

Disciplinary Segregation: How the Punitive Solitary Confinement Policy in Federal Prisons Violates the Due Process Clause of the Fifth Amendment in Spite of *Sandin v. Conner*

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**DISCIPLINARY SEGREGATION:
HOW THE PUNITIVE SOLITARY CONFINEMENT
POLICY IN FEDERAL PRISONS VIOLATES THE
DUE PROCESS CLAUSE OF THE FIFTH
AMENDMENT IN SPITE OF SANDIN V. CONNER**

In 1995, the Supreme Court decided Sandin v. Connor, which held inmates did not have a protected liberty interest requiring due process before being placed in solitary confinement. With the increasing problems in the criminal justice systems nationwide, or perhaps a renewed interest in those problems, the public has turned its attention to the plight of the incarcerated. This Comment seeks to flush out the reasoning the Court provided in Sandin and understand the impacts of the “atypical and significant hardship” on subsequent prisoner litigation, chiefly involving solitary confinement. Following the legal analysis of cases, this Comment will view the process of how prisoners end up in solitary confinement in federal prisons and then look to the psychological world, which has provided a number of studies on the effect solitary confinement has on prisoners. When creating law, it should be informed first and foremost by reason; it is understandable how the Court made its decision in Sandin, absent evidence that there is a very real distinction between the effect of being in general population and the effect of being in solitary confinement. However, today, almost twenty years after Sandin, we know there is a substantial difference between the effects each type of incarceration has on inmates, which is not adequately handled by administrative proceedings that lack due process. The effect solitary confinement has on individuals is detrimental to the mental and social health of inmates and is experienced by few within the prison context, and knowing this, it is appropriate that solitary confinement be regarded as an “atypical and significant hardship” within the federal prison context, thus invoking the due process guarantees of the Fifth Amendment.

I.	INTRODUCTION	478
II.	THE DUE PROCESS CLAUSES AND INMATE-LITIGANTS	
	PRE-SANDIN V. CONNER.....	480
A.	Morrissey v. Brewer at the Supreme Court	480
B.	Gagnon v. Scarpelli in 1973	482
C.	Wolff v. McDonnell at the Supreme Court.....	484
D.	Due Process in This Era.....	486

III.	THE FEDERAL PROCESS OF DISCIPLINARY SEGREGATION	486
A.	<i>The Federal Bureau of Prison’s Disciplinary Segregation Policy</i>	487
B.	<i>The Government Accountability Office’s Evaluation of the Federal Bureau of Prison’s Policy in Practice</i>	490
C.	<i>Solitary Confinement Today</i>	493
IV.	SANDIN V. CONNER: EFFECTS ON THE DUE PROCESS CLAUSE FOR INMATE-LITIGANTS CONCERNING SOLITARY CONFINEMENT	493
A.	<i>Sandin v. Conner at the Supreme Court</i>	494
B.	<i>Wilkinson v. Austin at the Supreme Court</i>	495
C.	<i>Stark Contrast</i>	496
V.	SANDIN V. CONNER WRONGLY ASSUMES EFFECTIVE PRISON ADMINISTRATION AND PENOLOGICAL INTERESTS	496
A.	<i>Solitary Confinement Increases the Need for Prison Administration, Spreading Limited Resources More Thinly Than Before</i>	497
B.	<i>Recidivism Rates Are Higher for Prisoners Who Were in Disciplinary Segregation</i>	498
C.	<i>Failed Goals</i>	498
VI.	SOLITARY CONFINEMENT IS AN “ATYPICAL AND SIGNIFICANT HARDSHIP” UNDER THE DUE PROCESS CLAUSE	499
A.	<i>Disciplinary Confinement Is Atypical</i>	499
B.	<i>Empirical Evidence Has Shown Solitary Confinement Is a Significant Hardship to Inmates</i>	500
C.	<i>The Federal Government Has Recognized How Problematic Solitary Confinement Is for Inmates</i>	502
VII.	OVERTURNING PRECEDENT.....	504
A.	<i>Overturing Supreme Court Precedent</i>	505
B.	<i>Overturing Sandin v. Conner</i>	506
VIII.	WHAT DUE PROCESS IS REQUIRED WHEN DETERMINING WHETHER DISCIPLINARY CONFINEMENT IS APPROPRIATE	508

I. INTRODUCTION

The term “solitary confinement” is broad within the federal prison context; it can mean an inmate has been placed on either “administrative detention status,” which is non-punitive,¹ or

1. FED. BUREAU OF PRISONS, U.S. DEP’T OF JUSTICE, NO. 5270.10, SPECIAL HOUSING

“disciplinary segregation status,”² which is punitive solitary confinement assigned by a Disciplinary Hearing Officer.³ This Comment is concerned with the latter. Government-sanctioned punishment requires due process of law,⁴ and this Comment contends that the Federal Bureau of Prison’s current policy for administering disciplinary segregation does not meet the requisite amount of due process for imposing such a severe punishment as solitary confinement.

Most recently the Supreme Court dealt with the issue of due process and solitary confinement in *Sandin v. Conner*.⁵ In that case, the Supreme Court found that the Hawaiian prison policy for placing inmates in solitary confinement did not impose an “atypical and significant hardship”⁶ on inmates and thus did not invoke due process protections.⁷ However, that standard both ignores Supreme Court precedent on due process protections for inmates⁸ and improperly finds solitary confinement is not an atypical and significant hardship.⁹ Additionally, the use of solitary confinement also works against penal and administrative prison goals, which are often cited in the need for limited due process in a prison context.¹⁰ Flowing from both a proper understanding that solitary confinement is demonstrably “atypical” and “significant” and a practical understanding that using solitary confinement acts counter to penal administrative goals, the current Federal Bureau of Prisons policy for placing inmates in punitive solitary confinement clearly violates the Due Process Clause of the Fifth Amendment.

UNITS 2–3 (2011) (quoting 28 C.F.R. § 541.22 (2011)), http://www.bop.gov/policy/progstat/5270_010.pdf [perma.cc/P5SG-3943].

2. This is the Federal Bureau of Prison’s term for punitive solitary confinement; a number of states have varying names, so I will use “disciplinary confinement” throughout this Comment and make distinctions in practice when necessary for analysis. FED. BUREAU OF PRISONS, *supra* note 1, at 3 (quoting 28 C.F.R. § 541.22(b) (2011)).

3. FED. BUREAU OF PRISONS, *supra* note 1, at 3 (citing 28 C.F.R. § 541.22(b) (2011)).

4. U.S. CONST. amend. V.

5. 515 U.S. 472 (1995).

6. *Id.* at 484.

7. *Id.* at 486.

8. *See infra* Part II.

9. *See infra* Part VI.

10. *See, e.g.,* *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972); *see also infra* Part V.

II. THE DUE PROCESS CLAUSES AND INMATE-LITIGANTS PRE- *SANDIN V. CONNER*

Prior to the Court's decision in *Sandin v. Conner*,¹¹ the Supreme Court developed precedent implicating due process protections when prison officials altered an inmate's confinement conditions.¹² *Morrissey v. Brewer*¹³ in 1972 and *Wolff v. McDonnell*¹⁴ in 1974 are notable cases in this precedent. In both cases, the Court found the need for basic due process protection: The former laid out the bevy of basic protections—all of which were required in a parole revocation context—and the latter set the minimal requirements in the incarceration context.¹⁵ The only reading of these cases indicates expansive due process guarantees under the Fifth and Fourteenth Amendments—guarantees that would become severely restricted later.

A. *Morrissey v. Brewer at the Supreme Court*

In *Morrissey*, the Supreme Court addressed whether the Due Process Clause of the Fourteenth Amendment¹⁶ applied to parolees facing revocation, thus affording them an opportunity to challenge the revocation.¹⁷ Two parolees claimed they had their parole revoked without an opportunity for a hearing when parole was revoked on their

11. 515 U.S. 472.

12. See *infra* Parts II.A, II.B, II.C.

13. 408 U.S. 471; see also *infra* Part II.A.

14. 418 U.S. 539 (1974); see also *infra* Part II.C.

15. *Morrissey*, 408 U.S. at 481, 489 (establishing that a number of due process protections were guaranteed despite being limited by the nature of the post-conviction context); *Wolff*, 418 U.S. at 563–67 (explicitly leaving the door open for more due process protections in the prison context).

16. The Due Process Clauses of the Fifth and Fourteenth Amendments are identical in application to the federal government and states respectively. See, e.g., *Malinski v. New York*, 324 U.S. 401, 415 (1945) (Frankfurter, J., concurring) (“To suppose that ‘due process of law’ meant one thing in the Fifth Amendment and another in the Fourteenth is too frivolous to require elaborate rejection.”).

