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Mary Ellen Kris

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COMMENT

HABEAS CORPUS CHALLENGES TO PRISON DISCIPLINE

I. INTRODUCTION

Habeas corpus administration1 and prison administration2 are two topics that have been discussed at length. However, the recent extension of habeas corpus to cover challenges to the constitutionality of prison discipline and conditions,3 and the extension of procedural due process to prison discipline


3. Johnson v. Avery, 393 U.S. 483 (1969), is the leading Supreme Court decision. There the Court invalidated a prison regulation that prohibited inmates from assisting each other in preparing applications for habeas corpus pursuant to which the petitioner had been confined to maximum security. Accord, Preiser v. Rodriguez, 411 U.S. 475, 498-99 (1973) (habeas corpus can be used to challenge duration of confinement and arguably is still available to challenge conditions of confinement); McCall v. Swain, No. 73-2013 (D.C. Cir., Mar. 20, 1975) (habeas corpus challenge to constitutionality of administrative decision to transfer prisoner to maximum security); Willis v. Ciccone, 506 F.2d 1011, 1014 (8th Cir. 1974) ("It is generally acknowledged that habeas corpus is a proper vehicle for any prisoner . . . to challenge unconstitutional actions of prison officials."); Williams v. Richardson, 481 F.2d 358, 360 (8th Cir. 1973) ("challenges to
cases added a new dimension to habeas corpus and prison administration problems. The new activity in this area is illustrated by an examination of Willis v. Ciccone, a decision by the United States Court of Appeals for the Eighth Circuit curtailing the use of evidentiary hearings in habeas corpus challenges to prison discipline. Willis raises the question whether federal courts have or should have power to conduct plenary evidentiary hearings on habeas corpus petitions challenging prison discipline, as distinguished from habeas corpus petitions challenging prison conditions in general, and as distinct from the traditional use of habeas corpus to challenge the constitutionality of the underlying conviction. Before examining Willis and its ramifications, an examination of the traditional rule governing a habeas corpus petitioner's right to an evidentiary hearing and the federal court's power to conduct one is in order. Against the background of the traditional rule, Willis will be considered in terms of what the Eighth Circuit was attempting to accomplish and why; and what better means, if any, are available to accomplish the court's objective.

II. HABEAS CORPUS EVIDENTIARY HEARINGS—THE TRADITIONAL ROLE OF THE DISTRICT JUDGE

A. When the District Judge Must Hold a Hearing

The first in a series of constitutional rules defining when a federal court must conduct an evidentiary hearing on a habeas corpus petition was laid down in Brown v. Allen. Justice Frankfurter delineated the rule: notwithstanding prior adjudication on the merits, when a constitutional claim is presented, a federal court must always draw its own conclusions of law and must always adjudicate mixed questions of fact and law with respect to the constitutional claim; however it must find historical facts de novo only if there was a vital flaw in the state court's fact-finding process.

Because the "vital flaw" test did not provide adequate guidance to the
It was replaced by the “full and fair hearing” test formulated in Townsend v. Sain: it was replaced by the “full and fair hearing” test formulated in Townsend v. Sain: when the facts are in dispute a federal court must hold an evidentiary hearing if the petitioner did not receive a full and fair hearing in the state court. The opinion did not define “full and fair hearing,” but instead established five specific categories and a sixth catch-all category in which petitioner is entitled to a hearing because of the inadequacy of the hearing below: (1) if the state hearing did not resolve the merits of the factual dispute; (2) if the state’s factual determinations were “not fairly supported by the record as a whole”; (3) if the “fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing”; (4) if the petitioner alleged substantial new evidence; (5) if “material facts were not adequately developed at the state court hearing”; and (6) if “for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.” Although these criteria provide some guidance, they are not free from ambiguity.

