *Id.*

¹³³ *Id.* at 244.

¹³⁴ 418 U.S. 539 (1974).

¹³⁵ *Olim*, 461 U.S. at 244.

¹³⁶ 427 U.S. 215 (1976).

¹³⁷ 427 U.S. 236 (1976).

¹³⁸ *Montanye*, 427 U.S. at 243; *Meachum*, 427 U.S. at 224.

¹³⁹ *Olim*, 461 U.S. at 245.

¹⁴⁰ *Id.* at 246.

¹⁴¹ 445 U.S. 480 (1980).

¹⁴² *Id.* at 494.

¹⁴³ *Olim*, 461 U.S. at 245 (quoting *Vitek*, 445 U.S. at 493).

¹⁴⁴ *Id.* at 247-48.

¹⁴⁵ *Id.* (quoting *Meachum*, 427 U.S. at 224).

¹⁴⁶ *Olim*, 461 U.S. at 248.

¹⁴⁷ *Id.* at 249.

there were no substantive limitations on official discretionary power to transfer.¹⁴⁸ In *Wakinekona's* case, the Court noted the prison administrator was the final decisionmaker regarding the transfer, and his discretion is "completely unfettered."¹⁴⁹ Without a substantive limitation placed on official discretion, the Court stated no liberty interest entitled to protection under the due process clause was created.¹⁵⁰

The Court did not accept the reasoning of the court of appeals that the prison regulations required a particular kind of hearing before the administrator could exercise his discretion.¹⁵¹ On this point, the Court stated that "process is not an end in itself," and a "liberty interest is of course a substantive interest of an individual; it cannot be the right to demand needless formality."¹⁵²

Justice Marshall, joined by Justice Brennan, dissented.¹⁵³ In Justice Marshall's view, *Wakinekona* did have a substantive liberty interest in remaining in a Hawaii prison.¹⁵⁴ *Wakinekona's* transfer, according to Justice Marshall, was not "within the range of conditions of confinement to which a prison sentence subjects an individual."¹⁵⁵ In Justice Marshall's view, such a drastic change implicates a substantive liberty interest which cannot be taken from a prisoner absent the protections of the due process clause.¹⁵⁶

Justice Marshall also disagreed with the majority's conclusion that the Hawaii prison regulations did not create a liberty interest in *Helms'* case.¹⁵⁷ According to Justice Marshall, earlier cases demonstrated the principle that state laws which impose substantive criteria limiting the discretion of prison officials create a protected liberty interest.¹⁵⁸ Conversely, Justice Marshall stated, state laws imposing no conditions on administrative discretion do not create a liberty interest.¹⁵⁹ In Justice Marshall's view, the Hawaii prison regulations, by providing that transfers would only take place if required to ensure an inmate's optimum placement, restricted official discretion in ordering transfers.¹⁶⁰ According to Justice Marshall, these regulations created a liberty interest protected by the due process clause.¹⁶¹

In summary, the *Olim* majority denied that a liberty interest protected by the due process clause existed in *Wakinekona's* case.¹⁶² The *Olim* Court rejected both state law and

¹⁴⁸ *Montanye*, 427 U.S. at 243; *Meachum*, 472 U.S. at 226-28.

¹⁴⁹ *Olim*, 461 U.S. at 249. In deciding that the administrator's discretion is completely unfettered, the Court relied on the decision of the Supreme Court of Hawaii in *Lono v. Ariyoshi*, 63 Haw. 138, 144-45, 621 P.2d 976, 980-81 (1981). *Olim*, 461 U.S. at 249.

¹⁵⁰ *Olim*, 461 U.S. at 249.

¹⁵¹ *Id.* at 250.

¹⁵² *Id.*

¹⁵³ *Id.* at 251 (Marshall, J., dissenting). Justice Stevens joined Part I of Justice Marshall's opinion, arguing that *Wakinekona's* transfer implicated a liberty interest protected by the due process clause itself. *Id.* (Marshall, J., dissenting).

¹⁵⁴ *Id.* at 251 (Marshall, J., dissenting).

¹⁵⁵ *Id.* at 252 (quoting *Vitek*, 455 U.S. at 493) (Marshall, J., dissenting).

¹⁵⁶ *Olim*, 461 U.S. at 253 (Marshall, J., dissenting).

¹⁵⁷ *Id.* at 254 (Marshall, J., dissenting).

¹⁵⁸ *Id.* at 255 (Marshall, J., dissenting). Justice Marshall cited the Supreme Court decisions of *Hewitt v. Helms*, 459 U.S. 460 (1983); *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979); *Wolff v. McDonnell*, 418 U.S. 539 (1974); and the district court opinion in *Wright v. Economoto*, 462 F. Supp. 397 (N.D. Cal. 1976), *summ. aff'd*, 434 U.S. 1052 (1978).

¹⁵⁹ *Olim*, 461 U.S. at 253 (Marshall, J., dissenting).

¹⁶⁰ *Id.* at 257 (Marshall, J., dissenting).

¹⁶¹ *Id.* at 258-59 (Marshall, J., dissenting).

¹⁶² *Olim*, 461 U.S. at 251.

the due process clause as sources of a liberty interest for Wakinekona.¹⁶³ In Wakinekona's situation, the Court saw nothing to protect. The combination of the lack of state law and the ability of officials to transfer a prisoner for whatever reason or for no reason at all left Wakinekona, in the Court's view, without a remedy.¹⁶⁴

The *Olim* decision differed from the decision in *Helms* in that, in *Helms*, the Court did find that a liberty interest had been created by state law.¹⁶⁵ Nonetheless, *Helms* was left in the same position as Wakinekona at the end of his litigation — without relief, because in his case the Court decided that he had been provided the minimum requirements of due process.¹⁶⁶

The *Helms* and *Olim* decisions reflect a developing policy of the Court to narrow the procedural due process protections of prisoners. This casenote will now look at the development of the law on prisoner transfers, beginning with a brief summary of the historical background of prisoners' rights cases.

II. THE DUE PROCESS IMPLICATIONS OF INVOLUNTARY PRISONER TRANSFERS

A. A Brief History of the Treatment of Prisoners' Rights Claims in American Courts

The traditional approach of the American courts regarding prisoners' rights was a "hands off"¹⁶⁷ policy towards claims brought by prisoners, simply a blanket refusal to grant the prisoner jurisdiction.¹⁶⁸ The rationale for this approach rested on two assumptions. First, courts declined to decide cases involving prisoners' rights because of a widely accepted view that courts lacked the expertise to deal with prison conditions.¹⁶⁹ Second, due process claims brought by prisoners were not favored because courts feared that judicial review of the decisions of prison officials would result in subverting the control of prison administrators.¹⁷⁰

The Supreme Court formulated its approach during the "hands off" period by distinguishing between the rights and privileges of prisoners.¹⁷¹ A criminal conviction, according to the Court, terminated the rights of a prisoner, leaving only the privileges granted by the state.¹⁷² This reasoning allowed the Court to dismiss the claims of prisoners

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 250-51.

¹⁶⁵ *Helms*, 459 U.S. at 472.

¹⁶⁶ *Id.* at 477.

¹⁶⁷ The "hands off" terminology is generally credited with having originated in Fritch, Civil Rights of Federal Inmates 31 (1961) (document prepared for the Federal Bureau of Prisons).

¹⁶⁸ During this period the Supreme Court reviewed just four cases involving actions brought by inmates: *Price v. Johnston*, 334 U.S. 266, 269-70 (1948); *Cochran v. Kansas*, 316 U.S. 255, 258 (1942); *Ex parte Hull*, 312 U.S. 546, 548 (1941); *Stroud v. United States*, 251 U.S. 15, 21 (1919). Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219, 221 n.7 (1977). See also Hirschkop & Millemann, *The Unconstitutionality of Prison Life*, 55 VA. L. REV. 795, 812 (1969).

¹⁶⁹ Note, *Searching for a Liberty Interest: The Prisoner's Right to Due Process*, 61 NEB. L. REV. 382, 382 n.1 (1982).

¹⁷⁰ For a detailed discussion of the "hands off" policy, see generally Comment, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506 (1963) (criticism of hands off doctrine and proposal for abandonment).

¹⁷¹ See, e.g., *Ughbanks v. Armstrong*, 208 U.S. 481, 487-88 (1908) (granting of parole is a privilege, state may use discretion or attach conditions as it sees fit).