17. *Morrissey*, 408 U.S. at 472. Though this case concerns parole, not disciplinary confinement, they both share the important quality of being “an established variation on imprisonment of convicted criminals.” *Id.* at 477; see also FED. BUREAU OF PRISONS, U.S. DEPT OF JUSTICE, NO. 5270.09, INMATE DISCIPLINE PROGRAM, 12, 14 (2011), http://www.bop.gov/policy/progstat/5270_009.pdf [perma.cc/VS69-5WZT] (listing both rescission of parole and disciplinary segregation as possible sanctions for inmates). The available sanctions are also listed in 28 C.F.R. § 541.3(b) tbl.1 (2015).

parole officers' recommendations.¹⁸ The Supreme Court agreed with the parolees' argument that they had been denied due process.¹⁹

In *Morrissey*, prior to arriving at the Supreme Court, the court of appeals agreed with the State's contention that prison officials require broad discretion when making revocation determinations and "that courts should retain their traditional reluctance to interfere with disciplinary matters" under prison authorities' control.²⁰ However, the Supreme Court did not agree that parole revocation did not implicate due process.²¹

Due process is implicated whenever the state acts to cause an individual "grievous loss."²² Revocation implicated loss of liberty, even though the parolee did not enjoy the "absolute liberty" granted free citizens.²³ Furthermore, society has an interest in treating parolees with basic fairness.²⁴ The Court then decided, upon determining that due process applies, what process is due.²⁵ There is no doubt that a "simple factual hearing will not interfere with the exercise of discretion" of the state.²⁶

The Court then provided a rough structure of what due process required. The minimum due process requirements are as follows:

18. *Morrissey*, 408 U.S. at 472–73. The State claimed, for the first time before the Supreme Court, that it had granted hearings to both petitioners; thus, the Court treated the record from the courts below as fact and denied any claim hearings were granted to petitioners. *Id.* at 475–77.

19. *See id.* at 490.

20. *Id.* at 475; *see also* *Morrissey v. Brewer*, 443 F.2d 942, 948, 951 (8th Cir. 1971).

21. *See Morrissey*, 408 U.S. at 482.

22. *Id.* at 481 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The Court determined the nature of the loss by comparing the liberty interests of a parolee with the liberty interests of a never-convicted person. *Id.* at 482. As a side note, it does not affect the analysis whether that liberty is categorized as a privilege or a right.

23. *Id.* at 480–82.

24. *Id.* at 484 ("[F]air treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness.").

25. *Id.* at 484. Due process is not a rigid standard, but a flexible standard based in context—"it is a recognition that not all situations calling for procedural safeguards call for the same kinds of [protections]." *Id.* at 481.

26. *Id.* at 483. The Court notes the parole board does not need to concern itself with providing this process while maintaining a prison. *See id.* 486. However, a process that requires witnesses be present at the risk of prisoner and staff safety is not contemplated in Part VIII—a process that does not allow safety to become a rubber stamp is. *See infra* Part VIII.

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body[,] . . . which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.²⁷

This is not as demanding as the full process given throughout criminal trials; conditioned liberty requires only a narrow, informal review without the constraints of the rules of evidence.²⁸ The Court provided a flexible set of process requirements, none too burdensome for any state.²⁹ These requirements are simple, simply applied, and should serve as the framework for reviewing, with consequences, the conduct of a person with limited liberty.

B. *Gagnon v. Scarpelli in 1973*

The following year, the Supreme Court heard *Gagnon v. Scarpelli*.³⁰ Scarpelli was convicted of armed robbery in Wisconsin and placed on a suspended sentence and probation.³¹ While lawfully residing in Illinois under the terms of his probation, Scarpelli was caught burglarizing a home; he confessed to the burglary and later claimed the confession was false and given under duress.³² His probation was revoked without a hearing for cavorting with known criminals and for committing the burglary, and Scarpelli was sent to Green Bay Prison to begin serving his previously suspended, fifteen-year sentence.³³

27. *Id.* at 489. The Court would later add the right to counsel—or documentation of refusal of right to counsel—to parolees’ rights at parole revocation hearings. *Gagnon v. Scarpelli*, 411 U.S. 778, 790–91 (1973). As the Court was presented with new questions surrounding the due process protections for persons with limited or conditioned liberty interests, the Court took a strong stance on what protections were owed.

28. *Morrissey*, 408 U.S. at 489.

29. *Id.* at 490.

30. 411 U.S. 778.

31. *Id.* at 779.

32. *Id.* at 779–80.

33. *Id.* at 780 (noting that at no point was Scarpelli afforded a hearing during his incarceration).

Three years into his sentence, Scarpelli filed a writ of habeas corpus.³⁴ However, he was released on parole before any action had been made on his writ.³⁵ Still, the district court found that the custody of a parolee conferred jurisdiction and that, due to collateral consequences, the issue was not moot.³⁶ There, the district court found that revocation without a hearing and without counsel amounted to a violation of due process—this was affirmed by the court of appeals.³⁷

The Court began by focusing on the holding of *Morrissey v. Brewer*: while not part of the criminal prosecution, the loss of liberty at stake during a parole revocation³⁸ hearing is sufficient enough to warrant two distinct hearings.³⁹ Here, the Court reasserted the importance of the “minimum requirements of due process” granted during a parole revocation hearing.⁴⁰ These are the assurances against “ill-considered revocation,”⁴¹ and the Court also added that the need for an indigent probationer’s or parolee’s representation by counsel at these hearings should be determined on a case-by-case basis.⁴²

The Court held that, because of the liberty interest, Scarpelli was owed a revocation hearing and that, due to his claim of duress, he should also be owed counsel for the determination of his role in the commission of the burglary.⁴³ Here, the Court espoused the importance

34. Petition for Writ of Habeas Corpus, *Scarpelli v. Gagnon*, 317 F. Supp. 72, 74 (E.D. Wis. 1970) (No. 68-C-387).

35. *Gagnon*, 411 U.S. at 780.

36. *Scarpelli*, 317 F. Supp. at 74.

37. *Id.* at 74–78, *aff’d sub nom.* *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971).

38. *Gagnon*, 411 U.S. at 782 (the distinction between a parole revocation and probation revocation is immaterial; neither is part of the criminal prosecution and both result in loss of liberty).

39. *Id.* at 781–82 (describing two hearings: the first hearing is to establish probable cause, and the second hearing—which is more comprehensive—is to determine the final revocation decision).

40. *Id.* at 786 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972)).

41. *Id.* at 786.

42. *Id.* at 789–90. This is, again, distinct from a criminal prosecution, and thus, the per se rule demanding indigent representation by counsel established in *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), is not appropriate; however, representation by counsel will be rare—“participation of counsel will probably be both undesirable and constitutionally unnecessary in most revocation hearings, there will remain certain cases in which fundamental fairness—the touchstone of due process—will require that the State provide at its expense counsel for indigent probationers or parolees.” *Gagnon*, 411 U.S. at 790.

43. *Gagnon*, 411 U.S. at 791.

of maintaining fundamental—though not formal—protections when the loss of liberty was at stake.⁴⁴

C. *Wolff v. McDonnell at the Supreme Court*

A year after *Scarpelli*, the Court took up *Wolff v. McDonnell*.⁴⁵ This case raised the issue of what due process inmates should expect during disciplinary proceedings that affect the term of confinement.⁴⁶ In the Nebraska penal system, an inmate's "flagrant or serious misconduct" is punishable through two mechanisms: withholding good-time credits the inmate previously earned or confinement of the inmate in a disciplinary cell.⁴⁷ The former "affects the term of confinement,"⁴⁸ whereas the latter "involves alteration of the conditions of confinement."⁴⁹

The Court explicitly held that inmates are protected by the Constitution and the Due Process Clause, even if the rights granted therein are diminished by the institutional environment of a prison.⁵⁰ Thus, determining what due process is required during disciplinary hearings involves balancing the "institutional needs and objectives"⁵¹ against the constitutional rights of the inmate.⁵² Because disciplinary hearings may result in alteration of the term of confinement, how that determination is made becomes "critical," which is to say minimal procedural safeguards must be in place.⁵³

In the Nebraska scheme the case arose under, the Adjustment Committee acted as fact finder in disciplinary proceedings and determined which sanctions were appropriate.⁵⁴ A charged inmate

44. *See id.*

45. 418 U.S. 539 (1974).

46. *Id.* at 544–47. Respondent, along with other inmates, filed a 42 U.S.C. § 1983 claim against the Nebraska Penal and Correctional Complex for denial of due process under the Fourteenth Amendment. *Id.* at 542.

47. NEB. REV. STAT. § 83-185(2) (1971). It is realized that the Court used a 1972 supplement to the 1971 version of the Nebraska Revised Statutes; however, the differences between the 1971 and 1972 versions are minor and irrelevant here. *Wolff*, 418 U.S. 545 n.5.

48. *Wolff*, 418 U.S. at 547.

49. *Id.*

50. *Id.* at 555–56 ("[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime.").

51. *Id.* at 556. One of the goals noted by the Court is the modification of the inmate's behavior and values when sanctioning him through a disciplinary proceeding. *Id.* at 562–63.

52. *Id.* at 556.

53. *Id.* at 558.

54. *Id.* at 549–52 (citing NEB. PENAL & CORR. COMPLEX PENITENTIARY UNIT, GENERAL POLICY AND PROCEDURE: INMATE CONTROL MISCONDUCT AND THE

could question the charging officer before the committee but had no right to call witnesses or present any documentary support in defense of the charge.⁵⁵ However, under the scheme, inmates had no notice of the proceedings,⁵⁶ so the Court held that the officials must give an inmate sufficient time “to marshal the facts and prepare a defense.”⁵⁷ Additionally, the Court held an inmate has the right to call witnesses in his defense and to present documentary evidence at the hearing.⁵⁸ Obviously, the Court views due process as granting more than a superficial right to a defense—even in the context of inmates with limited liberty interests, the Due Process Clause ensures fairness.