10. See Wright § 53, at 213-14; Developments 1117.
11. 372 U.S. 293, 312 (1963). See also Sanders v. United States, 373 U.S. 1 (1963) (hearing required for subsequent applications for habeas corpus where a different ground is asserted).
12. 372 U.S. at 312.
13. Id. at 313.
14. For instance, the third criterion is circular: petitioner did not receive a full and fair hearing if the state fact-finding procedure was not adequate to afford a full and fair hearing. The district judge is left to determine the nature of a full and fair fact-finding procedure. The second criterion appears to establish a standard of evidence. “In requiring the habeas court to determine if the state court’s conclusions were ‘fairly supported’ in the record, Townsend recognizes that a review of the sufficiency of evidence akin to that provided by an appellate court is a necessary part of the inquiry into reliability.” Developments 1123. This is contradicted, however, by the rule that, in general, challenges to the sufficiency of the evidence are a question of state law and hence not cognizable in habeas corpus. Greene v. Tucker, No. 74-1692, at 5 (4th Cir., Mar. 25, 1975) (per curiam) (“The power of a federal court to grant habeas relief for insufficiency of the evidence is limited to determining whether the conviction rests upon any evidence at all”); Cunha v. Brewer, 511 F.2d 894 (8th Cir. 1975) (sufficiency of evidence not cognizable unless there was no evidence to sustain the conviction; credibility not cognizable); Price v. Slayton, 347 F. Supp. 1260, 1273 (W.D. Va. 1972) (where there is at least some evidence on which jury could have found defendant guilty, district court cannot inquire further into the sufficiency of the evidence on a habeas corpus petition); Brown v. Slayton, 337 F. Supp. 10, 13 (W.D. Va. 1971) (federal question not raised by allegation that evidence was insufficient to support revocation of probation unless totally devoid of evidentiary support); Developments 1070 n.170 (state prisoner's claim that he was convicted by insufficient evidence is question of state law and not cognizable in habeas corpus). Hence, the purpose and effect of the second criterion is unclear. The sixth category “is intentionally open-ended because we cannot here anticipate all the situations wherein a hearing is demanded. It is the province of the district judges first to determine such necessities in accordance with the general rules.” Townsend v. Sain, 372 U.S. at 317-18. Since it provides no guidance, the sixth category is not a criterion at all. Rather it is a fail-safe mechanism to insure that a legitimate petitioner is not denied relief simply because none of the defined categories cover his situation. As such, it is an admission that the first five categories are inadequate. Hart & Wechsler question the purpose of such an open-ended category. Hart & Wechsler 1504. For further discussion of the Townsend criteria see Developments 1124-40; Note, Federal Habeas Corpus for State Prisoners: The Isolation Principle, 39 N.Y.U.L. Rev. 78, 106-28 (1964).
In 1966 these criteria were substantially enacted by Congress by amendment to the Habeas Corpus Act. This amendment apparently was intended to codify the Townsend criteria. However, the change in format (eight criteria instead of six) and the creation of a presumption of validity of state records (unless one of the eight criteria is proven) has led to speculation as to

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15. Act of Nov. 2, 1966, Pub. L. 89-711 § 2(d), 80 Stat. 1105 (codified at 28 U.S.C. § 2254(d) (1970)). This section provides that "[i]n any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant . . . ;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced . . . and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record . . . considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous."

Sanders v. United States, 373 U.S. 1 (1963) indicated that 28 U.S.C. § 2255 (1970), which provides relief similar to that afforded by the writ of habeas corpus for federal prisoners, should be read in conjunction with the Townsend principles (now embodied in § 2254(d)) even though this construction seems to be at odds with the language of § 2255 which provides in part: "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto."

17. See Wright § 53, at 214-15 n.54.
18. Petitioner bears the burden of proof in overcoming the presumption of validity of the state record. LaVallee v. Delle Rose, 410 U.S. 690, 695 (1973) (per curiam) (petitioner has burden of proving by convincing evidence that state factual determination was erroneous); accord, Cranford v. Rodriguez, No. 74-1223 (10th Cir., Mar. 18, 1975); Faught v. Cowan, 507 F.2d 273, 275 (6th
the purpose of the amendment and its effect on the *Townsend* criteria.\(^9\)

When the habeas corpus petitioner is entitled to a plenary hearing and what showing he must make is still uncertain under this statute and *Townsend*. Nonetheless, the district judge has at least some guidelines, however inadequate, on which to rely.

**B. When the District Judge May Hold a Hearing**

In contrast, the problem of when the district judge *may* or *should* hold an evidentiary hearing,\(^20\) even though one is not required, is an area without guidelines.\(^21\)

*Brown v. Allen*\(^22\) made it clear that the federal court's *power* to conduct plenary habeas corpus hearings was not limited to those situations where a hearing is mandatory:

Although they *have the power*, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights

\(^19\) See Hart & Wechsler 1505; Developments 1122 n.46. "On its face and in light of the legislative history, the amendment is not directed at the question whether to hold a federal evidentiary hearing. Instead, it assumes that a hearing is to be held and attempts to decide if the state's factual conclusions are to be deemed presumptively correct at that hearing. Though their purposes are distinguishable, the amendment and *Townsend* do reinforce each other. If the procedure at the state hearing was so inadequate that a *Townsend* hearing is necessary, it would be inconsistent, as the statute recognizes, for the judge at the federal evidentiary hearing to treat the state decision as presumptively correct." Id.