¹⁷² According to this analysis the due process clause has no effect upon a state-granted privilege. *Id.*

because there were no rights left to protect.¹⁷³ The Court employed the "hands off" doctrine for prisoners' rights analysis until the early 1960's.¹⁷⁴

The federal courts began to show a willingness to discard the "hands off" approach in the early 1960's.¹⁷⁵ Developments in two other areas of the law weakened the "hands off" policy.¹⁷⁶ The first of these developments was the increased protection the Court began to provide the accused from police and prosecutors.¹⁷⁷ Ignoring completely the claims of prisoners no longer appeared rational after prisoners were granted due process protection at all earlier stages of their incarceration.¹⁷⁸

In 1961, the Supreme Court breathed new life into the hundred year old Civil Rights Act in a case involving police misconduct by holding that a private right of action existed to provide a remedy to parties deprived of constitutional rights, privileges and immunities by a state official's abuse of discretion.¹⁷⁹ The Court made this right of action available to prisoners in 1964.¹⁸⁰ Through these decisions, the Civil Rights Act became a vehicle for state prisoners to air their grievances in federal court by claiming their constitutional rights had been violated by state prison officials acting under color of state law.¹⁸¹

In the 1970's, the Burger Court began an expansion of procedural due process rights for individuals.¹⁸² In these cases, the Court developed the idea that to satisfy procedural requirements of due process, some kind of hearing is required before a person can be deprived of property.¹⁸³ The Court imputed a hearing requirement to property interests of the average free person: wages,¹⁸⁴ welfare payments,¹⁸⁵ and household goods,¹⁸⁶ in what has been termed a "due process explosion."¹⁸⁷ With its decision in *Morrissey v. Brewer*,

¹⁷³ See *id.* at 488. For a criticism of the rights and privileges distinction, see *Sostre v. McGinnis*, 442 F.2d 178, 196 (1971). See also Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1459 (1968). "Holmes himself readily admitted that to deny that a person had a 'right' to something was merely to announce the conclusion that a court would not give him any relief; but the denial itself provides no reason whatsoever why such relief should be denied." *Id.*

¹⁷⁴ For a history of the demise of the "hands off" doctrine, see Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal*, 4 HASTINGS CONST. L.Q. 219, 220 (1977).

¹⁷⁵ Some of the first cases rejecting the "hands off" doctrine: *Fulwood v. Clemmer*, 295 F.2d 171, 173 (D.C. Cir. 1961); *Redding v. Pate*, 220 F. Supp. 124, 128 (N.D. Ill. 1963).

¹⁷⁶ Goldfarb & Singer, *Redressing Prisoners' Grievances*, 39 GEO. WASH. L. REV. 175, 183-85 (1970) [hereinafter cited as Goldfarb, *Prisoners' Grievances*].

¹⁷⁷ See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 467 (1966) (voluntary confessions); *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 660 (1961) (exclusionary rules).

¹⁷⁸ Goldfarb, *Prisoners' Grievances*, *supra* note 176, at 184.

¹⁷⁹ *Monroe v. Pape*, 365 U.S. 167, 172 (1961).

¹⁸⁰ *Cooper*, 378 U.S. at 546.

¹⁸¹ See generally Note, *Prisoners, 1983, and the Federal Judge as Warden*, 9 TOL. L. REV. 873 (1978) (ever increasing volume of prisoners challenging the conditions of their confinement under section 1983).

¹⁸² See, e.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) ("It is hardly useful any longer to try to deal with this problem [parolee facing revocation of parole] in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." (Burger, C.J. majority opinion)).

¹⁸³ See generally Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267 (1975) [hereinafter cited as Friendly, *Hearing*] (discussion of the development of the hearing requirement and the elements of a fair hearing).

¹⁸⁴ *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969).

¹⁸⁵ *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

¹⁸⁶ *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972).

¹⁸⁷ Friendly, *Hearing*, *supra* note 183, at 1268 n.169.

the Court carried the requirement of a hearing into prisoners' rights cases.¹⁸⁸ In *Morrissey*, the parolees complained of a denial of due process when their parole was revoked without a hearing.¹⁸⁹ The Court applied, for the first time in a prisoners' rights case,¹⁹⁰ a "grievous loss" approach to determine whether the parolees were entitled to due process protection.¹⁹¹ Under this analysis, procedural protections are due only to the individual who had suffered a grievous loss.¹⁹² In *Morrissey* the Court found that the revocation of parole does inflict a grievous loss upon a person.¹⁹³ In the Court's view, a parolees' liberty, whether termed a "right" or a "privilege," was a liberty within the protection of the due process clause.¹⁹⁴

The grievous loss approach tended to overlook fundamental differences involved between free individuals and prisoners, and that incarceration in prison itself, by most definitions, is a "grievous loss."¹⁹⁵ In *Meachum v. Fano*¹⁹⁶ the Court switched to what has been termed an "entitlement test"¹⁹⁷ to determine whether procedural due process protections are applicable.¹⁹⁸ Under this analysis, a prisoner's due process rights are violated if he is denied a "liberty interest" to which he is entitled without adequate procedural protection.¹⁹⁹ Such a liberty interest can arise in one of two ways: from the due process clause or from relevant state law.²⁰⁰

The Court currently uses this two pronged approach to determine whether a liberty interest exists, looking to both the due process clause and state law. This two pronged approach was applied by the Court to analyze the liberty interests claimed in both *Hewitt v. Helms* and *Olim v. Wakinekona*.²⁰¹ The next two parts of this casenote will trace these two sources of liberty interests from their beginnings up to their present status in involuntary transfer cases as a result of the Court's decisions in *Helms* and *Olim*.²⁰²

B. Liberty Interest Direct from the Due Process Clause

The fourteenth amendment itself may give rise to a liberty interest.²⁰³ Where such a liberty interest is found, the Supreme Court has established the rule that an individual may not be deprived of the interest absent procedural due process protections.²⁰⁴ In the

¹⁸⁸ 408 U.S. 471, 488-89 (1972).

¹⁸⁹ *Id.* at 474.

¹⁹⁰ *Id.* at 481.

¹⁹¹ The term originated in Justice Frankfurter's concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951).

¹⁹² *Morrissey*, 408 U.S. at 481.

¹⁹³ *Id.* at 482.

¹⁹⁴ *Id.*

¹⁹⁵ See, e.g., *Winsett v. McGinnis*, 617 F.2d 996, 1004 (1980) ("It is well settled that when a person is lawfully incarcerated for the conviction of a crime, that person's constitutional rights become circumscribed.").

¹⁹⁶ 427 U.S. 215 (1976).

¹⁹⁷ Murphy, *Due Process Implications of Prisoner Transfers*, 16 U. RICH. L. REV. 583, 585-87 (1982).

¹⁹⁸ *Meachum*, 427 U.S. at 223-27. For a discussion of entitlement theory, see Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 72 (1982); Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 434-43 (1977).

¹⁹⁹ *Wolff v. McDonnell*, 418 U.S. 539, 552 (1974); *Meachum*, 427 U.S. at 226.

²⁰⁰ *Hewitt v. Helms*, 459 U.S. at 466 (citing *Meachum*, 427 U.S. at 223-27).

²⁰¹ *Helms*, 459 U.S. at 466; *Olim*, 461 U.S. at 243-44.

²⁰² See *infra* notes 205-87 and accompanying text.

²⁰³ See, e.g., *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 339 (1969).

²⁰⁴ *Id.*

prisoners' rights context, the discussion of liberty interest direct from the due process clause began with the Court's decision in *Morrissey v. Brewer* and has continued in a line of cases including *Helms* and *Olim*.

1. The Case Law Preceding *Helms* and *Olim*

As discussed previously, in *Morrissey v. Brewer*,²⁰⁵ the Court found a liberty interest present only where the inmate will suffer a "grievous loss."²⁰⁶ In that case, the Court found revocation of parole without a hearing to be such a grievous loss.²⁰⁷ The Court reasoned that due process is a flexible concept which requires taking into consideration the "precise nature of the government function involved as well as the private interest that has been affected by the government action."²⁰⁸ The *Morrissey* Court concluded that the right to parole was protected within the "liberty" language of the fourteenth amendment, and could not be taken away absent adequate procedural protections.²⁰⁹ In *Morrissey*, the Court also defined what procedures are due once a liberty interest is found.²¹⁰ According to the Court, the minimum requirements of due process include:

- (a) written notice of the claimed violations;
- (b) disclosure of evidence against the individual;
- (c) the opportunity to be heard and to present witnesses and documentary evidence;
- (d) the right to confront and cross-examine adverse witnesses;
- (e) a neutral and detached hearing body;
- (f) a written statement by the factfinder as to evidence relied on and reasons for the decision.²¹¹

Following *Morrissey*, the Court held that the same due process procedures applicable to revocation of parole applied to revocation of probation.²¹² In *Gagnon v. Scarpelli*, the Court found that the revocation of probation resulted in a loss of liberty equivalent to revocation of parole, and therefore entitled the prisoner to due process protections.²¹³ The Court also extended *Morrissey* to require the assistance of counsel in the prison environment.²¹⁴

Morrissey and *Scarpelli* represented a dramatic departure from the "hands off" approach followed by earlier courts.²¹⁵ The Court next applied this liberty interest

²⁰⁵ 408 U.S. 471 (1972).