The Court held that current practices in penal systems nationwide implicated no need for the right to confront one’s accuser or the right to appointed counsel in disciplinary proceedings—due process is a context dependent determination.⁵⁹ Still, the Court made note that this opinion was not “graven in stone” and that there remains a possibility of extending all of the *Morrissey-Scarpelli* protections to inmates facing the loss of good-time credits.⁶⁰

It is worth noting Justice Marshall’s dissent in this case for one particular reason: the protections the majority claims inmates have in these proceedings do not protect the inmate. Without the ability to confront his accuser or call witnesses, even an innocent inmate “will invariably be the loser.”⁶¹ Unable to call impartial witnesses, the inmate

ADJUSTMENT COMMITTEE (1971)) (listing the members of the “Adjustment Committee” as “the Associate Warden Custody, the Correctional Industries Superintendent, and the Reception Center Director,” who are likely a neutral and detached hearing body in most cases).

55. *See id.* at 552–53 (quoting *McDonnell v. Wolff*, 342 F. 616, 625–26 (1972)). The Court notes that retaliation by prisoners is a concern in administering disciplinary proceedings. *Id.* at 562.

56. *Id.* at 564.

57. *Id.*

58. *Id.* at 566. However, prison officials may still deny witnesses if allowing the witness would be “unduly hazardous to institutional safety or correctional goals.” *Id.*

59. *Id.* at 568–69.

60. *Id.* at 571–72.

61. *Id.* at 581–82 (Marshall, J., concurring in part, dissenting in part). Even in the prison context, “[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.” *Id.* at 583 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)). Justice Marshall also makes a compelling point about the concern over safety and the right to confront one’s accuser: Most charges are brought by prison officials, not other inmates, and when they are brought by inmates, the accuser is likely already known, e.g., the assault victim. *See id.* at 586–87, 589 (“[A] substantial majority of the States do permit confrontation and cross-examination in prison disciplinary proceedings, and their experience simply does not

is unlikely to surmount the issue of credibility when charged with serious misconduct by a prison official.⁶² Worse than that is the abridgement of the right itself for the sake of administration when “the Due Process Clause ‘recognizes higher values than speed and efficiency.’”⁶³ The Court should allow only the most necessary and minimal limitations to due process: Prisons should no longer limit defense witnesses as a matter of course, lest the judiciary step in to protect that fundamental constitutional right, and when it is necessary to restrict confrontation, the Adjustment Committee should probe the credibility of the accuser *in camera* for itself.⁶⁴ In short, Justice Marshall’s dissent outlines some very serious problems with the majority’s application of minimal due process while providing potential corrections for those problems.

D. Due Process in This Era

Following the holdings of these cases, there is one apparent theme: a present limitation on liberty does not entail the loss of due process rights for further restrictions on liberty. While tailored to match the situation that these plaintiffs faced—e.g., loss of probation-based liberty to extremely limited liberty during incarceration—each plaintiff was due some process to protect their liberty interests. Each type of liberty lost deserved some type of procedural protections because each plaintiff actually had liberty worth protecting.

Though the Court did not demand the litany of procedural due process rights granted a defendant at trial, it sought to ensure that no liberty was stripped away without adequate procedural safeguards. However, as we examine the state of disciplinary segregation in federal prisons—a loss of liberty compared with prisoners living in general populations—in the following part, the lack of procedural safeguards offered inmates today becomes apparent.

III. THE FEDERAL PROCESS OF DISCIPLINARY SEGREGATION

The Federal Bureau of Prisons (BOP) currently has a policy for assigning problematic inmates to solitary confinement, which is

bear out the speculative fears of Nebraska authorities.”).

62. *See id.* at 583 (citing *Clutchette v. Proconier*, 497 F.2d 809, 818 (9th Cir. 1974)).

63. *Id.* (quoting *Fuentes v. Shevin*, 407 U.S. 67, 90 n.22 (1972)).

64. *Id.* at 584, 590.

examined here for its effectiveness at providing due process.⁶⁵ The process for placement in solitary confinement is handled by a number of individuals and boards at various steps in the process.⁶⁶ However, this process, while well reviewed concerning adjudicators, gives little control to the defendant in ever presenting a viable defense before an adjudicator.⁶⁷ The BOP's efficacy in actuating this policy has even been called into question by the Government Accountability Office (GAO).⁶⁸ Ultimately, the BOP's policy regarding disciplinary segregation leaves due process protections unsatisfied.

A. The Federal Bureau of Prisons' Disciplinary Segregation Policy

The BOP has set forth policies regarding the use of solitary confinement for disciplinary segregation within its Inmate Discipline Program.⁶⁹ This program was last updated July 8, 2011, despite the GAO recommending a new, refined oversight program in May 2013.⁷⁰ Following is the current process of determining whether an inmate's conduct should be punished with disciplinary confinement.⁷¹

The Disciplinary Hearing Officer (DHO) ultimately determines whether an inmate should be placed in disciplinary segregation, which may be up to twelve months for a single offense.⁷² The discipline

65. See FED. BUREAU OF PRISONS, *supra* note 17; see also *infra* Part III.A.

66. See FED. BUREAU OF PRISONS, *supra* note 17; see also 28 C.F.R. pt. 541 (2015).

67. See FED. BUREAU OF PRISONS, *supra* note 17, at 17–20, 23–36 (citing 28 C.F.R. §§ 541.5, .7–.8 (2011)).

68. See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-429, BUREAU OF PRISONS: IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND EVALUATION OF IMPACT OF SEGREGATED HOUSING (2013), <http://www.gao.gov/assets/660/654349.pdf> [perma.cc/U7JJ-ZEQA].

69. See generally FED. BUREAU OF PRISONS, *supra* note 17 (citing 28 C.F.R. pt. 541 (2011)).

70. FED. BUREAU OF PRISONS, *supra* note 17, at 1; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 42. The GAO also recommended the BOP begin comprehensive studies regarding the efficacy of disciplinary segregation in correcting inmates' behavioral problems and in administrating cost-effective prisons. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 42.

71. The current BOP policy is based on the due process requirements set forth in *Wolff v. McDonnell*, 418 U.S. 539 (1974). U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 10 n.7. However, the liberty interest involved in *Wolff* is less than the liberty interest involved in disciplinary segregation. See *infra* Part VI.

72. See FED. BUREAU OF PRISONS, *supra* note 17, at 14. If an inmate has committed multiple offenses from "different acts," then the default is to run those disciplinary segregation sentences consecutively, not concurrently; twelve months is not the upper bound of how much time an inmate may spend in solitary confinement for disciplinary purposes. *Id.*

process begins when a staff member witnesses, or reasonably believes, an inmate was involved in a prohibited act and goes on to draft a detailed factual incident report.⁷³ This report is offered to the inmate charged with the prohibited act, usually within twenty-four hours, so that the inmate may prepare a defense.⁷⁴ A supervisory employee—who was not “the employee reporting the incident or otherwise . . . involved in the incident”—is appointed Investigating Officer (IO) by the Warden to conduct an investigation, which should be completed within twenty-four hours of appointment.⁷⁵ The IO will inform the inmate of the charges against him, as well as his right to remain silent.⁷⁶ Then, the inmate may request witnesses be interviewed and evidence preserved.⁷⁷

The first stop for potential imposition of disciplinary segregation for an inmate is the initial review by the Unit Discipline Committee (UDC), which is generally composed of at least two staff members not “significantly involved in the incident”;⁷⁸ however, it is worth noting that the UDC may be composed of only one staff member.⁷⁹ The members qualified to sit on the UDC must have completed a self-study program.⁸⁰ Inmates under review may appear before the UDC during review “at the UDC’s discretion.”⁸¹ At his appearance, the inmate may provide only documentary evidence in support of his innocence, and the UDC’s decision must be made “based on at least some facts.”⁸² If the UDC determines the inmate did commit the prohibited act, and it believes

These lengthy disciplinary segregation sentences are discussed in *infra* Part VI.B. It is worth noting that such offenses as “[i]nsolence towards a staff member,” “[f]ailing to stand count,” altering or damaging another inmate’s or government property “having a value of \$100.00 or less,” or “[b]eing unsanitary or untidy” may earn an inmate up to three months in disciplinary segregation. FED. BUREAU OF PRISONS, *supra* note 17, at 50–52 tbl.1 (quoting 28 C.F.R. § 541.3(a) tbl.1 (2011)).

73. FED. BUREAU OF PRISONS, *supra* note 17, at 17 (citing 28 C.F.R. § 541.5(a) (2011)).

74. *Id.* (citing 28 C.F.R. § 541.5(a) (2011)).

75. *Id.* at 18. The inmate does not receive a copy of the IO’s report. *Id.* at 20.

76. *Id.* at 18 (citing 28 C.F.R. § 541.5(b)(1) (2011)).

77. *Id.* (citing 28 C.F.R. § 541.5(b)(2) (2011)).