\(^20\) This is primarily the district judge's province. 28 U.S.C. § 2241(a) (1970) gives the courts of appeals and the Supreme Court jurisdiction to hear the petition, but subdivision (b) provides that they may decline to exercise jurisdiction and instead transfer the application to the district judge. It is incumbent upon a petitioner seeking habeas relief from an appellate court to explain why he did not petition the district court directly. Id. § 2242. One reason appellate courts decline to hear habeas corpus petitions is to allow impartial review in case of appeal. Hart & Wechsler 1431.

\(^21\) But cf. Developments 1144.

\(^22\) 344 U.S. 443 (1953); see text accompanying notes 6-10 supra.
have been protected. It is necessary to exercise jurisdiction to the extent of determining by examination of the record whether or not a hearing would serve the ends of justice.\textsuperscript{23}

The Court reaffirmed this broad discretionary power in \textit{Townsend}:

The purpose of the [full and fair hearing] test is to indicate the situations in which the holding of an evidentiary hearing is mandatory. In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. If he concludes that the habeas applicant was afforded a full and fair hearing by the state court resulting in reliable findings, he may, and ordinarily should, accept the facts as found . . . . But he need not. In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim.\textsuperscript{24}

It is no accident that federal district courts were given broad power to conduct plenary habeas corpus hearings. The Court, in both \textit{Brown} and \textit{Townsend}, realized that it was bestowing power with few guidelines for its exercise. But in each case the Court implicitly concluded that uniformity was less valuable than flexibility, which it saw as essential to the preservation and administration of this extraordinary writ.\textsuperscript{25} Maximum flexibility meant some uncertainty, but the Court expressed confidence that the district judges, whom the Court adjudged to be in the best position to assess the need for a hearing, could meet this burden.\textsuperscript{26}

The Court's deference to the district judge probably resulted in part from necessity: the only way to insure maximum flexibility—the Court's goal—was to refrain from formulating rules for the lower courts and to defer instead to their discretion. Apart from necessity, it is likely that the Court's deference was also motivated by a recognition of the importance of the fact-finding process and the superior position the district judge occupies with respect to it. Thus, the recognition that fact-finding bears directly on the outcome\textsuperscript{27} is at

\begin{itemize}
\item \textsuperscript{23} 344 U.S. at 464 (footnote omitted) (emphasis added).
\item \textsuperscript{24} 372 U.S. at 318.
\item \textsuperscript{25} "There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus . . . ." Harris v. Nelson, 394 U.S. 286, 292 (1969).
\item \textsuperscript{26} "[E]xperience cautions that the very nature and function of the writ of habeas corpus precludes the formulation of fool-proof standards which the . . . District Judges can automatically apply. Here as elsewhere in matters of judicial administration we must attribute to them the good sense and sturdiness appropriate for men who wield the power of a federal judge. Certainly we will not get these qualities if we fashion rules assuming the contrary." Brown v. Allen, 344 U.S. 443, 501 (1953) (Frankfurter, J., concurring).
\item \textsuperscript{27} "To experienced lawyers it is commonplace that the outcome of a lawsuit . . . depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are
the root of the federal courts' plenary power to conduct habeas corpus hearings.  

To summarize, as the use of habeas corpus expanded, so did the power of federal courts to conduct plenary hearings on the petition. This was in keeping with a prevailing respect for the importance of the "Great Writ," the need for a federal forum to effectuate the writ, the relation of the fact-finding process to the integrity of the outcome, and the superior position of the district judge to administer the process.

III. Willis v. Ciccone

A. Time For Change

Habeas corpus was intended to be an extraordinary remedy for an extraordinary deprivation. Its abuse is well-documented. The recent extension of the writ to permit challenges to prison conditions and prison discipline, and the imposition of due process requirements on the prison discipline setting, will likely lead to further abuses. Specifically, it is probable that the determined assume an importance fully as great as the validity of the substantive rule of law to be applied." Wingo v. Wedding, 418 U.S. 461, 474 (1974), quoting Speiser v. Randall, 357 U.S. 513, 520 (1958).


29. See generally Developments.

30. Id. at 1060-62.

31. "[H]abeas corpus is an extraordinary remedy . . . . Its use has been limited to cases of special urgency, leaving more conventional remedies for cases in which the restraints on liberty are neither severe nor immediate." Hensley v. Municipal Court, 411 U.S. 345, 351 (1973) (dictum); see Note, Federal Habeas Corpus For State Prisoners: The Isolation Principle, 39 N.Y.U.L. Rev. 78 (1964); note supra.