²⁰⁶ *Morrissey*, 408 U.S. at 482.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 481 (quoting *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1965)).

²⁰⁹ *Morrissey*, 408 U.S. at 482.

²¹⁰ *Id.* at 484-90.

²¹¹ *Id.* at 489. See generally *Friendly, Hearing, supra* note 183; *Tobriner & Cohen, How Much Process is "Due"? Parolees and Prisoners*, 25 *HASTINGS L.J.* 801 (1974) [hereinafter cited as *Tobriner & Cohen, Parolees*].

²¹² *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

²¹³ *Id.*

²¹⁴ *Id.* at 790 (appointment by counsel made on a case by case basis by decision making administrators). See *Morrissey*, 408 U.S. at 489 ("We do not reach or decide the question whether the parolee is entitled to the assistance of retained counsel or to appointed counsel if he is indigent.").

²¹⁵ The Court had progressed from the sheer refusal to even allow the prisoner-plaintiff into court to a granting of a substantial set of procedural protections upon the finding of a denial of a liberty interest. See *supra* text accompanying notes 205-11.

analysis in both *Meachum v. Fano*²¹⁶ and *Montanye v. Haymes*,²¹⁷ in which the prisoners claimed that intrastate prisoner transfers without hearings violated their due process rights.²¹⁸ Similar to the situation presented in *Morrissey*, in which the court held that the due process clause gave rise to the protected interest, neither case involved any applicable state statute or regulation governing transfers.²¹⁹ In both cases, the Court held that "intrastate" transfers do not trigger the liberty interest found directly in the due process clause.²²⁰ The Court retreated from its "grievous loss" approach, unwilling to find that any change in confinement warrants due process protection.²²¹

After *Meachum* and *Montanye*, the extent of the liberty interests a prisoner derived from the due process clause was unclear. Whether *Meachum* and *Montanye* represented a retrenchment of the rule in *Morrissey* and *Scarpelli* or only an example of a specific situation not rising to the constitutional "liberty" level was an open question. One possible interpretation was that intrastate prison transfers did not involve a protected liberty interest, but that these decisions did not foreclose later prisoners subject to other types of transfers from seeking protection under the due process clause. The Court appeared to sanction the view that *Meachum* and *Montanye* applied only to intrastate transfers with its summary affirmance of *Wright v. Enomoto*.²²² In *Wright*, the lower court had limited *Meachum* and *Montanye* to intrastate transfers, and therefore had found them not controlling when the transfer in question was a transfer into maximum security segregation for administrative reasons.²²³ The *Wright* court had found that due process safeguards attach to such a transfer because it involves a "severe impairment of the residuum of liberty" of the prisoner.²²⁴

One year after *Wright*, the Court considered an inmate's challenge of parole procedures in *Greenholtz v. Nebraska Penal Inmates*.²²⁵ In *Greenholtz*, the prisoners complained that the procedures followed by the Nebraska Board of Parole in granting parole did not satisfy due process requirements.²²⁶ This case provided the Court with a clear opportunity to find a liberty interest within the due process clause and follow procedural protections for parole revocation established in *Morrissey*. The Court, however, chose not to do so. Instead, it distinguished the prisoners' claim in *Greenholtz* from the claim in *Morrissey* and held that the possibility of parole was not a constitutionally protected liberty interest.²²⁷

²¹⁶ 427 U.S. 215 (1976).

²¹⁷ 427 U.S. 236 (1976). See generally Note, *No Process Due Prisoners in Intrastate Transfers: Due Process Imprisoned Within the Entitlement Doctrine*, 38 U. PITT. L. REV. 561, 561-87 (1977) (analysis of *Meachum* and *Montanye*).

²¹⁸ *Montanye*, 427 U.S. at 237; *Meachum*, 427 U.S. at 222.

²¹⁹ See *infra* notes 294-300 and accompanying text.

²²⁰ *Montanye*, 427 U.S. at 242; *Meachum*, 427 U.S. at 225. The *Meachum* Court relied on the argument that because the original conviction allowed the state to place a prisoner in any of its prisons, the subsequent transfer had no effect. *Id.*, 427 U.S. at 224.

²²¹ *Id.*

²²² 462 F. Supp. 397 (N.D. Cal. 1976), *summ. aff'd*, 434 U.S. 1052 (1978).

²²³ *Wright*, 462 F. Supp. at 402.

²²⁴ *Id.*

²²⁵ 442 U.S. 1, 3-4 (1979). The prisoners in *Greenholtz* challenged the parole system itself, unlike in *Morrissey*, where the issue presented was a revocation of parole without due process. *Id. Morrissey*, 408 U.S. at 472. See generally Note, *Due Process Behind Bars — The Intrinsic Approach*, 48 FORDHAM L. REV. 1067, 1067-1109 (discussion of the *Greenholtz* decision and its effects on procedural due process rights of prisoners).

²²⁶ *Greenholtz*, 442 U.S. at 3-4.

²²⁷ *Id.* at 9-11.

According to the Court, the prisoners in *Morrissey* were no longer prisoners but parolees, whereas in *Greenholtz*, the prisoners were still in prison but sought parole.²²⁸ The Court noted that in *Morrissey*, the liberty denied was one the prisoners already had, whereas in *Greenholtz*, the liberty denied was one the prisoners desired.²²⁹ In the Court's view, this difference was the distinguishing factor.²³⁰

The Court also decided against the prisoner's claim of a liberty interest arising from the due process clause in *Connecticut Board of Pardons v. Dumschat*.²³¹ In *Dumschat*, the inmate claimed that the failure of the Connecticut Board of Pardons to provide him with a written statement of reasons for repeatedly rejecting his commutation request denied him due process.²³² The Court relied on the *Greenholtz* rationale that a critical difference exists between the denial of a liberty a prisoner has and the denial of liberty the prisoner desires, ruling that the mere desire of commutation falls within the latter category.²³³ Without any substantive liberty interest to protect, the Court concluded, no procedural protections are required.²³⁴

The concurring and dissenting opinions in *Dumschat* disagreed over whether the majority limited the independent due process clause liberty interests of the earlier cases.²³⁵ Justice Stevens, in dissent, suggested that the majority had erred by eliminating the due process clause as a source of protectible liberty interests.²³⁶ Justice White, in concurrence, argued that while no liberty interest was present in *Dumschat*, the decision did not imply that all liberty interests entitled to constitutional protection must be found in state law.²³⁷ Under the White analysis, *Dumschat* left intact the due process clause as a source of protected liberty interests of prisoners.²³⁸

In *Vitek v. Jones*, the Court affirmatively stated that a prisoner retains rights that will be protected by due process even absent applicable state law.²³⁹ In that case, an inmate challenged his transfer to a mental hospital on the grounds of lack of adequate notice and absence of a hearing.²⁴⁰ While finding a liberty interest rooted in state statutes existed, the Court stated that even absent relevant state law, the prisoner had been denied procedural

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ 452 U.S. 458, 467 (1981).

²³² *Id.* at 461. The Connecticut Board of Pardons had in the past granted approximately three-fourths of the applications for commutations of life sentences. *Id.*

²³³ *Id.* at 464.

²³⁴ *Id.* (quoting *Greenholtz*, 442 U.S. at 7). The quote from *Greenholtz* stated:

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right . . .

442 U.S. at 7 (emphasis in original).

²³⁵ *Dumschat*, 452 U.S. at 467 (White, J., concurring); *Id.* at 468 (Stevens, J., dissenting).

²³⁶ *Dumschat*, 452 U.S. at 469 (Stevens, J., dissenting).

²³⁷ *Id.* at 467-68 (White, J., concurring).

²³⁸ See *id.* See also Aronson, *Prisoners' Rights*, *supra* note 3, at 93 (agreeing with Justice White that the majority opinion does not severely limit the scope of protected liberty interest direct from the due process clause).

²³⁹ 445 U.S. 480, 491 (1980). See generally Comment, *Prisoners' Rights: Due Process and Transfers to Mental Institutions*, 32 U. FLA. L. REV. 770, 770-84 (1980) (analysis of *Vitek* and conclusion that it represents fortification of liberty interest rationale).