78. *Id.* at 23 (quoting 28 C.F.R. § 541.7 (2011)).

79. *Id.*

80. *Id.*

81. *Id.* at 24 (quoting 28 C.F.R. § 541.7(d) (2011)).

82. *Id.* (quoting 28 C.F.R. § 541.7(e) (2011)). The inference to be drawn is that the UDC may not find guilt based only on the inmate’s remaining silent. *See id.* at 18 (citing 28 C.F.R. § 541.5(b)(1)(B) (2011)). Given that the incident report is launched by a staff member, there is already some evidence against the inmate; no right to call witnesses may prove detrimental to the inmate’s defense where documented evidence is lacking.

disciplinary segregation is appropriate, the UDC must refer the incident to the DHO.⁸³

Along with its recommendation for disciplinary segregation, the UDC submits copies of all relevant documents and reasons for referral to the DHO.⁸⁴ The UDC also gives a copy of its decision to refer to the inmate and instructs him of his rights before the DHO.⁸⁵ The inmate may appeal the UDC's referral.⁸⁶

The DHO is an impartial decision maker, who is unconnected to the incident in question and has received specialized training and certification.⁸⁷ The inmate is given notice of the charges against him at least twenty-four hours in advance.⁸⁸

An inmate may request or may upon need—e.g., illiteracy—have a staff member appointed to assist and represent him in the DHO hearing process.⁸⁹ This representative aids the inmate in understanding the charges against him and the possible consequences.⁹⁰ The representative will also help the inmate “speak[] with and schedule[] witnesses, obtain[] written statements, and otherwise help[] [the inmate] prepare evidence for presentation.”⁹¹ The inmate is allowed to appear before the DHO during the hearing.⁹²

During the hearing, the inmate is granted certain procedural safeguards; however, the DHO hearing may use “written statements of witnesses not readily available,” which may be “*liberally used* in place of in-person witnesses.”⁹³ This raises a serious concern over the actual function of witnesses at the DHO hearing—for example, “the DHO need not call witnesses adverse to you if their testimony is adequately summarized in the incident report or other investigation materials,” which means there is no right to confront an accuser.⁹⁴ Further concern

83. *Id.* at 24–25 (citing 28 C.F.R. § 541.7(f)–(g) (2011)).

84. *Id.* at 25.

85. *Id.* (citing 28 C.F.R. § 541.7(g) (2011)).

86. *Id.* (citing 28 C.F.R. § 541.7(g) (2011)).

87. *Id.* at 27 (citing 28 C.F.R. § 541.8(b) (2011)).

88. *Id.* (citing 28 C.F.R. § 541.8(c) (2011)).

89. *Id.* at 27–28 (citing 28 C.F.R. § 541.8(d)(1) (2011)).

90. *Id.* at 28 (citing 28 C.F.R. § 541.8(d)(2) (2011)).

91. *Id.* (quoting 28 C.F.R. § 541.8(d)(2) (2011)).

92. *Id.* at 28–29 (citing 28 C.F.R. § 541.8(e) (2011)).

93. *Id.* at 29 (emphasis added).

94. *Id.* at 30 (quoting 28 C.F.R. § 541.8(f)(2) (2011)); *see also* Patterson v. Superior Court of Cal., 420 U.S. 1301 (1975).

arises from the DHO's complete, discretionary control over what questions are asked of the witnesses that do appear—the inmate has no right to question the accuser, and his right to confront an accuser may be limited to receiving the witness's prepared written statement.⁹⁵ Furthermore, the DHO does not have to call any witnesses requested by the inmate if he does not believe the testimony will be helpful.⁹⁶ The DHO is also allowed to rely on information from a confidential informant he “finds reliable”; the informant will not be revealed to the inmate facing punishment, and what portions of his testimony may be made available to the inmate are done so at the DHO's discretion.⁹⁷ Compounding this problem is that, again, the DHO need only make a determination of guilt on “some facts,” as was the case before the UDC.⁹⁸

Upon determining an inmate's guilt, the DHO will submit a written report to the charged inmate, which will include the following: whether the inmate was advised of his rights, what evidence the DHO relied on, what the DHO decided, what sanction the DHO imposed, and what reasons underlie that sanction.⁹⁹ The inmate has the opportunity to appeal to the Regional Director at the Bureau of Prisons.¹⁰⁰ Though prisoners do not enjoy the panoply of due process rights owed free citizens, the current process seems to lack or severely condition some fundamental rights of due process.¹⁰¹

B. The Government Accountability Office's Evaluation of the Federal Bureau of Prison's Policy in Practice

Due to the growing concerns over America's prison systems, U.S. Senator Richard Durbin, joined by two other U.S. congressmen, requested the GAO investigate the BOP's use of segregated housing.¹⁰²

95. FED. BUREAU OF PRISONS, *supra* note 17, at 30–32 (citing 28 C.F.R. § 541.8(f) (2011)).

96. *Id.* at 31 (citing 28 C.F.R. § 541.8(f)(2)–(3) (2011)).

97. *Id.* at 30 (quoting 28 C.F.R. § 541.8(f)(6) (2011)). “Uncorroborated confidential information from a single informant is **insufficient** as the sole basis for a finding, **unless** the circumstances of the incident and the knowledge possessed by the informant are convincing enough to show that the information must be reliable.” *Id.* at 32.

98. *Id.* at 29–30 (quoting 28 C.F.R. § 541.8(f) (2011)).

99. *Id.* at 34 (citing 28 C.F.R. § 541.8(h) (2011)).

100. *Id.* at 35 (citing 28 C.F.R. § 541.8(i) (2011)).

101. E.g., the right to confront one's accuser, question him, and call witnesses in one's defense. U.S. CONST. amend. VI.

102. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 1–2.

The GAO completed its report in May 2013.¹⁰³ The report raised concerns over the effectiveness of current BOP segregated housing policy in achieving penal goals.¹⁰⁴

The GAO's study covers the BOP's care and custody of over 200,000 federal inmates.¹⁰⁵ At interest here are the inmates placed in disciplinary segregation and, more particularly, those in single-person cells for disciplinary confinement placed at the Florence Administrative Maximum Facility (ADX).¹⁰⁶ The BOP claims that it does not hold anyone in solitary confinement because guards regularly visit with inmates, inmates may interact during recreation times, and inmates in adjoining cells may communicate;¹⁰⁷ however, these inmates may be confined to these restrictive conditions twenty-three hours a day for years at a time.¹⁰⁸

The BOP has a centralized Program Review Division (PRD), which completes reviews of the Special Housing Units (SHU) and Special Management Units (SMU)—less restrictive disciplinary segregation schemes¹⁰⁹—every three years based on specific monitoring policies.¹¹⁰ However, there are no such specific monitoring requirements for ADX confinement, and it is not scrutinized to the same degree when reviewed.¹¹¹ The BOP says this policy is in place, in part, because all ADX referrals and placements are monitored by BOP headquarters and placements are reviewed every sixty to ninety days.¹¹² The GAO raised issue with the lack of actual oversight BOP headquarters has in

103. *Id.* at 1.

104. *See id.* at 41–42. This report only concerns the inmates of the 119 BOP-operated facilities, so the study does not cover issues arising from privately managed prisons. *Id.* at 1 n.1.

105. *Id.* at 1. The federal prison population has grown by 400% since the 1980s, and with that has come the increased use of “highly restrictive conditions.” *Id.*

106. *See id.* at 9 fig.2.

107. *Id.* at 12.

108. *Id.* at 12 & n.11, 22.

109. *See id.* at 7 fig.1.

110. *Id.* at 17.

111. *Id.* at 22–23 (“BOP HQ lacks oversight over the extent to which ADX staff are in compliance with many ADX-specific requirements related to conditions of confinement and procedural protections to the same degree that it has for SHUs and SMUs. According to PRD officials, PRD does not assess the extent to which ADX provides conditions of confinement or procedural protections as required under ADX policy and program statements because it is not required to do so. As a result, PRD cannot report to BOP management on the extent of compliance with these ADX-specific requirements.”).

112. *Id.* at 22.

determining whether ADX policies are being followed and recommended tighter monitoring be put in place to ensure ADX-specific policies were followed.¹¹³ The GAO emphasized the importance of monitoring implementation and execution of programming to ensure effective administration and achievement of governmental goals.¹¹⁴

The GAO also found the BOP's lack of documentation concerning.¹¹⁵ Specifically, in its report the GAO stressed the lack of documentation relating to procedural protections and conditions of confinement.¹¹⁶ Upon reviewing fifty-one case files of inmates placed in disciplinary segregation, only forty-two of them provided the underlying reason for disciplinary segregation.¹¹⁷ The BOP claimed that a new software program—SHU application¹¹⁸—would help the documentation issues in its prisons; however, the BOP was unable to articulate its goals and objectives in using the new software or how the software would address the documentation problems.¹¹⁹ Overall, the GAO found the BOP's ADX monitoring lacking and recommended new requirements

113. *See id.* at 22, 24.