32. In 1972 there were 9,317 habeas corpus petitions filed. 1972 Admin. Office of the U.S. Cts. Ann. Rep. of the Director 287 [hereinafter cited as Report of the Director]. In general, it is acknowledged that most of the petitions filed are unmeritorious. See authorities cited in notes 35 & 95 infra. It has been suggested that one possible reason for the large number of habeas corpus petitions may be the revocation of prison rules that had prevented prisoners from filing petitions. Developments 1041 n.4. Another commentator pointed to Brown v. Allen, 344 U.S. 443 (1953), and the expansion of the fourteenth amendment as possible reasons for increased filings. Note, Habeas Corpus vs. Prison Regulations: A Struggle in Constitutional Theory, 54 Marq. L. Rev. 50, 53 (1971).

33. See note 3 supra and accompanying text.


already sizeable number of frivolous petitions will increase.\textsuperscript{36} Such a development will in turn increase the burdens on district judges to conduct evidentiary hearings and other discovery, and will add a new dimension to the comity problem\textsuperscript{37} by bringing federal courts into conflict with the administration of state prisons.

The Eighth Circuit, which is reputedly conservative toward judicial intervention into prisons,\textsuperscript{38} may have had the foregoing factors in mind when it expressed disenchantment with the district courts' manner of processing habeas corpus petitions\textsuperscript{39} and decided to displace some of the discretion given to the district courts by 28 U.S.C. section 2254(d) and Townsend by interposing its own guidelines on the district courts. It accomplished this by using Willis v. Ciccone\textsuperscript{40} as a vehicle for a quasi-advisory opinion,\textsuperscript{41} venturing well beyond what was necessary to dispose of the appeal.\textsuperscript{42}

\begin{enumerate}[\textsuperscript{36}]
\item But see Report of the Director 116, predicting that § 1983 complaints would continue to rise, while habeas corpus petitions would continue to decline because of the improvement in post-conviction remedies, the appointment of counsel for indigents, and the abolition of the death penalty. (Habeas corpus petitions from prisoners on death row were numerous and complicated and were given priority consideration by judges. Id. at 119). Subsequent to this prediction, however, the Supreme Court held in Preiser v. Rodriguez, 411 U.S. 475 (1973), that challenges to duration of confinement must be brought in habeas corpus rather than under § 1983. This should increase the number of habeas corpus petitions filed, though a corresponding decrease in § 1983 complaints will not necessarily ensue since the decrease may be offset by increased § 1983 challenges to conditions of confinement, as distinct from duration of confinement. Wolff v. McDonnell, 418 U.S. 539 (1974), which extended due process to prison discipline, will probably result in an increase in § 1983 complaints and habeas corpus petitions.

\item Comity is usually a question of conflict between state and federal judiciaries. "[F]ederal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries." Henry v. Mississippi, 379 U.S. 443, 453 (1965) (dictum). But in Preiser v. Rodriguez, 411 U.S. 475 (1973), the Supreme Court invoked comity in terms of the conflict between the federal judiciary and state prison administration. See notes 117-19 infra and accompanying text for fuller discussion of this new comity problem.


\item "This case . . . raises substantial questions regarding the scope of the writ of habeas corpus as well as the propriety of certain procedures followed by the district court in processing such petitions. In view of the increasing number of habeas corpus actions being filed, and what we perceive to be a basic misunderstanding by both federal and state prisoners of the availability of the writ for redressing prisoner grievances relating to the conditions of their confinement, these questions are important ones. "To avoid further abuse of the writ and hopefully to obviate some of the unnecessary procedural time and paper work undertaken by district courts, we think it useful to briefly review both the substantive claims for which habeas relief is available and the procedural guidelines to be followed with prisoner petitions." Willis v. Ciccone, 506 F.2d 1011, 1014 (8th Cir. 1974).

\item 506 F.2d 1011 (8th Cir. 1974).

\item Coincidentally, the Supreme Court was accused of using Townsend as a vehicle for an advisory opinion. 372 U.S. at 326-27 (Stewart, Clark, Harlan & White, JJ., dissenting).