²⁴⁰ *Vitek*, 445 U.S. at 484.

due process.²⁴¹ The Court reasoned that an involuntary transfer to a mental hospital produces a loss of liberty interest, not simply the loss of freedom resulting from the prisoner's conviction and subsequent confinement.²⁴² Such a transfer may have a possible stigmatizing effect, the Court stated, and could "engender adverse social consequences to the individual."²⁴³ Before such a transfer could be implemented, the Court held, procedures which satisfy the due process clause must be followed, notably the full range of procedures outlined in *Morrissey*.²⁴⁴ In reaching this conclusion, the *Vitek* Court held that determining whether a transfer implicates a liberty interest and therefore is subject to procedural protection turns on determining whether "[s]uch consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime . . . [and are] not within the range of conditions of confinement to which a prison sentence subjects an individual."²⁴⁵ This language from *Vitek* suggested that a prisoner has a procedurally protected liberty interest if his transfer subjects him to a situation not normally imposed upon an inmate.

2. The *Helms* and *Olim* Treatment of the Due Process Clause as a Source of Liberty Interests for Prisoners

Against the backdrop described above, the Court decided *Helms* and *Olim*. In light of the precedent in the prison transfer area, the inmates in both these cases arguably had a liberty interest originating in the due process clause and were therefore entitled to procedural protection before being transferred. Neither prisoner, however, succeeded in his claim for pre-transfer process. In each case the Court appeared to reduce the procedural protection for the prisoner provided in prior cases.

In *Helms*, the Court recognized that a liberty interest protected by the fourteenth amendment may arise directly from the due process clause.²⁴⁶ The Court nonetheless rejected *Helms*' liberty interest claim by describing his transfer into solitary confinement as simply subjecting him to "more austere and restrictive" quarters.²⁴⁷ Such an approach, however, underestimates the change in conditions attendant to *Helms*' transfer.²⁴⁸ While in administrative confinement, *Helms* was denied access to vocational, educational, recreational, and rehabilitative programs.²⁴⁹ He was limited to just a few minutes outside of his

²⁴¹ *Id.* at 491.

²⁴² *Id.* at 492.

²⁴³ *Id.* (quoting *Addington v. Texas*, 441 U.S. 418, 425-26 (1979)).

²⁴⁴ *Vitek*, 445 U.S. at 494-95. See *supra* text accompanying note 211.

²⁴⁵ *Vitek*, 445 U.S. at 493.

²⁴⁶ *Helms*, 459 U.S. at 466.

²⁴⁷ *Id.* at 466-67.

²⁴⁸ See e.g., *Wright*, 462 F. Supp. at 399. The court stated:

Prisoners in the maximum security units are confined in cells approximately five feet wide by eight feet long. The cells are without fresh air or daylight, both ventilation and lighting being poor. The lights in some cells are controlled by guards. It is difficult for prisoners to get needed medical attention It is clear, then, that a prisoner confined in a maximum security unit suffers a loss of liberty much more severe than that experienced by a prisoner in the general population.

Id. The restrictive nature of *Helms*' confinement was compounded because he suffered an administrative confinement as opposed to a disciplinary confinement. *Helms*, 459 U.S. at 463-64. Administrative confinement subjected *Helms* to segregation for unclear reasons and an indefinite time period, unlike the usual disciplinary confinement, which is for a definite offense and a definite period. *Id.* See *Wright*, 462 F. Supp. at 403.

²⁴⁹ *Helms*, 459 U.S. at 479 n.1 (Stevens, J., dissenting).

cell each day as opposed to the fourteen hours experienced daily by the general population.²⁵⁰ This hardship could reasonably be described as not being "within the range of conditions of confinement to which a prison sentence subjects an individual."²⁵¹ The Court chose not to view Helms' confinement this way, and instead saw it as "the sort of confinement that inmates should reasonably anticipate receiving at some point in their incarceration."²⁵²

The majority's conclusion that transfer into solitary confinement is reasonably foreseeable is debatable. As Justice Stevens asserted in dissent, residency in the general prison population is the institutional norm.²⁵³ A transfer to solitary confinement was not specified by the terms of Helms' initial criminal sentence, and in Justice Stevens' view, "[n]ot only is there a disparity, the disparity is drastic."²⁵⁴ As Justice Stevens indicated, the difference in conditions involved in a transfer to solitary confinement infringe on a prisoner's "residuum of liberty," making procedural due process safeguards necessary.²⁵⁵

The majority in *Helms* relied on *Meachum* and *Montanye* to support its decision that Helms did not have a protected liberty interest arising from the due process clause itself.²⁵⁶ The Court interpreted these cases as standing for the proposition that a prison transfer is unprotected by the due process clause even though the change in facilities involves a "significant modification" in conditions of confinement.²⁵⁷ *Meachum* and *Montanye*, however, were interpreted by a lower court in *Wright* as applicable only to intrastate prison transfers, and not transfers into maximum security.²⁵⁸ The Supreme Court, by summarily affirming the *Wright* decision, appeared to sanction this interpretation.²⁵⁹ As the *Wright* court pointed out, the *Meachum* and *Montanye* opinions explicitly stated that the transfer decision in those cases did not result in confinement in maximum security segregation.²⁶⁰ Before the *Helms* decision, the Court indicated that an inmate was entitled to due process protections before suffering an administrative transfer into solitary confinement.²⁶¹ The *Helms* opinion makes clear that no liberty interest exists; absent relevant state law, a prisoner can be transferred into administrative segregation for any or no reason. In *Helms*, the Court did not discuss the significance of its summary affirmance of *Wright* when considering whether a liberty interest could arise directly from the due process clause. The Court *did* discuss this affirmance later in the opinion when deciding the issue of a potential state-created liberty interest.²⁶² Apparently, the majority viewed

²⁵⁰ *Id.*

²⁵¹ *Vitek*, 445 U.S. at 493. See J. ABBOTT, IN THE BELLY OF THE BEAST 51-62 (1981) ("Solitary confinement in prison can alter the ontological makeup of a stone."). *Id.* at 53.

²⁵² *Helms*, 459 U.S. at 468.

²⁵³ *Id.* at 487 (Stevens, J., dissenting).

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 488 (Stevens, J., dissenting).

²⁵⁶ *Helms*, 459 U.S. at 467-68.

²⁵⁷ *Id.* at 468. The change in conditions involved in *Meachum* was later defined as being a "grievous loss" in *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976).

²⁵⁸ *Wright*, 462 F. Supp. at 402.

²⁵⁹ *Wright v. Enomoto*, 434 U.S. 1052, 1052 (1978).

²⁶⁰ *Wright*, 462 F. Supp. at 402 (citing *Montanye*, 427 U.S. at 236; *Meachum*, 427 U.S. at 219).

²⁶¹ The Court appeared to ignore its statement that "it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue." *Wolff*, 418 U.S. at 571 n.19. See also Murphy, *Due Process Implications of Prisoner Transfers*, 16 U. RICH. L. REV. 583, 584 ("an important but often neglected footnote").

²⁶² *Helms*, 459 U.S. at 469.

the district court's opinion in *Wright* as a finding of state-created liberty interest only. The language of the district court, however, would indicate otherwise: "[w]hen a prisoner is transferred from the general prison population to the grossly more onerous conditions of maximum security, be it for disciplinary or administrative reasons, there is a severe impairment of the residuum of liberty which he retains as a prisoner — an impairment which triggers the requirement for due process safeguards."²⁶³ Despite this language, the *Helms* Court's reliance on *Meachum* and *Montanye* indicates these decisions are not limited solely to intrastate transfers.

A second type of prisoner transfer — prison to prison — was addressed by the Court in *Olim v. Wakinekona*.²⁶⁴ Again, the majority decided that *Meachum* and *Montanye* were controlling.²⁶⁵ The Court viewed Wakinekona's transfer as differing from an intrastate transfer in degree, but not in kind.²⁶⁶ Similar to *Helms*' transfer, according to the Court, Wakinekona's transfer was "within the normal limits or range of custody" a state may impose.²⁶⁷ In *Meachum* and *Montanye*, the Court had relied on the notion that an intrastate transfer is within the normal range of confinement because an inmate has no justifiable expectation he will be incarcerated in any particular prison within a state.²⁶⁸ In *Olim*, the majority extended this notion by stating that an inmate has no justifiable expectation that he will be incarcerated in any particular state.²⁶⁹

The majority rejected Wakinekona's argument that *Vitek* should control.²⁷⁰ For *Vitek* to govern, Wakinekona would have had to show a change in confinement "qualitatively different from the punishment characteristically suffered by a person convicted of a crime."²⁷¹ Absent such a finding, no liberty interest existed and therefore no procedural protections were due.²⁷² The majority seemed to attach little significance to the severity of Wakinekona's transfer, even though the transfer involved crossing an ocean and traveling a distance of 4,000 miles, separating him from his family, friends, and counsel.²⁷³ In addition, the transfer placed him in a potentially hostile environment and interrupted his educational and rehabilitative programs.²⁷⁴ Such a transfer would appear to cross the line between differing only in degree to differing in kind.²⁷⁵ In *Vitek*, the Court found that the transfer to a mental hospital was not within the inmate's normal conditions of confinement because it was a transfer not characteristically suffered by prisoners.²⁷⁶ As a result, the Court concluded that the inmate in *Vitek* was entitled to due process protections

²⁶³ *Wright*, 462 F. Supp. at 402.