114. *See id.* at 24 (“The [*Standards for Internal Controls in the Federal Government*] state, among other things, that monitoring activities are an integral part of an entity’s planning, implementing, reviewing, and accountability for stewardship of government resources and achieving effective results. Specific requirements for PRD to monitor ADX-specific policies to the same degree that these requirements exist for SHUs and SMUs could help provide BOP HQ additional assurance that ADX officials are following BOP policies to hold inmates in a humane manner, in its highest security, most restrictive facility.”); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-704G, STANDARDS FOR INTERNAL CONTROL IN THE FEDERAL GOVERNMENT (2014), <http://www.gao.gov/assets/670/665712.pdf> [perma.cc/EJ7Y-5N39]. The Acting Assistant Director of PRD agreed such monitoring mechanisms should be implemented. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68, at 24.

115. *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68, at 25 (“[GAO] reviewed 45 PRD monitoring reports from 20 prisons that assessed compliance at [lower-level disciplinary segregation units]. PRD identified deficiencies in 38 of these reports, including documentation concerns in 30 reports.”).

116. *Id.* at 25. There was not clear documentation that inmates in disciplinary segregation were given all their meals or their daily hour for exercise—“documentation at these prisons did not clearly indicate that these standards were always observed.” *Id.*

117. *Id.* at 27.

118. *Id.* at 28. SHU application is a new software program for SHUs and SMUs that “could improve the documentation of the conditions of confinement in SHUs and SMUs, but . . . may not address all the deficiencies . . . identified.” *Id.*

119. *Id.* at 28–29 (describing how the BOP did not provide evidence because the software program was too new to provide data for evaluation of its impact on the lack of documentation in BOP prisons).

be developed to ensure inmates receive their procedural protections and conditions of confinement.¹²⁰

C. *Solitary Confinement Today*

It is apparent from the BOP's punitive solitary confinement process alone that placing an inmate in solitary confinement is a one-sided endeavor. These inmates are not given any meaningful opportunity to present a viable defense—an essential aspect of due process—which goes against the precedent established by the Supreme Court in the line of cases flowing from *Morrissey v. Brewer*.¹²¹ This is a process that the GAO calls into question for effectiveness. However, the process the BOP employs does not arise from nothing.

The following part addresses *Sandin v. Conner*, a Supreme Court case addressing the rights retained by inmates facing solitary confinement.¹²² The Court issued a short standard for reviewing those rights,¹²³ but the standard is not simple, particularly in light of modern psychology and statistics.¹²⁴

IV. *SANDIN V. CONNER*: EFFECTS ON THE DUE PROCESS CLAUSE FOR INMATE-LITIGANTS CONCERNING SOLITARY CONFINEMENT

In 1995, the Supreme Court decided the last case concerning punitive solitary confinement in *Sandin v. Conner*.¹²⁵ This case offered the standard “atypical and significant hardship” that must be found in change-of-confinement situations to warrant due process protections.¹²⁶ This has led to few cases elaborating on that standard from lower courts, all of which will be described and analyzed in the following part.¹²⁷ The questions are whether the Court gave sufficient guidance and whether its decision comports with what the Due Process Clause of the Fifth and Fourteenth Amendments require under *Wolff v. McDonnell*.¹²⁸

120. *See id.* at 42.

121. 408 U.S. 471 (1972); *see also supra* Part II.

122. 515 U.S. 472 (1995).

123. *See id.* at 483–84.

124. *See infra* Part IV.

125. 515 U.S. 472.

126. *Id.* at 483–84, 486.

127. *See infra* Part IV.A, IV.B.

128. 418 U.S. 539 (1974).

A. *Sandin v. Conner at the Supreme Court*

DeMont Conner was an inmate at a Hawaii maximum-security prison.¹²⁹ When a prison guard attempted a strip search and inspection of Conner's rectum, he pulled away from the guard and used profanity.¹³⁰ He was charged with "high misconduct" for pulling away from the guard and "low moderate misconduct" for cursing at the guard.¹³¹ Conner subsequently appeared before the Adjustment Committee, which rejected his request to call witnesses for his defense.¹³² The committee found him guilty of those prohibited conducts and "sentenced him to 30 days' disciplinary segregation."¹³³ Nine months later, one of the deputy administrators found the misconduct charges unsupported and expunged Conner's record.¹³⁴

The Ninth Circuit Court of Appeals held in favor of Conner's claim that the limited process granted him by the Adjustment Committee violated the Due Process Clause under *Wolff v. McDonnell*.¹³⁵ However, the Supreme Court did not view the precedent as favorable to Conner's case, holding that—despite the later factual determination that Conner was not guilty of the prohibited conduct for want of evidence—all due process requirements had been fulfilled.¹³⁶ The Court focused on what rights flow from the Due Process Clause of the Fourteenth Amendment itself rather than whether the State had created a liberty interest in remaining free from disciplinary segregation.¹³⁷

The focal point of the majority's argument is that the case line following *Wolff* created two issues: due process analysis now focuses on state-created liberty interests and disincentivizes states from codifying prison regulations, and that that approach "has led to the involvement of federal courts in the day-to-day management of prisons."¹³⁸ The Court stated that the focus on the language of a given statute or regulation, rather than a focus on "the nature of the deprivation," has

129. *Sandin*, 515 U.S. at 474–75.

130. *Id.* at 475.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 476.

135. *Conner v. Sakai*, 15 F.3d 1463, 1467–68 (9th Cir. 1993), *rev'd sub nom.* *Sandin v. Conner*, 515 U.S. 472 (1995).

136. *Sandin*, 515 U.S. at 486–487.

137. *Id.*

138. *Id.* at 482.

led inmates to litigate over any and all interests they can find in prison regulations, even when successful litigation bears “little . . . benefit to anyone.”¹³⁹ The Court stated that Conner’s punishment was not the type of “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”¹⁴⁰ Obviously, abuse of the court system is a serious concern, but these arguments seem to distract from the case at hand, which involved a serious liberty interest: the movement to severely confined disciplinary segregation. While the reasoning in *Sandin* explicitly supports the holding in *Wolff*—to analyze based on the nature of the deprivation of the liberty¹⁴¹—its application of that analysis is flawed.

B. *Wilkinson v. Austin at the Supreme Court*

Ten years after *Sandin*, the Supreme Court addressed what procedure is required under the Fourteenth Amendment when assigning an inmate to a “Supermax” prison facility.¹⁴² The Ohio Supermax facility at issue in this case—the Ohio State Penitentiary (OSP)—was designed to be highly restrictive, comprised of 504 single-inmate cells designed to keep the most violent and dangerous offenders separated from the general prison population.¹⁴³

The cells at the OSP were extremely solitary in design— “[i]t is fair to say OSP inmates are deprived . . . of almost all human contact.”¹⁴⁴ Inmates were placed in these cells for an indefinite period of time, limited only by the length of their sentence.¹⁴⁵ Inmates are placed at

139. *Id.* 481–82.

140. *Id.* at 484.

141. *Id.* at 482–83.

142. *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005). “Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population.” *Id.* The Ohio Supermax facility is the most restrictive incarceration available in the state, more restrictive than any Ohio administrative control units—“a highly restrictive form of solitary confinement”—or even death row. *Id.* at 214. “About 30 States now operate Supermax prisons, in addition to the two somewhat comparable facilities operated by the Federal Government.” *Id.* at 213–14.

143. *Id.* at 214 (the inmates at the Supermax facility could leave their cell for one hour a day); see also CORR. INST. INSPECTION COMM., CORRECTIONAL INSTITUTION INSPECTION COMMITTEE REPORT ON THE INSPECTION AND EVALUATION OF OHIO STATE PENITENTIARY 2–3 (2015), <http://ciic.state.oh.us/docs/Ohio%20State%20Penitentiary%202015.pdf> [perma.cc/PGX2-ENT8].

144. *Wilkinson*, 545 U.S. at 214.

145. *Id.* at 214–15 (“For an inmate serving a life sentence, there is no indication how

OSP based on the nature of their crimes or their conduct while in prison;¹⁴⁶ the process is initiated by a prison official, and then reviewed by three groups—any of which may terminate the process.¹⁴⁷

The notable due process issue in this case is the inmate's complete lack of ability to call witnesses in his defense.¹⁴⁸ Here, the Court reasserted its prior holdings that no due process violation occurs by placing inmates in more restrictive custody.¹⁴⁹ The Court held that the solitary confinement of the inmates at OSP did create a protectable liberty interest, which was affected by the “atypical and significant hardship”; however, the Court also held the policy in place adequately addressed due process concerns.¹⁵⁰

C. Stark Contrast

These cases hold a remarkably different tenor toward inmates' rights than the cases arising out of the *Morrissey* case line.¹⁵¹ Inmates have an extremely limited opportunity for due process, and what is available to them is one-sided. However, these holdings are flawed in their reasoning because these prison practices are flawed in effectiveness and practicality, which is discussed in the following part.¹⁵² Flawed, also, is the assertion that a punishment must be “atypical and significant” to trigger due process protections, yet what is considered “atypical and significant” punishment excludes solitary confinement, which is a premise examined both statistically and scientifically in a further part.¹⁵³

V. SANDIN V. CONNER WRONGLY ASSUMES EFFECTIVE PRISON ADMINISTRATION AND PENOLOGICAL INTERESTS

The Supreme Court held that imposition of solitary confinement “effectuates prison management and prisoner rehabilitative goals.”¹⁵⁴ However, this is a presumption not supported by the evidence.¹⁵⁵ The

long he may be incarcerated at OSP once assigned there.”).