\item In Frazier v. Ciccone, 506 F.2d 1022 (8th Cir. 1974), another habeas corpus case decided the same day as Willis, the court held that petitioner's claim was frivolous on its face and thus not cognizable. Although that holding would have disposed of the appeal, the court went on to hold
The petitioner in *Willis* was a federal prisoner who alleged that he had been placed in punitive isolation pursuant to a disciplinary hearing that denied him procedural due process by failing to provide proper notice and cross examination, and substantive due process in that the outcome of the hearing allegedly was determined by a false disciplinary report. Petitioner also alleged deprivation of independent constitutional rights, namely, access to the courts and freedom to associate with white prisoners. Petitioner's appeal of the district judge's decision to deny in part the requested injunctive relief was based on the fact that the evidentiary hearing was conducted by a magistrate in contravention of *Wingo v. Wedding*, and the district judge refused petitioner's request to hear the facts de novo. The Eighth Circuit decided that a hearing should not have been conducted at all.

**B. The Court's Analysis**

The court departed from tradition in its treatment of a prisoner's right to an evidentiary hearing on a habeas corpus petition alleging unfair prison discipline and controverting the correction officer's position. The court's explicit analysis of the habeas corpus evidentiary hearing requirement was threefold: first, the need for a hearing on a habeas corpus claim of denial of that the response by the prison authorities eliminated the necessity of a hearing on the factual dispute. Id. at 1013. The resolution of factual disputes in favor of prison authority respondents, based on the presumptive veracity of the respondent's return, was unnecessary to the disposition of the case and apparently departed from the most analogous, if not controlling, rule. 28 U.S.C. § 2248 (1970) provides: "The allegations of a return . . . , if not traversed, shall be accepted as true except to the extent that the judge finds from the evidence that they are not true." A similar presumption employed in Willis is discussed at notes 68 & 69 infra and accompanying text.

43. 506 F.2d at 1013.
44. Id.
48. 506 F.2d at 1013.
49. Id. at 1013-14.
procedural due process in prison discipline; second, the power to conduct an evidentiary hearing to resolve factual disputes in the prison discipline record; third, the power to conduct an evidentiary hearing to resolve factual disputes arising out of prison conditions apart from the disciplinary context. Implicit in the court's analysis is a distinction between the formal disciplinary and non-disciplinary settings. This is apparent from the court's conclusions that a hearing is not required to dispose of the procedural due process claim and that a hearing cannot be held to resolve factual disputes in the discipline record, but that a hearing is appropriate to resolve factual disputes involving alleged deprivations of constitutional rights apart from the discipline hearing. There is perhaps a rational basis for the discipline/non-discipline distinction, since the non-discipline claim involves finding facts for the first time, whereas the resolution of facts regarding a discipline claim involves re-finding facts. Moreover, it is arguable that prison discipline should be largely a matter of administrative discretion, at least more so than allegedly unconstitutional non-disciplinary prison conditions should be.

Regarding the procedural due process claim, the court's analysis of the need for a hearing involved a consideration of what facts are relevant and necessary to the determination of the issue and what means are available for obtaining those facts. It concluded that in the instant case the magistrate had found irrelevant facts and that the relevant facts could have been developed more efficiently by documentary evidence rather than by a hearing. These reasons would have sufficed to support the court's conclusion that a hearing on the procedural due process claim was superfluous in this case. However, the court went further by stating that it assumed all prison disciplinary hearings would be conducted in accordance with the procedural due process guidelines mandated by Wolff v. McDonnell and adopted by the Bureau of Prisons. If the court intended to imply that henceforth prison

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50. Id. at 1017.
51. Id.
52. Id. at 1015, 1018.
53. Id. at 1018.
54. This argument is made regularly by prison officials. It was a fundamental rationale of the hands-off doctrine, see note 123 infra, but is accorded less respect today. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 555-57 (1974). But see, e.g., Fowler v. Anderson, 386 F. Supp. 411, 415 n.3 (E.D. Okla. 1974) ("Actions of prison officials in disciplining inmates are not subject to judicial review in the absence of arbitrariness or caprice.").
55. 506 F.2d at 1017.
56. "The magistrate heard evidence on factual disputes over whether the petitioner had stolen food from the prison cafeteria, whether he had in fact been found 'out of bounds,' whether he had been in possession of property belonging to another, and whether he had committed homosexual acts. The hearing, however, did not focus on the federal issue, that is, whether procedural due process had been afforded in the disciplinary proceedings . . . ." Id.
57. Id.
58. Id. at n.6.
discipline hearings will be regarded as presumptively fair, then its reasoning was superfluous with respect to the particular procedural due process claim under consideration. In addition, such a presumption is arguably unwarranted in view of the fact that the Bureau of Prisons guidelines apply to Federal Prisons only, whereas the Willis decision presumably applies to both federal and state prisons. Moreover, the existence of guidelines does not guarantee conformance therewith. Although the court's position does not preclude a petitioner from showing that the hearing failed to conform with procedural due process, it makes it very difficult for him to make the required showing.