²⁶⁴ 461 U.S. 238 (1983).

²⁶⁵ *Id.* at 248.

²⁶⁶ *Id.* at 247-48.

²⁶⁷ *Id.* at 247 (quoting *Meachum*, 427 U.S. at 225).

²⁶⁸ *Meachum*, 427 U.S. at 224; *Montanye*, 427 U.S. at 243.

²⁶⁹ *Olim*, 461 U.S. at 245.

²⁷⁰ *Id.*

²⁷¹ *Id.* (quoting *Vitek*, 445 U.S. at 493).

²⁷² *Id.*

²⁷³ *Id.* at 248 n.9. An analysis of the injuries suffered by the transferred prisoner is contained in Millemann & Millemann, *The Prisoner's Right to Stay Where He Is: State and Federal Transfer Compacts Run Afoul of Constitutional Due Process*, 3 CAP. U.L. REV. 223, 229-34 (1974).

²⁷⁴ *Olim*, 461 U.S. at 248 n.9.

²⁷⁵ The majority defined Wakinekona's transfer as the legal equivalent of the intrastate transfers in *Meachum* and *Montanye*, the difference only a "matter of degree, not of kind." *Olim*, 461 U.S. at 247-48. The Court relied on the language of *Meachum* that "the determining factor is the nature of the interest involved rather than its weight." *Id.* at 248 (quoting *Meachum*, 427 U.S. at 224).

²⁷⁶ See *supra* notes 239-45 and accompanying text.

before such a transfer could be made.²⁷⁷ Because transfers of such magnitude as Wakinekona's are not characteristically suffered by prisoners, the same reasoning could have been applied in his case.²⁷⁸

The majority, however, chose not to make this analysis.²⁷⁹ In effect, Wakinekona has been "banished" from his homeland, a punishment considered historically to be among the severest.²⁸⁰ The majority found this argument unpersuasive, stating that Wakinekona's conviction, and not his transfer, kept him from inhabiting his homeland.²⁸¹ Moreover, Wakinekona is still in this country and therefore, according to the majority, was not exiled.²⁸² This argument assumes that a prison is a prison and its location is irrelevant, and ignores Wakinekona's loss of family, friends, and counsel.²⁸³ Justice Marshall limited the holdings of *Meachum* and *Montanye* to intrastate transfers.²⁸⁴ According to Marshall, these decisions hold that no liberty interest is implicated by a transfer to a prison where an inmate could originally have been confined.²⁸⁵ In Marshall's view, whether a prisoner could be placed initially in a prison far from his homeland without raising a due process clause issue is an entirely different question.²⁸⁶ The majority opinion erred, as Justice Marshall pointed out, by not recognizing a difference between intrastate and interstate transfers.

The decisions of *Helms* and *Olim* narrow the scope of protected liberty interests stemming from the due process clause. The prisoner faced with a transfer does not have a protected liberty interest in remaining where he is unless he can demonstrate that the transfer results in consequences "qualitatively different from the punishment characteristically suffered by a person convicted of crime."²⁸⁷ If no liberty interest is present, the analysis ends; the prisoner may be transferred without any form of procedural protection. After these two decisions, as long as the transferee's destination is still within a prison's walls, this test will rarely be met. Transfers are now matters of administrative choice which can be made for any reason or no reason; the propriety of such transfers will not be reviewable by the courts.

²⁷⁷ *Id.*

²⁷⁸ See *Olim*, 461 U.S. at 254 (Marshall, J., dissenting). Justice Marshall noted that "in Hawaii less than three percent of the state prisoners were transferred to prisons in other jurisdictions in 1979, and on a nationwide basis less than one percent of the prisoners held in state institutions were transferred to other jurisdictions." *Id.*

²⁷⁹ The majority found this argument to be "unpersuasive." *Id.* at 248 n.9.

²⁸⁰ *Id.* at 252 (Marshall, J., dissenting).

²⁸¹ *Id.* at 248 n.9 ("The fact that [Wakinekona's] confinement takes place outside Hawaii is merely a fortuitous consequence of the fact that he must be confined, not an additional element of his punishment.").

²⁸² *Id.*

²⁸³ An early recognition of the problems facing the prisoner who suffers a long distance transfer is found in *Keliher v. Mitchell*, 250 F. 904, 906-7 (D. Mass. 1916). The court stated:

The transfer of a prisoner, having a wife and young child, from a prison near which they reside, and at which they can visit him, to a distant place of confinement, where they may well be unable to go, with the result that they may not see him for 10 or 12 years, obviously imposes on him an additional hardship, [citations omitted] and additional peril. It may result in a loss of that interest in him by his family and friends which would be maintained if they saw him occasionally, and which furnishes one of his most powerful incentives to reformation and honest living after his discharge.

Id.

²⁸⁴ *Id.* at 253 (Marshall, J., dissenting).

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 253-54 (Marshall, J., dissenting).

²⁸⁷ *Olim*, 461 U.S. at 245 (quoting *Vitek*, 445 U.S. at 493).

C. Liberty Interest Rooted in State Law

Prior decisions of the Supreme Court held that a state may create a liberty interest through statutes and regulations, even though the Constitution itself does not provide for such a liberty interest.²⁸⁸ Once created by the state, the protection of this liberty interest becomes a matter of federal law. A prisoner cannot be deprived of the interest without due process protection.²⁸⁹ To understand the Court's decisions in *Helms* and *Olim*, the cases developing a state-created liberty interest must first be examined.

1. The Case Law Preceding *Helms* and *Olim*

The development of a protected liberty interest for prisoners rooted in state law began with the Court's decision in *Wolff v. McDonnell*.²⁹⁰ In *Wolff*, the Court held that Nebraska had "created" a liberty interest protected by the due process clause by establishing a right to good time credits and specifying that these credits could be forfeited only for serious misbehavior.²⁹¹ While the Court recognized that Nebraska was not compelled to provide prisoners with good time credits, this right, once created, could not be arbitrarily abrogated.²⁹² The due process clause, the Court concluded, requires procedural protection before the state-created liberty interest may be removed.²⁹³

The *Wolff* Court's concept of a state-created liberty interest was refined in *Meachum v. Fano*²⁹⁴ and *Montanye v. Haymes*.²⁹⁵ The *Meachum* Court acknowledged *Wolff* and deemed it still valid law, but did not find any relevant state law creating a liberty interest in that case.²⁹⁶ Similarly, the *Montanye* Court, focusing on the paucity of relevant state law, found no liberty interest involved in an intrastate transfer.²⁹⁷ In these cases, the Court found no liberty interest rooted in state law because the only relevant statutes simply allowed for transfers and did not condition them on the occurrence of certain events.²⁹⁸ On this point, the Court stated that laws of those states did not provide that transfer would not occur absent specific acts of misconduct.²⁹⁹ This absence of a state-created liberty interest removed the intrastate transfer from the *Wolff* precedent.³⁰⁰

Meachum and *Montanye* did not signal the end of state-created liberty interests for prisoners, as the Court made clear in an opinion three years later.³⁰¹ In *Greenholtz v.*

²⁸⁸ *Helms*, 459 U.S. at 469.

²⁸⁹ *Vitek*, 445 U.S. at 491. Determining what procedural protections are due in a particular case is the second step in the Court's analysis, undertaken only after a liberty interest has been found. For a description of this process, see *infra* text accompanying notes 352-83.

²⁹⁰ 418 U.S. 539 (1974).

²⁹¹ *Id.* at 557.

²⁹² *Id.*

²⁹³ *Id.* at 557-58. The *Wolff* Court analogized its liberty interest analysis with that of due process analysis as to property, where "[t]he court has consistently held that *some kind of hearing* is required at some time before a person is finally deprived of his property interests." *Id.* at 558-59 (emphasis added). See generally Friendly, *Hearing*, *supra* note 183, at 1267-87 (1975) (title taken from *Wolff* opinion).