146. *Id.* at 216.

147. *Id.* at 216–17.

148. *Id.* at 216.

149. *Id.* at 221–22 (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

150. *Id.* at 223, 230.

151. *See supra* Part II.

152. *See infra* Part V.

153. *See infra* Part VI.

154. *Sandin v. Conner*, 515 U.S. 472, 485 (1995).

155. *See infra* Parts V.A, V.B.

use of solitary confinement limits effective prison administration and creates a population more inclined to reoffend.¹⁵⁶

A. Solitary Confinement Increases the Need for Prison Administration, Spreading Limited Resources More Thinly Than Before

Prisons are expensive institutions and require incredible amounts of administration to function.¹⁵⁷ However, the cost of generic prisons pales in comparison with the cost of disciplinary segregation units. The GAO's report estimated the cost of administration for the varying levels of security institutions.¹⁵⁸ The daily inmate per capita cost at one of the BOP high security facilities is \$69.41.¹⁵⁹ Comparatively, the daily per capita of inmates in Special Management Units (SMU)—restrictive compared to general-population, disciplinary segregation¹⁶⁰—is \$119.71, despite being in the same facility as general population.¹⁶¹ However, even the cost of the SMU is far below the daily per capita for inmates in ADX, which totals \$216.12 daily.¹⁶² The annual cost of ADX was roughly \$34 million to house 435 inmates in 2012.¹⁶³ This is not unique to the federal system; Alexa Steinbuch found that Supermax facilities in Arizona cost “up to three times as much as general prison housing” and it costs 45% more to house inmates in solitary confinement than general population in Texas.¹⁶⁴ Obviously, this calls into question the fiscal responsibility underlying the BOP policy of ADX disciplinary segregation.

One of the fundamental goals of prison administration is safety.¹⁶⁵ However, there is little evidence to suggest disciplinary segregation furthers that goal¹⁶⁶—it may even function contrary to that goal.¹⁶⁷

156. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 39.

157. *See id.* at 30–32.

158. *Id.* at 29–32.

159. *Id.* at 31.

160. *Id.* at 7 fig.1.

161. *Id.* at 31.

162. *Id.* (comparing the daily per capita cost for ADX inmates with the daily per capita of \$85.74 for non-ADX inmates in the same facility).

163. *Id.* at 32. Additionally, the current annual cost of SMU is \$87 million. *Id.* If all these SMU inmates were housed in medium or high security facilities, the cost would annually total \$42 million and \$50 million, respectively. *Id.*

164. Alexa T. Steinbuch, *The Movement Away from Solitary Confinement in the United States*, 40 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 499, 502 (2014).

165. *See* 18 U.S.C. § 4042(a)(2)–(3) (2012).

166. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 33.

Despite the continued claim that disciplinary confinement is essential to prison administration,¹⁶⁸ the BOP has never conducted a study on the efficacy of disciplinary segregation in achieving more peaceful prison administration.¹⁶⁹

The BOP noted that there had been an overall drop in prison assaults and lockdowns, despite an increase in prison population, but were unable in any way to link it to the use of disciplinary confinement.¹⁷⁰ During its study, the GAO reviewed five states' use of disciplinary segregation, all of which instituted new policies directed at minimizing the population in disciplinary segregation.¹⁷¹ All five states reported no increase in prison violence after moving segregated prisoners to less restrictive housing—under the revised standards, Mississippi found 80% of its disciplinary segregation inmates were inappropriately placed in disciplinary segregation, and Colorado reported 37% of its inmates in disciplinary segregation did not require that level of security.¹⁷² In addition, these two states also reported large savings following the closings of segregated housing units.¹⁷³ Limiting the use of solitary confinement—through the use of adequate due process—can serve administrative and pragmatic governmental interests far better than the current level of use.

B. Recidivism Rates Are Higher for Prisoners Who Were in Disciplinary Segregation

There is serious concern that extended time in solitary confinement causes high rates of recidivism.¹⁷⁴ Steinbuch suggests it is the lack of human interaction over time “without the opportunity to engage in the types of interaction, treatment, and educational experiences” that causes such high recidivism rates among these inmates.¹⁷⁵ An estimated 40% of Supermax inmates from California and Colorado were “directly

167. Press Release, Dick Durbin, Senator, Durbin Chairs First-Ever Congressional Hearing on Solitary Confinement (June 19, 2012), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-chairs-first-ever-congressional-hearing-on-solitary-confinement> [perma.cc/JC64-9DEA].

168. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 562–63 (1974).

169. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 33.

170. *Id.* at 33–34.

171. *Id.* at 34 (the states studied were Colorado, Kansas, Maine, Mississippi, and Ohio).

172. *Id.* at 34–35.

173. *Id.* at 34.

174. See Steinbuch, *supra* note 164, at 502.

175. *Id.*

released from total isolation.”¹⁷⁶ It is no surprise that inmates who have spent significant amount of time in solitary confinement conditions reoffend at a higher rate than their general population counterparts.¹⁷⁷

C. Failed Goals

For the abovementioned reasons, it is apparent that the use of solitary confinement abjectly fails the practical goals of its penological use. Solitary confinement complicates prison administration rather than simplifying it and heavily increases the cost of prison administration. Furthermore, its use limits the chance for success concerning inmates’ abilities to keep from reoffending and reintegrate into society.

However, as discussed in the following part,¹⁷⁸ those are not the only reasons the use of solitary confinement fails to meet the Court’s holding in *Sandin*.¹⁷⁹

VI. SOLITARY CONFINEMENT IS AN “ATYPICAL AND SIGNIFICANT HARDSHIP” UNDER THE DUE PROCESS CLAUSE

The Court has stated that liberty interests must arise from some type of or rule or regulation,¹⁸⁰ so to challenge the BOP’s policies there must be something within the policy granting those rights. Arguably at issue in disciplinary segregation, the BOP created a liberty interest in promising no disciplinary sanctions may be imposed in a “capricious” manner.¹⁸¹ Discussed below is how the BOP’s current policy qualifies as the imposition of an “atypical and significant hardship” lacking appropriate due process and how solitary confinement is “a dramatic departure from the basic condition[] of [an] indeterminate sentence.”¹⁸²

A. Disciplinary Confinement Is Atypical

The “atypical” requirement set forth in *Sandin* is not explained.¹⁸³

176. *Id.* (citing *End the Overuse of Solitary Confinement*, ACLU, https://www.aclu.org/sites/default/files/field_document/stop_solitary_-_two_pager.pdf [perma.cc/95B8-Z2RU] (last visited Dec. 29, 2015)).

177. *See id.* at 511.

178. *See infra* Part VI.

179. 515 U.S. 472, 483–84 (1995).

180. *See id.* at 482.

181. FED. BUREAU OF PRISONS, *supra* note 17, at 1 (quoting 28 C.F.R. § 541.1 (2011)). The Inmate Discipline Program is authorized by 18 U.S.C. § 4042(a) (2012).

182. *Sandin*, 515 U.S. at 484.

183. *Id.* at 484.

There is no metric against which to compare whether a hardship is atypical. So it is best to turn to the plain meaning and understanding of the word: “irregular [or] unusual.”¹⁸⁴ At issue is whether disciplinary segregation in the BOP constitutes an unusual punishment.

Disciplinary segregation in the BOP does constitute an atypical hardship. The BOP is responsible for 217,000 federal inmates.¹⁸⁵ Of those inmates, only 12,460 are placed in disciplinary segregation—a mere 7% of the federal inmates were segregated.¹⁸⁶ Certainly an issue affecting only 7% of a population could be viewed as atypical. Furthermore, what is really at issue here are those placed in solitary disciplinary segregation (ADX),¹⁸⁷ which is a total of approximately 435 inmates in the entire federal prison system.¹⁸⁸ The 435 inmates in ADX segregation divided into the total federal prison population of 217,000 equates to roughly 0.2%.¹⁸⁹ Even if this number were five times what it currently is—then totaling a whole percent—the placement of any inmate in solitary disciplinary segregation would certainly constitute an atypical hardship. Thus, any inmate in ADX is suffering an atypical hardship within the federal prison system.

B. Empirical Evidence Has Shown Solitary Confinement Is a Significant Hardship to Inmates

Disciplinary segregation involves solitary confinement for twenty-three hours a day.¹⁹⁰ The significant hardship facing inmates placed in disciplinary confinement, chiefly in ADX in federal prisons, is the loss of mental well-being.¹⁹¹ At a hearing on the use of solitary confinement in the United States, Congress heard evidence from multiple state and national studies, which concluded “[f]ifty percent of all prison suicides occur in solitary confinement.”¹⁹² Loss of liberty is certainly

184. *Atypical*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

185. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 1.

186. *Id.* at 2.

187. Inmates are alone in their cells for about twenty-three hours a day. *Id.*

188. *Id.*

189. *See id.* at 1–2.

190. *Id.* at 6.

191. *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights and Human Rights of the Comm. on the Judiciary*, 112th Cong. 3 (2012) [hereinafter *Reassessing Solitary Confinement*] (statement of Sen. Richard J. Durbin, Chairman, S. Comm. on the Judiciary); Press Release, Dick Durbin, *supra* note 167.