With respect to petitioner's claim that he was deprived of substantive due process by being disciplined on the basis of a false disciplinary report, the court held unequivocally that district courts are powerless to resolve such disputes:

Habeas petitions cannot seek de novo review of the facts involved in a disciplinary proceeding. A federal district judge or magistrate can never serve as final arbiter on factual disputes over the occurrence of rule infractions within a prison.

The court justified this holding by employing another implicit presumption, namely, that the findings and conclusions adopted by a discipline committee are presumptively fair. Its rationale for this presumption was that, pursuant to Wolff, prison hearings will culminate in a written statement of facts relied upon and reasons therefor. "A result can be reached at the pleading stage" because of the weight the court should accord this written statement.

The district court should simply determine whether the decision was supported by some facts. The sole and only issue of constitutional substance is whether there exists any evidence at all, that is, whether there is any basis in fact to support the action taken by prison officials. . . . Otherwise the federal court would assume the task of retrying all prison disciplinary disputes.

In other words, the court concluded that because prison discipline hearings presumptively adhere to Wolff standards, and are therefore presumptively fair, factual disputes regarding the discipline record can be and must be
resolved in favor of the respondent so long as there is any basis in fact for the outcome of the prison hearing. In the instant case, the basis in fact was an allegedly false disciplinary report. By foreclosing the district court from deciding factual disputes as to the disciplinary charges filed against the petitioner, the court successfully eliminated the necessity of relitigating all disciplinary hearings. However, the additional practical effect of this abrogation of judicial review is the circular prospect that if a discipline committee accepts a false report of a correction officer this false report will become part of the respondent’s return; and because the respondent’s return is based on this documentary evidence, Willis would require acceptance of the return, and thereby preclude the petitioner from proving the falsity of the disciplinary report. Since it is likely that the correction officer will be sustained by the discipline committee even if he is lying, and since a minimum of evidence is

68. See Frazier v. Ciccone, 506 F.2d 1022 (8th Cir. 1974), discussed at note 42 supra.

69. It is unclear whether the weight the court would attach to such records and the narrow scope of review it would impose on district courts reflect existing law. See 28 U.S.C. § 2254(d)(8) (1970) (quoted at note 15 supra) (if petitioner challenges sufficiency of the evidence, federal court must determine whether the fact-finding is fairly supported by the record as a whole; this is the analogue of the second Townsend criterion, discussed at note 14 supra); K. Davis, Administrative Law chs. 29-30 (3d ed. 1972) (“Almost any scope of review is possible, from complete substitution of judicial judgment at one end to complete judicial hands off at the other.” Id. § 29.07. “The quality of the agency and of its performance in the particular case necessarily affects scope of review. In one case a judge looks at a record and quickly gets the impression that the agency is in all respects the master of the situation. . . . In another case the judge develops the uneasy feeling that one party has been administratively mistreated, and his own solution of the problem gradually becomes firm and strong.” Id. § 30.06, at 553. “[C]ourts which are ordinarily trying to limit themselves to reasonableness inevitably to some extent determine questions of rightness, for the problem is in final analysis one for judicial judgment, and the formula for review becomes to some extent artificial.” Id. § 29.06); C. McCormick, Evidence § 352 (2d ed. 1972) (standard of judicial review of administrative findings is the substantial evidence rule, as compared to the clearly erroneous rule employed by appellate courts in reviewing fact-findings of the trial judge in a non-jury case); Allocation of Fact-Finding, supra note 1, at 947 (“[I]f the habeas fact-finding hearing is to perform any function in the review of the sufficiency of evidence, the habeas court must have a greater obligation than [an appellate court] on direct review.”); Beyond the Ken, supra note 2, at 530 n.116 (regarding questions of fact, courts use the “substantial evidence on the record considered as a whole test”). Apparently, prior to the demise of the hands-off doctrine, see note 123 infra, the standard of review was the “arbitrary or capricious test” or the “unsupported by substantial evidence rule.” See Note, Federal Habeas Corpus Review of “Final” Administrative Decisions, 56 Colum. L. Rev. 551, 578 (1956). The standard of review proposed by the Willis court seems closer to the arbitrary or capricious test than it does to the prevailing substantial evidence test. But Willis is not alone in applying a narrow standard of review. See Woodard v. Mills, No. 74-2088 (4th Cir., Mar. 17, 1975) (per curiam) (“[W]e cannot serve as a reviewing body over the accuracy of disciplinary committees’ findings of fact.” Id. at 3.); note 14 supra for a discussion of habeas corpus challenges to the sufficiency of the evidence.