²⁹⁴ 427 U.S. 215 (1976).

²⁹⁵ 427 U.S. 236 (1976).

²⁹⁶ *Meachum*, 427 U.S. at 226.

²⁹⁷ *Montanye*, 427 U.S. at 242.

²⁹⁸ *Meachum*, 427 U.S. at 226; *Montanye*, 427 U.S. at 242.

²⁹⁹ *Id.*

³⁰⁰ *Montanye*, 427 U.S. at 227.

³⁰¹ *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

Nebraska Penal Inmates,³⁰² the Court again found a protectible liberty interest grounded in state law where one did not exist under the due process clause. In *Greenholtz*, the inmates challenged the discretionary powers of the Nebraska Board of Parole.³⁰³ The Court reasoned that in Nebraska a prisoner could not be denied parole without due process protections because the statute provided for release of an inmate absent specific reasons for continued detention.³⁰⁴ This statute, according to the Court, resulted in an expectation of release in the prisoner and therefore created a protected liberty interest.³⁰⁵

A short time after *Greenholtz*, the Court refined the elements of a state-created liberty interest. In *Connecticut Board of Pardons v. Dumschat*,³⁰⁶ the prisoner complained that he was denied due process when he was refused commutation of his sentence.³⁰⁷ The Court found no state-created liberty interest because, unlike the Nebraska statute in *Greenholtz*, the Connecticut statute did not contain mandatory language such as "shall" and "unless."³⁰⁸ *Dumschat*, therefore, clarified the elements needed to create a liberty interest by means of state law: explicit language in the state statutes or regulations defining the obligations of those charged with granting or denying the liberty in question.³⁰⁹

Vitek v. Jones,³¹⁰ the most recent decision by the Court before *Helms* and *Olim* concerning state-created liberty interests of prisoners, demonstrated that the Court still considered state law to be a viable source of liberty interests. In *Vitek*, the Court found a liberty interest rooted in a Massachusetts state statute.³¹¹ The statute provided that a prisoner found by a physician to be suffering from a mental disease or defect that cannot be given proper treatment in prison may be transferred to a mental hospital.³¹² This statute, the Court concluded, gave the prisoner the objective expectation that he would not be transferred to a mental hospital unless a physician determined that the prisoner suffered from a mental disease or defect that could not be properly treated in prison.³¹³ According to the Court, this objective expectation gave Jones a liberty interest, and therefore such a transfer could not be made without first providing due process procedural protections.³¹⁴ Significantly, the Court stressed the notion that once a liberty interest is created, the procedures necessary are a matter of federal law.³¹⁵ In addition, the Court stated that a state's procedures will not necessarily satisfy federal standards.³¹⁶ Once a liberty interest is found to be present, the Court will proceed to consider independently what process is

³⁰² *Id.*

³⁰³ *Id.* at 3.

³⁰⁴ *Id.* at 11-12.

³⁰⁵ *Id.* at 12.

³⁰⁶ 452 U.S. 458 (1981). See generally Note, *Searching For a Liberty Interest: The Prisoner's Right to Due Process*, 61 NEB. L. REV. 382, 382-408 (1982) (analyzing lower court and Supreme Court decisions in *Dumschat*).

³⁰⁷ *Dumschat*, 452 U.S. at 461. *Dumschat* was not given a written statement as to why his commutation requests had been repeatedly denied, and the evidence showed that the board had previously granted relief to at least 75% of all life term inmates. *Id.*

³⁰⁸ *Id.* at 466.

³⁰⁹ See *id.* at 465.

³¹⁰ 445 U.S. 480 (1980).

³¹¹ *Id.* at 488-89.

³¹² *Id.* at 483 n.1.

³¹³ *Id.* at 489-90.

³¹⁴ *Id.* at 488-91.

³¹⁵ *Id.* at 490-91. See *infra* text accompanying notes 352-83.

³¹⁶ *Vitek*, 445 U.S. at 490-91.

due.³¹⁷ Thus, the *Vitek* decision established that even without implicit due process protections, a prisoner who has an objective expectation rooted in state law that he will not be transferred absent specific preconditions has a protected liberty interest.³¹⁸

2. The *Helms* and *Olim* Analysis of Due Process Protections for State-Created Liberty Interests

In *Helms*, the prisoner claimed to have been transferred to administrative segregation without due process.³¹⁹ After the Court dismissed the argument that the prisoner had a liberty interest direct from the due process clause, it turned to the claim that a liberty interest had been created by state law.³²⁰ While *Helms*' claim was successful on this point, the majority seemed reluctant to find a liberty interest.³²¹ The Court began its discussion of whether a protected liberty interest was created with a disclaimer, stating that "the mere fact that Pennsylvania has created a careful procedural structure to regulate the use of administrative segregation" does not itself create a liberty interest.³²² According to the majority, "procedural guidelines" alone do not create the requisite objective expectation necessary for a finding of a liberty interest rooted in state law.³²³ *Helms* was successful, however, because Pennsylvania had used "language of an unmistakably mandatory character, namely requiring that certain procedures 'shall', 'will', or 'must' be employed."³²⁴ This mandatory language, according to the Court, created a liberty interest for *Helms*.

As noted by the majority, *Helms* represents the first case in which a state law dealing with the daily operation of a prison system was found to create a liberty interest.³²⁵ At first glance, this holding might be considered an advance for prisoners in other states facing transfers. This conclusion does not appear to be correct, however, for two reasons. First, the procedural structure alone did not create the liberty interest, but rather it was created by the specific language outlining the procedures.³²⁶ The message from the Court, therefore, appears to be that not all statutes providing procedural guidelines governing transfers will create a liberty interest, but only those containing "language of an unmistakably mandatory character."³²⁷ Second, the Court expressly discussed reasons why it should not find a liberty interest in statutes and regulations governing daily operations.³²⁸ According to the Court, deprivations imposed during daily operations are likely to be

³¹⁷ See *id.* at 495-96. For a discussion of what process is due once a liberty interest is found, see *infra* text accompanying notes 352-83.

³¹⁸ *Vitek*, 445 U.S. at 488-89.

³¹⁹ *Helms*, 459 U.S. at 462.

³²⁰ *Id.* at 469.

³²¹ The Court warned that "regulations structuring the authority of prison administrators may warrant treatment, for purposes of creation of entitlements to 'liberty,' different from statutes or regulations in other areas." *Id.* at 470. This statement suggests that a higher standard may be required in the next case, or perhaps a complete denial of state-created liberty interests insofar as transfers are concerned.

³²² *Id.* at 471.

³²³ *Id.*

³²⁴ *Id.* at 471-72.

³²⁵ *Id.* at 469. The Court acknowledged that its summary affirmance of *Wright*, 434 U.S. 1052 (1978), may be an exception. *Helms*, 459 U.S. at 469.

³²⁶ See *supra* note 75 and accompanying text.

³²⁷ See *Helms*, 459 U.S. at 471-72.

³²⁸ *Id.* at 470.

minor when compared to the deprivations involved in cases such as *Wolff* and *Greenholtz*, where the interests involved were, respectively, good time credits and parole decisions.³²⁹ In addition, the Court pointed out that "the safe and efficient operation of a prison on a day to day basis has traditionally been entrusted to the expertise of prison officials."³³⁰ Later cases may use this reasoning to avoid finding a liberty interest in state statutes and regulations governing the daily operations of a prison system. Although it is true that the statute involved in *Helms* concerned daily operations, it cannot be said with certainty that the deprivation resulting from such statutes will be "minor."³³¹ The Court's second justification, that prison operations have traditionally been managed by prison officials, while true, does not free the courts from taking action when that management fails. As the *Wolff* Court acknowledged, the courts have a duty to make sure that prisoners receive the constitutional rights to which they are entitled.

The majority's opinion may also be criticized for placing too much reliance on "substantive predicates" and "explicitly mandatory language" for the finding of a liberty interest.³³² Such reasoning, according to Justice Stevens, hinged the finding of a liberty interest on a "magical combination" of language.³³³ Stevens pointed out in dissent that the majority's reasoning allows the state to decide which liberty interests to give today and which to remove tomorrow.³³⁴ Apparently, a change of statutory language from "must" to "may" will remove a prisoner's protected liberty and thus deny him due process clause protections prior to his transfer.