192. *Reassessing Solitary Confinement*, *supra* note 191, at 2; *see also* Press Release, Dick

contemplated when sentencing an individual; however, the loss of mental acuity is certainly not.

Solitary confinement may cause a variety of “negative psychological reactions” including depression, anxiety, decreased brain function, hallucinations, impulse control, and self-mutilation.¹⁹³ Dr. Craig Haney, who testified before Congress on the mental effects of solitary confinement,¹⁹⁴ has stated that published studies have exclusively found ten days in Supermax or solitary confinement conditions precipitates negative psychological effects in inmates.¹⁹⁵

Dr. Stuart Grassian studied fifteen inmates in solitary confinement at a facility in Massachusetts—their mean age was twenty-eight, and the average stay in solitary was two months.¹⁹⁶ Among the inmates he interviewed, Dr. Grassian found all of the negative psychological issues listed above; he found the “specific psychiatric symptoms reported were strikingly consistent among the inmates.”¹⁹⁷ Dr. Grassian also stated that the specific effects of solitary confinement may establish a “clinically distinguishable syndrome.”¹⁹⁸

The present concern is whether the BOP’s ADX program causes psychological effects. Unfortunately, the BOP has never studied the long-term effects of its ADX program on inmates, which the GAO raised issue with in its report.¹⁹⁹ The BOP has psychologists meet with ADX inmates on a weekly basis and perform an assessment every thirty days after placement, and the psychologists have found no negative psychological effects among their inmates;²⁰⁰ however, it may be worth

Durbin, Senator, Durbin Statement on Federal Bureau of Prisons Assessment of its Solitary Confinement Practices (Feb. 04, 2013), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-statement-on-federal-bureau-of-prisons-assessment-of-its-solitary-confinement-practices> [perma.cc/9DSL-UCZF].

193. Steinbuch, *supra* note 164, at 501 (citing Jeffrey L. Metzner & Jamie Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. AM. ACAD. PSYCHIATRY & L. 104, 104–05 (2010)); *see also* Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 AM. J. PSYCHIATRY 1450 (1983).

194. *Reassessing Solitary Confinement*, *supra* note 191, at 20–21 (statement of Dr. Craig Haney, Professor of Psychology at University of California, Santa Cruz).

195. Steinbuch, *supra* note 164, at 510 (quoting Craig Haney, *Mental Health Issues in Long-Term Solitary and “Supermax” Confinement*, 49 CRIME & DELINQ. CONFINEMENT 124, 132 (2003)).

196. Grassian, *supra* note 193, at 1451.

197. *Id.* at 1452.

198. *Id.* at 1453.

199. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68, at 38.

200. *Id.* at 38–39.

noting that when studying the Massachusetts inmates, Dr. Grassian stated all the inmates he met denied any negative psychological issues and only began to describe their mental anguish upon particularized and prying questions.²⁰¹ The GAO also noted in its report that the studies it relied on overwhelmingly supported the proposition that long-term solitary confinement causes negative psychological effects.²⁰²

The studies that have been conducted on the effects of long-term solitary confinement resoundingly point to a single truth: Solitary confinement likely causes negative psychological effects on inmates. And while the BOP claims there are no negative impacts from long-term disciplinary confinement,²⁰³ the BOP's *Psychology Services Manual* "recognizes that extended periods of confinement in Administrative Detention or Disciplinary Segregation Status may have an adverse effect on the overall mental status of some individuals."²⁰⁴ At sentencing, a convict's physical liberty is lost, but—other than the goal to encourage better morals and good character—never is the loss of his mental liberty contemplated. There is no question this is a significant hardship.

C. *The Federal Government Has Recognized How Problematic Solitary Confinement Is for Inmates*

Recently, there has been movement in both the Legislative and Executive Branches to investigate and correct the problems of solitary confinement. Senator Richard Durbin of Illinois has held two congressional hearings—in 2012 and 2014—investigating the current use of solitary confinement;²⁰⁵ during both hearings, Senator Durbin stated that solitary confinement is overused in America.²⁰⁶ In response to the

201. Grassian, *supra* note 193, at 1451–52.

202. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 68, at 39.

203. *Id.* at 39–40.

204. *Id.* at 40 (quoting FED. BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, NO. 5310.12, PSYCHOLOGY SERVICES MANUAL § 4.2 (1995)).

205. *Reassessing Solitary Confinement*, *supra* note 191; *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences*, 113th Cong (2014) [hereinafter *Reassessing Solitary Confinement II*], <http://www.judiciary.senate.gov/meetings/reassessing-solitary-confinement-ii-the-human-rights-fiscal-and-public-safety-consequences> [perma.cc/MK6M-JGWD].

206. *Reassessing Solitary Confinement*, *supra* note 191; *Reassessing Solitary Confinement II*, *supra* note 205; see also ACLU, BRIEFING PAPER: THE DANGEROUS OVERUSE OF SOLITARY CONFINEMENT IN THE UNITED STATES 14 (2014), https://www.aclu.org/sites/default/files/assets/stop_solitary_briefing_paper_updated_august_2

same problem, U.S. Immigration and Customs Enforcement (ICE) has implemented new monitoring requirements and a new policy on the use of solitary confinement.²⁰⁷ Both of these—along with the recent GAO report²⁰⁸—evidence government-recognized problems of current policies underlying the use of solitary confinement.

At Senator Durbin’s first congressional hearing, he noted that the United States employs solitary confinement more than any other democratic nation and said, “The dramatic expansion of the use of solitary confinement is a human rights issue we can’t ignore.”²⁰⁹ He called attention to the current policy’s impact on inmates’ mental health and the impact that has on the nation’s safety.²¹⁰ Dr. Craig Haney, a psychology professor, testified before Congress that solitary confinement “can lead to mental illness, self-mutilation and a ‘disturbingly high’ rate of suicide.”²¹¹ Congress also heard testimony evidencing the use of solitary confinement increases violence among prisoners and the fiscal irresponsibility underlying the use of solitary confinement.²¹² At the end of the first hearing, Senator Durbin said, “All of these issues lead to the obvious conclusion: we need to reassess solitary confinement and honestly reform policies which do not make us safer.”²¹³

ICE has recently revised its policies regarding the use of disciplinary segregation.²¹⁴ Aimed at correcting the abuses that pervade solitary confinement practices, ICE requires that any detainee placed in solitary

014.pdf [perma.cc/5KNY-ZUZB].

207. U.S. IMMIGRATION & CUSTOMS ENF’T, NO. 11065.1, REVIEW OF THE USE OF SEGREGATION FOR ICE DETAINEES (2013), https://www.ice.gov/doclib/detention-reform/pdf/segregation_directive.pdf [perma.cc/ZUC4-LTRQ]; see also ACLU, *supra* note 206, at 12.

208. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68; see also *supra* Part III.B (providing a detailed discussion of the GAO report).

209. Press Release, Dick Durbin, *supra* note 167 (noting that nationwide, roughly 80,000 of the more than 2.3 million inmates are held in “some kind of restricted detention,” which is approximately 3.5% of the prison population).

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. See U.S. IMMIGRATION & CUSTOMS ENF’T, *supra* note 207. “Because ICE is comparable to BOP in many ways, including its extensive national network of government-run and private contract facilities, the ICE directive sets a strong example of rigorous monitoring and substantive requirements which BOP can and should follow.” ACLU, *supra* note 206, at 12.

confinement should be reviewed within seven days and every week thereafter.²¹⁵ During these reviews, the supervisor interviews the detainee to ensure he has “received all services to which he . . . is entitled.”²¹⁶ During the weekly review, the supervisor should always consider alternative housing options and is assisted by ICE headquarters in making any alternative placement.²¹⁷ Where solitary confinement is appropriate, the supervisor is encouraged to limit the amount of solitary by adding to the detainees’ out-of-cell time and arranging for the detainees participation in group activities.²¹⁸ All reports require “clear articulation” of whether the reason for placement in solitary confinement was valid and whether that reason remains valid.²¹⁹ If there are cases of particular note or concern, they will be regularly reviewed by the Detention Monitoring Council at ICE headquarters, which is comprised of a variety of ICE management.²²⁰ The goal of ICE’s new policy is clear: minimize the use of solitary confinement.

Both the congressional hearings on solitary confinement in the United States and ICE’s new policy support the inferences that there are serious issues with the current use of solitary confinement in the United States and that there is a growing public concern over its use. This is further supported by the roughly 90% drop in solitary confinement population in Mississippi and Colorado and 50% drop in Washington’s solitary confinement population.²²¹

VII. OVERTURNING PRECEDENT

The following part describes what conditions must be present to overturn Supreme Court precedent, whether by the Supreme Court itself or by the courts generally restricted by Supreme Court precedent. Those reasons include recent cases’ inconsistency with prior Supreme Court precedent and a change in social values. Developing those reasons in the context of *Sandin v. Conner*,²²² it is apparent the holding—though not the logic—in that case should no longer have precedential value.

215. U.S. IMMIGRATION & CUSTOMS ENF’T, *supra* note 207, at 4–5.

216. *Id.* at 5.

217. *Id.*

218. *Id.*

219. *Id.* at 8.