71. See, e.g., Harvard Study, supra note 2, at 210; Tibbles 391 (“[O]nly in ‘exceptional circumstances’ will the adjustment committee fail to uphold the officer making the charge. If the
all that is required to immunize the committee's findings and conclusions from judicial review, the prisoner faces the prospect of being unfairly punished in contravention of substantive due process and of being denied the opportunity for judicial review of this claim. In sum, the Supreme Court gave prisoners the right to a disciplinary hearing in conformity with certain safeguards. This right was the Eighth Circuit's basis for several assumptions, which assumptions effectively deny prisoners a habeas corpus hearing on the substantive and procedural fairness of the discipline. The question remaining is: on what basis did this court indirectly limit Wolff?

IV. Willis—Innovative, Inappropriate, Inadequate?

A. Should Prior Law Have Controlled?

The court did not cite any authority for its holdings because prior to Willis no cases or statutes recognized habeas corpus challenges to prison discipline as a sui generis habeas corpus problem. On the other hand, although Brown, Townsend, and 28 U.S.C. section 2254(d) are arguably distinguishable since they are concerned with plenary review of state court proceedings, not federal prison discipline proceedings, the court did not distinguish or even mention these precedents. Assuming that the court was distinguishing them sub silentio, was the court correct in doing so? And if the court was correct in finding that these authorities do not control, should the court nonetheless have found them persuasive?

Arguments can be made both ways. Townsend can be viewed as controlling the disposition of only those habeas corpus petitions which collaterally attack conviction, and as merely persuasive as regards the disposition of petitions challenging prison discipline and prison conditions. Judicial conservatives might argue that past failures of the judiciary and legislature to provide adequate guidance for the district judge caused the abuse of the writ and that such problematic precedent as Townsend should not be extended. Moreover, some would probably argue, notwithstanding Supreme Court decisions to the

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72. But cf. Burks v. Egeler, No. 73-2003 (6th Cir., Feb. 6, 1975) (allegation that conviction was based on perjured testimony does not state a due process claim absent proof of prosecutorial involvement in the perjury; hence no habeas corpus hearing required).


74. Compare the Willis court's position (see text at note 64 supra) with that of the Townsend Court: "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues. Thus a narrow view of the hearing power would totally subvert Congress' specific aim . . . . The language of Congress, the history of the writ, the decisions of this Court, all make clear that the power of inquiry on federal habeas corpus is plenary. Therefore, where an applicant for a writ of habeas corpus alleges facts which, if proved, would entitle him to relief, the federal court . . . has the power to receive evidence and try the facts anew." Townsend v. Sain, 372 U.S. 293, 312 (1963).
contrary,\textsuperscript{75} that there is a qualitative difference in the use of the writ to challenge unconstitutional imprisonment and the use of the writ to challenge unconstitutional conditions of imprisonment.\textsuperscript{76}

On the other hand, it is arguable that Townsend preempts the entire area of habeas corpus hearings, not just those related to attacking a conviction. Although the Supreme Court has not been confronted with the precise question, it apparently has assumed that this new use of habeas corpus would be bound by the traditional rules. In fact, in Preiser v. Rodrigues,\textsuperscript{77} the Court recently applied the traditional exhaustion requirement\textsuperscript{78} to habeas corpus challenges to prison discipline.\textsuperscript{79} Moreover, if the traditional rule giving broad power and discretion to the district judge should not be applied to prison discipline challenges, perhaps it is for the Supreme Court, which developed this rule, and not the courts of appeals, to distinguish it. This line of argument would appeal to whose who favor maintenance or extension of the writ and those who favor some degree of judicial intervention into, or oversight of, prisons. They would argue further that if federal courts have plenary power to relitigate\textsuperscript{80} questions disposed of by state tribunals, a fortiori federal courts should have plenary power over questions disposed of by prison boards, which arguably should be accorded far less deference than a state trial conducted publicly by an impartial judge in accordance with rules of evidence and the Constitution.\textsuperscript{81} Moreover, if this federal power was granted

\textsuperscript{75} See note 3 supra.

\textsuperscript{76} One could speculate that the Eighth Circuit may have been reluctant to assume a role in rectifying prison conditions, or at least was wary of administering a remedy so prone to abuse, and accordingly used Willis to circumvent the imposition of this role.