As foreshadowed by the decision in *Helms*, the Court found no protected liberty interest had been created by the state regulations of Hawaii at issue in *Olim*.³³⁵ Wakinekona had argued that a state regulation requiring that a hearing be provided before a prison transfer involving a "grievous loss to the inmate" gave rise to a protected liberty interest.³³⁶ The prison administrators had conceded that Wakinekona suffered a "grievous loss" within the meaning of the regulation.³³⁷ The regulation provided further that the hearing will be conducted by an "impartial program committee . . . composed of at least three members who were not actively involved in the process by which the inmate . . . was brought before the Committee."³³⁸ Under the regulations, the committee is then in a position to make recommendations to the prison administrator.³³⁹ The Hawaii regulations appeared to create an objective expectation that a specific type of hearing would occur prior to Wakinekona's transfer. The Court, however, found that these regulations do not create a liberty interest protected by the due process clause.³⁴⁰ Because the

³²⁹ *Id.* See *supra* notes 290-93 and accompanying text for a discussion of the *Wolff* Court's finding of a liberty interest in state law governing good time credits. See *supra* notes 302-05 and accompanying text for a discussion of the *Greenholtz* Court's finding of a liberty interest in state law governing the granting of parole.

³³⁰ *Helms*, 459 U.S. at 470.

³³¹ See *supra* notes 248 and 251.

³³² *Helms*, 459 U.S. at 482 (Stevens, J., dissenting).

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Olim*, 461 U.S. at 251.

³³⁶ See *supra* note 119.

³³⁷ *Olim*, 461 U.S. at 242 n.1.

³³⁸ *Id.* at 242.

³³⁹ *Id.*

³⁴⁰ *Id.* at 248. The approach taken by the Court of Appeals was to focus on the regulations concerning the committee. *Olim*, 664 F.2d at 712.

administrator, according to the statute, is not expressly bound to follow the recommendation of the committee, the Court reasoned that the Hawaii regulations do not create such an expectation.³⁴¹ This discretion made the administrator's decision to transfer a prisoner completely unfettered, in the Court's view, and thus no liberty interest was created.³⁴²

In its argument, the majority appeared to misapply precedent. The Court ruled that this case was governed by *Meachum* and *Montanye*, in which no liberty interest was found to be created where state law allowed prison officials to act for any or no reason.³⁴³ In *Meachum* and *Montanye*, however, the state statutes concerning the transfer of prisoners only allowed for transfers, it did not condition them on the occurrence of specific events.³⁴⁴ As Justice Marshall indicated in dissent, *Olim* is more properly governed by *Helms* because the Hawaii regulations are set out in "language of an unmistakably mandatory character."³⁴⁵ The majority relied on the regulations' failure to bind the administrator to follow the recommendations of the committee to avoid the creation of a liberty interest³⁴⁶ and attached little significance to the existence of the committee. Although the final decision by the administrator was discretionary, this discretion did not negate the function of the committee: to guard against arbitrary decision making.³⁴⁷ The regulation's creation of such a committee suggests that the legislature intended it to have a purpose and not be a meaningless body which the administrator can arbitrarily bypass, avoiding all due process limitations.

After the Court's decisions in *Helms* and *Olim*, few lower courts will be likely to find a

³⁴¹ Contrary to the Court of Appeals' approach, the Supreme Court focused on the regulations with respect to the administrator. *Olim*, 461 U.S. at 242-43. The language relied on by the Court was: [The administrator] may, as the final decisionmaker:

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

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

Id. (quoting Rule IV, ¶ 3d(3), of the Supplementary Rules and Regulations of the Corrections Division, Department of Social Services and Housing, State of Hawaii).

³⁴² *Olim*, 461 U.S. at 249. In reaching its conclusion that the administrator's discretion is "completely unfettered" the Court relied on the decision of the Supreme Court of Hawaii in *Lono v. Ariyoshi*, 63 Haw. 138, 621 P.2d 976 (1981). In *Lono*, with facts almost identical to those in *Olim*, the Hawaii Supreme Court focused on the administrator and found no limit on his discretionary power in "selecting a place of confinement upon a decision to transfer." *Id.* at 980 (emphasis added).

³⁴³ *Olim*, 461 U.S. at 248-49.

³⁴⁴ *Montanye*, 427 U.S. at 242; *Meachum*, 427 U.S. at 226.

³⁴⁵ *Id.* at 257 (Marshall, J., dissenting). According to Justice Marshall, this language indicates that the standard for classifying inmates requires providing "optimum placement within the Corrections Division" in light of the "best interests of the individual, the State, and the Community." *Id.* In addition, Justice Marshall stated that the regulations establish detailed procedures for the Program Committee hearing that must be held before a transfer involving a "grievous loss" is made. *Id.* See also note 119.

³⁴⁶ *Id.* at 249-50. ("Because the Administrator is the only decisionmaker under Rule IV, we need not decide whether the introductory paragraph of Rule IV, [containing the language that the standard for classifying inmates is their optimum placement within the Corrections Division] places any substantive limitations on the purely advisory Program Committee."). The Court also determined from its finding of no state-created liberty interest that Wakinekona's "claim of bias in the composition of the prison Program Committee [became] irrelevant." *Id.* at 251 n.14.

³⁴⁷ The lower court stressed that the administrator can act only after the impartial committee has acted. The role of the committee is to act as a check on the administrator. *Olim*, 664 F.2d at 712 ("The regulations certainly do not contemplate a transfer at the will of the prison administrator The whole purpose of such procedural requirements is to protect against arbitrary or uninformed action by the prison administrator.").

liberty interest rooted in state law governing either prison-to-prison transfers or transfers to more restrictive custody. The Court's opinions indicate that the decision to transfer, for any or no reason, is one that will be made by administrators and will be unreviewable by the courts. In *Helms* and *Olim*, the Court narrowed the scope of state-created liberty interests just as it had limited the extent of liberty interests implicit in the due process clause.

Despite the narrowing trend of the Court, *Helms* was successful in asserting that a liberty interest, created by state law, existed in his case.³⁴⁸ If no liberty interest is found either directly under the due process clause or under state law, as in *Wakinekona's* case, the analysis ends and the Court does not examine the procedures, or lack thereof, involved.³⁴⁹ On the other hand, if a liberty interest is found, as in *Helms*, the Court must proceed to a second step in its analysis.³⁵⁰ In this inquiry the Court looks at the liberty interest present and determines what process is due before it may be removed.³⁵¹ The next section of this casenote will examine this question.

III. AFTER FINDING A LIBERTY INTEREST — WHAT PROCESS IS DUE?

After a finding of a protected liberty interest, the Court must then consider what process is due, as demonstrated in the early prisoners' rights case of *Morrissey v. Brewer*, involving parole revocation.³⁵² The Court set out its basic framework for this determination in *Morrissey*. In *Morrissey*, the Court noted that due process is a flexible concept and the procedures required by the Constitution will vary according to the circumstances.³⁵³ The *Morrissey* Court then used the balancing approach developed in *Mathews v. Eldridge*³⁵⁴ to determine what constitutes due process. Under the *Eldridge* test, the Court must consider both private and government interests involved.³⁵⁵ In addition, the *Eldridge* test requires the Court to balance the risk that existing procedures will lead to an erroneous deprivation of the private interest against the probable value of creating any additional or substantive procedures.³⁵⁶

Both *Helms* and *Wakinekona* claimed to have suffered losses of liberty interests that warranted due process protections.³⁵⁷ In *Helms*, where a protectible liberty interest was found by the Court, the Court held that the procedures followed satisfied the due process clause.³⁵⁸ *Helms* was given written notice of the charges against him, and his transfer was reviewed by a hearing committee five days after he was placed in administrative segregation.³⁵⁹ For seven weeks *Helms* was then kept in administrative segregation pending completion of an investigation.³⁶⁰ *Helms* received much less procedural protection than was required in *Morrissey*, and the Court justified this result by purporting to balance

³⁴⁸ *Helms*, 459 U.S. at 472.

³⁴⁹ *Olim*, 461 U.S. at 251.

³⁵⁰ *Helms*, 459 U.S. at 472.

³⁵¹ See *infra* text accompanying notes 352-83.

³⁵² 408 U.S. at 481.

³⁵³ *Id.* at 481.

³⁵⁴ 424 U.S. 319, 335 (1976).

³⁵⁵ *Mathews*, 424 U.S. at 325.

³⁵⁶ *Id.*

³⁵⁷ See *supra* text accompanying notes 246-88 and 319-51.