220. *Id.* at 10–11.

221. See Steinbuch, *supra* note 164, at 502.

222. 515 U.S. 472 (1995).

A. *Overturing Supreme Court Precedent*

One of the fundamental rules in American law is “stare decisis,” which is to say when a higher court issues a holding that should be followed by all courts below.²²³ However, while there has long been the belief that this rule outweighed the actual determination of a holdings’ rightness,²²⁴ there has also been the belief that prior holdings could be mistakenly made and should be overturned.²²⁵ Thus, a variety of reasons have developed to overturn Supreme Court precedent.²²⁶ The holding at issue in *Sandin* implicates two strong reasons for overturning precedent: inconsistency with other Supreme Court decisions and changed societal conditions.²²⁷

The first reason to overturn a Supreme Court precedent is its inconsistency with other Supreme Court holdings.²²⁸ A strong example of this is the case of *Hobbs v. Thompson*.²²⁹ That case dealt with the political speech rights of public employees.²³⁰ In that case, the Fifth Circuit held the decision in *United Public Workers of America v. Mitchell*²³¹ ran afoul of First Amendment cases decided “as early as 1940.”²³² Those cases demanded any law effecting First Amendment rights must be narrowly drawn, contrary to the holding in *Mitchell*; the Fifth Circuit found those cases accurately captured the protections owed to First Amendment rights and found *Mitchell* was no longer good law.²³³ This demonstrates the importance of consistency within the law, which may rely on a history of developed case law rather than a singular decision.

223. Margaret N. Kniffin, *Overruling Supreme Court Precedents: Anticipatory Action by United States Courts of Appeals*, 51 *FORDHAM L. REV.* 53, 54 (1982).

224. *Id.* at 55 (“Justice Brandeis wrote: ‘Stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.’” (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting))).

225. *Id.* (“Justice Cardozo observed that ‘the whole subject matter of jurisprudence is more plastic, more malleable, the [moulds] less definitively cast, the bounds of right and wrong less preordained and constant, than most of us . . . have been accustomed to believe.’” (quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161 (1921))).

226. *See id.* at 61–71.

227. *Id.* at 68–70.

228. *Id.* at 68.

229. 448 F.2d 456 (5th Cir. 1971).

230. *Id.* at 457.

231. 330 U.S. 75 (1947).

232. *Hobbs*, 448 F.2d at 471–72.

233. *Id.* at 472–73.

The second reason to overturn a Supreme Court precedent is changed societal conditions.²³⁴ In 1943, the Supreme Court held that a school regulation compelling students to salute the flag was unconstitutional.²³⁵ When discussing a shift in American attitudes concerning the role of government in citizens' affairs, Justice Jackson wrote:

These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment. But we act in these matters not by authority of our competence but by force of our commissions. We cannot, because of modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court *when liberty is infringed*.²³⁶

This is a strong statement on the value of the national zeitgeist in law. What this case suggests, and Professor Kniffin asserts, is that noticeable and pervasive social trends have the potential to influence Supreme Court decisions, even in the face of contrary precedent.²³⁷

B. Overturning Sandin v. Conner

When an individual is facing imprisonment at the fault of bad precedent, that court has a strong interest in resolving that case against precedent—loss of liberty is a powerful interest justifying a challenge to precedent.²³⁸ While *Sandin* holds that inmates in disciplinary confinement do not have a liberty interest warranting strong due process protections, in light of current understandings of the mental dangers disciplinary segregation poses and the growing societal concern for inmate populations, the analytical framework provided in *Wolff v. McDonnell*²³⁹ and *Sandin v. Conner*²⁴⁰ suggests inmates facing disciplinary segregation do have a protectable liberty interest.

234. Kniffin, *supra* note 223, at 70–71. Oliver Wendell Holmes accurately captured this sentiment when he said, “We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.” *Id.* at 70 n.90 (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897)).

235. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

236. *Id.* at 640 (emphasis added).

237. *See id.*; Kniffin, *supra* note 223, at 70–71.

238. *See* Kniffin, *supra* note 223, at 77 (citing *Rowe v. Peyton*, 383 F. 2d 709 (4th Cir. 1967), *aff'd*, 391 U.S. 54 (1968) (describing how, under Supreme Court precedent, an inmate would have faced years of imprisonment before he could challenge his conviction)).

239. 418 U.S. 539 (1974).

Wolff made clear that inmates, while not enjoying the full panoply of rights, do have liberty interests that may invoke Fifth Amendment due process protections.²⁴¹ *Sandin* stated that inmates facing solitary confinement do not possess strong due process protections because they are not facing an “atypical and significant hardship” differing from ordinary prison life;²⁴² however, as established in Part VI, disciplinary segregation is both atypical and significant. The vast majority of the prison population does not experience disciplinary segregation in the BOP, particularly when discussing ADX, so it is in fact significant.²⁴³ Further, it is a significant hardship because the inmates in disciplinary segregation face negative psychological effects—and not to a minor degree.²⁴⁴ There is little doubt these inmates face an atypical and significant hardship invoking due process protections under the Fifth Amendment.

Relevant to the analysis is that disciplinary confinement may work contrary to effective prison administration and achievement of penological interests. Disciplinary segregation is incredibly expensive compared with general population prisons, medium security prisons, and high security prisons.²⁴⁵ There is also a complete lack of evidence demonstrating disciplinary segregation reduces violence and assaults in prisons.²⁴⁶ The former alone is not a reason to question a prison policy or program, but when compounded with the latter proposition, there seems to be little reason to defer to prison administration. The value of disciplinary confinement in the BOP is thrown further into question when noting that inmates who spent significant time in disciplinary segregation have higher rates of recidivism.²⁴⁷ It is also important to note the government’s seemingly widespread recognition of the dangers disciplinary confinement poses, as well as the growing public outcry over its use—evidenced by a number of campaigns fighting the use of solitary confinement.²⁴⁸

240. 515 U.S. 472 (1995).

241. *Wolff*, 418 U.S. at 555–56.

242. *Sandin*, 515 U.S. at 486.

243. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68, at 1–2.

244. See, e.g., Grassian, *supra* note 193, at 1451–53.

245. See *supra* Part V.A.

246. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 68, at 34–35.

247. See *supra* Part V.B.

248. See, e.g., Carl Takei, *New Limits Announced on ICE’s Solitary Confinement of Immigrants*, ACLU: SPEAK FREELY, (Sept. 6, 2013, 4:06 PM),

In light of all that, it cannot be maintained that the current BOP procedure for placement in disciplinary confinement meets the required procedural safeguards.²⁴⁹ The recognition that disciplinary confinement is an “atypical and significant hardship” brings *Sandin* and *Wilkinson* in line with prior due process cases that focused on the nature of the deprivation—*Morrissey* and *Wolff*. Due process protections are flexible, and here they are strong in the face of grievous loss.

VIII. WHAT DUE PROCESS IS REQUIRED WHEN DETERMINING WHETHER DISCIPLINARY CONFINEMENT IS APPROPRIATE

The issues surrounding current disciplinary confinement policies—ADX in the BOP—do not call for an entirely new system, nor are they designed to burden the prison administration. *Morrissey v. Brewer* set out basic and flexible standards for meeting due process requirements that adequately address the imposition of disciplinary segregation,²⁵⁰ as it is an “atypical and significant hardship” deserving procedural safeguards.²⁵¹ Due process in this case requires at least two additions to the current process: the right to confront one’s accuser and the right to call witnesses in one’s defense.

There is little value in hiding the accuser from the accused inmate. It is either a prison staff member, who need not fear the inmate’s retaliation, or it is another inmate, who is already known as the victim of the accused’s conduct. At the very least, it is important any of the reviewing authorities meet with the accuser *in camera*, prepared with questions from the accused, so that the authorities may determine for themselves the reliability of the accuser—reliance on a written statement is merely that and nothing more: reliance.

The right to call witnesses poses the same problem, which is easily resolved by meeting *in camera* with questions provided by the accused. The secondary issue with calling witnesses is the problems it may cause with prison administration, particularly when the witness is a staff member with other responsibilities to take care of. However, as discussed above, there are potentially serious consequences to placing someone in solitary confinement, concerns warranting due process, so

<https://www.aclu.org/blog/immigrants-rights-prisoners-rights/new-limits-announced-ices-solitary-confinement-immigrants> [perma.cc/UCC4-WQZQ]; see also *supra* Part VI.C.

249. *But see* *Wilkinson v. Austin*, 545 U.S. 209, 230 (2005).

250. *See* *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

251. *See* *Sandin v. Conner*, 515 U.S. 472, 486 (1995).

efficient prison administration should not overcome the constitutional commands of the Fifth Amendment.

It is essential that all inmates facing placement in ADX disciplinary segregation be granted their due process rights. They are facing the loss of a liberty not contemplated in their initial sentence and newly created by the BOP's own policies and are thus granted protections under the Fifth Amendment—not the least of which are the rights to face one's accuser and call witnesses in one's defense. Under the reasoning provided by *Sandin v. Conner*,²⁵² and in light of modern psychology, imposition of solitary confinement on any inmate requires added procedural safeguards.

GRANT HENDERSON

252. 515 U.S. 472 (1995).