³⁵⁸ *Helms*, 459 U.S. at 477.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 464-65.

interests according to the *Mathews* formula. Justice Rehnquist determined Helms' private interests to be minimal; he was "merely transferred from one extremely restricted environment to an even more confined situation."³⁶¹ In addition, the Court considered the absence of any stigma attached to being transferred into administrative confinement and the absence of any effect on parole opportunities as further indicators of the inconsequential level of private interests involved.³⁶² Conversely, the Court viewed the government's interests in confining Helms in administrative segregation — insuring the safety of others, Helms, and witnesses — as substantial.³⁶³ Finally, the Court considered the third factor under *Mathews*, the effect greater procedural protections would have had. On this point, Justice Rehnquist concluded that decisions to place an inmate in administrative confinement turn on "purely subjective evaluations and on predictions of future behavior" which would not be helped by greater procedural safeguards.³⁶⁴

Several weaknesses afflict the majority's reasoning. The record is unclear about whether Helms was present at the hearing committee review.³⁶⁵ The majority held that a written statement by the inmate is adequate to present his views to the committee deciding whether to transfer him into administrative segregation.³⁶⁶ Given the educational level of many prisoners, such an opportunity is meaningless. Justice Stevens, the author of the dissent, would require that the inmate be given the opportunity to present his views in person before being transferred into administrative segregation to satisfy due process requirements.³⁶⁷

As argued by Justice Stevens, the Court failed to provide protection against arbitrary continuation of an inmate's administrative confinement.³⁶⁸ The majority, in undertaking its *Mathews* balancing, may have been correct in ranking government interests high in determining what procedure is due before the initial transfer into administrative confinement is made. As pointed out by Justice Stevens, however, these interests do not remain valid over time.³⁶⁹ A need exists to re-examine the facts to determine whether the prisoner should remain in administrative confinement. As more evidence comes to light, the significance of the third prong of the *Mathews* test, risk of error weighed against added procedure, may become more significant. The deciding party at this point will have a better overall view of the situation and be able to judge more accurately whether the prisoner should remain in administrative segregation. Finally, as time passes, the private interests increase.³⁷⁰ The prisoner, kept in a condition far worse than the condition of the

³⁶¹ *Id.* at 473.

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.* at 474.

³⁶⁵ *Id.* at 464.

³⁶⁶ *Id.* at 476.

³⁶⁷ *Id.* at 490 (Stevens, J., dissenting). The majority allowed for the possibility of oral statements, but did not require them. *Id.* at 476 ("Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective.").

³⁶⁸ *Id.* at 490 (Stevens, J., dissenting). The *Wright* court concluded that a prisoner confined in solitary confinement for administrative reasons suffers an even greater deprivation than one confined for disciplinary reasons. *See supra* note 248. Among the reasons given was the indefiniteness of the time period. *Wright*, 462 F. Supp. at 403.

³⁶⁹ *Helms*, 459 U.S. at 490-91 (Stevens, J., dissenting).

³⁷⁰ Justice Stevens pointed out that "[c]onditions, including Helms' own attitudes, the attitudes of other prisoners toward him and toward each other, . . . simply do not remain static." *Id.* at 492 (Stevens, J., dissenting).

general population and with no idea of the reasons for or length of his segregation, will be anxious to find out why he is being so confined. At this stage, due process does not require the full elements of a *Morrissey*-type hearing, because such a hearing should ordinarily be provided at the end of the investigation before any disciplinary action is taken. Even with the safeguard of a pre-disciplinary hearing, however, more than "paper-shuffling" should be required to hold an inmate in administrative segregation for any length of time.³⁷¹

Justice Stevens suggested that a periodic review take place where the inmate is present and allowed to explain his attitude and the impact of continued solitary confinement.³⁷² In addition, if prison officials decide that an investigation should continue and that the inmate should remain in confinement, a written statement with reasons should be provided to the prisoner.³⁷³ These safeguards will protect prisoners such as Helms who, although holders of a protected liberty interest, are kept in isolation for weeks or months with no idea as to their status or when they might return to the general prison population.³⁷⁴

In *Olim*, the Court held that Wakinekona did not have a liberty interest protected by the due process clause.³⁷⁵ As discussed previously, the Court should have held that protected liberty interests existed in both *Helms* and *Olim*.³⁷⁶ Had the Court found a liberty interest, based on either the due process clause or state law, a determination of the procedural protections would have been necessary before such a transfer would have been permitted. The balancing approach of *Mathews* would justify providing Wakinekona the full range of *Morrissey* procedures.³⁷⁷ The personal interest at stake in Wakinekona's case was high — the isolating effect of sending Wakinekona to California was a serious personal loss to him. On the other hand, the government interests were strictly financial and physical — Wakinekona was transferred because the state had nowhere to put him.³⁷⁸ Procedural requirements could be limited by the costs of providing additional protection.³⁷⁹ But the State did not claim that it could not afford the cost of a hearing. Rather, it claimed it did not have the facilities necessary to maintain Wakinekona in Hawaii.³⁸⁰ A lack of facilities does not justify changing Wakinekona's classification and transferring him without a proper hearing.

What constitutes a fair hearing inside the walls of a prison has been debated by the courts and commentators,³⁸¹ but the approach set out in *Morrissey* remains a good model to be used whenever a prisoner faces interstate transfer likely to cause the difficulties encountered by Wakinekona. An additional issue implicated by requiring that *Morrissey* procedures be made available is the issue of whether counsel should be provided at any

³⁷¹ *Id.* at 493.

³⁷² *Id.* at 494 (Stevens, J., dissenting).

³⁷³ *Id.*

³⁷⁴ See *supra* note 248.

³⁷⁵ *Olim*, 461 U.S. at 248.

³⁷⁶ See *supra* text accompanying notes 246-87 and 319-51.

³⁷⁷ See *supra* note 211.

³⁷⁸ The program committee report given to Wakinekona read in part as follows: "Since there is no other Maximum Security prison in Hawaii which can offer you the correctional programs you require and you cannot remain at [the maximum control unit] because of impending construction of a new facility, the Program Committee recommends your transfer to an institution on the mainland." *Olim*, 461 U.S. at 241.

³⁷⁹ Redau, *How to Argue About Prisoners' Rights: Some Simple Ways*, 33 RUTGERS L. REV. 687, 701 (1981).

³⁸⁰ *Olim*, 461 U.S. at 241.

³⁸¹ Tobriner & Cohen, *Parolees*, *supra* note 211, at 801-11.

pre-transfer hearings if requested by the prisoner. The argument against providing counsel is mainly a cost-availability argument, but this argument can be overcome. First, an interstate transfer requiring due process protection will not be a common event, limiting the situations calling for counsel.³⁸² Indeed, the Court did not find this argument persuasive in *Gagnon*, where the interest involved was parole revocation.³⁸³ Second, not every inmate facing transfer will request counsel, either because the complexity of the case is not beyond his grasp or he is allowed the assistance of others — "jailhouse lawyers," counselors, and the like.

This discussion indicates that in addition to narrowing the scope of liberty interests for prisoners faced with a transfer, the Court is also now willing to narrow the extent of the procedures available once a liberty interest is found. Helms, who did have a liberty interest according to the Court, was given much less protection than the Court provided in earlier prisoner cases such as *Morrissey* and *Vitek*. How much procedure Wakinekona or future transferred prisoners deserve is unknown because the Court did not reach the issue in *Olim*. The *Helms* decision indicates, however, that even with a liberty interest, a prisoner may not be guaranteed adequate protection.

CONCLUSION

The Supreme Court, with its recent decisions in *Helms* and *Olim*, has retreated from its pro-prisoner stance of the early 1970's. It has accomplished this retreat both by narrowing the scope of protected liberty interests found in the due process clause and in state law, and by limiting the available procedural protections once a liberty interest is found.

The prisoner faced with an involuntary transfer who hopes to find a protected liberty interest in the due process clause itself must now make a strong showing of a change "qualitatively different from the punishment characteristically suffered by a person convicted of crime." *Helms* and *Olim* indicate that so long as the destination of a transfer is within the walls of a prison, any prison, this test will never be met.

The prisoner faced with an involuntary transfer who hopes to find a protected liberty interest in state law faces a similar uphill battle. Establishing the existence of such a liberty interest will require a showing of statutory language clearly limiting the decisionmaker's discretion and creating an objective expectation that a transfer will not occur absent specific preconditions. Such an expectation will not be found in all state statutes governing transfers. In addition, the Court has indicated that the standard may be higher for statutes governing the day to day operations of a prison system.

Finally, *Helms* indicates that the prisoner who does succeed in establishing that a liberty interest exists will not necessarily obtain the procedural protections formerly accorded under the case law. The Court will now undertake a strict balancing of the prisoner's interests, the government's interests, and the benefits of greater procedural protection. Given the Court's present attitude towards due process protections for prisoners, the inmate may very well come out on the lighter side of the scales after the relevant competing considerations are weighed.

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³⁸² *Id.* at 807-9.

³⁸³ *Gagnon v. Scarpelli*, 411 U.S. 778, 778 (1973).