\textsuperscript{77} 411 U.S. 475 (1973).

\textsuperscript{78} See text accompanying note 109 infra for a discussion of Preiser and the exhaustion requirement.

\textsuperscript{79} 411 U.S. at 491.

\textsuperscript{80} But cf. Kaufman v. United States, 394 U.S. 217 (1969) ("These problems raise, not the issue whether relitigation is necessary, but whether one adequate litigation has been afforded." Id. at 231, quoting Thornton v. United States, 368 F.2d 822, 831 (D.C. Cir. 1966) (Wright, J., dissenting)).

\textsuperscript{81} However, this argument is persuasive only if the adjudicatory-adversary model, with its emphasis on fact-finding, is deemed superior to other hearing procedures. Cf. J. Palmer, Constitutional Rights of Prisoners § 7.4.2 (1973). Commentators frequently evaluate prison discipline hearings by a due process criterion based on the adjudicatory-adversary model. E.g., Harvard Study 210-11 ("[T]he factors affecting the Board's decisions—personal knowledge of, and sometimes bias toward, the inmate defendant, tendency to support staff, and reaction to inmate attitude before the Board—combine to make the prison disciplinary process something less than a hearing before impartial arbiters based only upon evidence and argument in open court." (footnotes omitted)). On the other hand, some commentators have suggested that the adjudicatory emphasis on fact-finding may be somewhat misplaced in the prison hearing where other goals are operative. See, e.g., id. at 223 (study revealed that prison hearings at the institution under study emphasized disposition of the case over accurate fact-finds); Kraft 73; cf. ABA Survey 2 (the variety of disciplinary procedures employed by prisons indicates that there is no consensus that discipline should be based on accurate fact-finding; nor is there agreement as to the objectives of discipline). The Supreme Court has hesitated to turn the prison hearing into a
notwithstanding important considerations of federal-state comity, a fortiori the judiciary-prison conflict should not be considered compelling.

B. Was Appellate Court Intervention Proper?

The traditional role of a court of appeals has been to reverse the district court only for an abuse of discretion in failing to hold a hearing in an appropriate case. Thus if petitioner had a right to a hearing under Townsend, i.e., if he alleged facts which, if proven, would indicate that a constitutional deprivation had occurred and petitioner had not yet had a full and fair hearing on this claim, then the district court clearly would be guilty of an abuse of discretion in denying a hearing. Willis is distinguishable from the above situation, however, for the court did not hold that the district court had abused its discretion in denying a hearing, but rather that it had exceeded its power in granting one. The validity of this holding turns on whether Willis was correct in distinguishing Townsend sub silentio.

Assuming that Willis was correct in distinguishing Townsend sub silentio, was this a proper subject for a quasi-advisory opinion? The court of appeals unquestionably had reason to be concerned with the problem, since it oversees the district courts and is appropriately concerned with their efficient administration. In particular, it was logical and appropriate for the court to be concerned with a practice that purportedly encourages the filing of frivolous applications and which consumes time that could be more efficiently spent. Although the court's concern was certainly proper, was it proper for it to interpose its own solution? Even if Townsend is only persuasive and the Willis court was free to formulate a new guideline for disposing of habeas corpus challenges to prison discipline, arguably, it was nonetheless inappropriate for the appellate court to have interfered with the district court's full-blown adversary trial. Wolff v. McDonnell, 418 U.S. 539 (1974), discussed at text accompanying notes 122-34 infra. In contrast, the dissenters in Wolff argued in favor of extending greater due process rights, such as rights to cross-examination, confrontation, and counsel, to prisoners. Id. at 589-92 (Marshall & Brennan, JJ., dissenting in part); see notes 138 & 139 infra. The dissent's position was based on an implicit assumption that the fact-finding model, rather than the dispositional model, should be employed in prison discipline hearings. Accord, Cluchette v. Procunier, 497 F.2d 809, 816-17 (9th Cir. 1974) (discipline hearing must provide for fair fact-finding); Walker v. Hughes, 386 F.Supp. 32, 40 (E.D. Mich. 1974) (accurate fact-finding cannot be sacrificed for speedy disposition). Contra, Gregory v. Wyse, No. 73-1405 (10th Cir., Mar. 11, 1975).

82. The Supreme Court indicated in Townsend v. Sain that it was not concerned that district judges would abuse their discretion and upset federal-state relations. 372 U.S. at 318.
84. 506 F.2d at 1015.
discretion because appellate courts operate from a vantage point that is in many respects inferior to that of the district court. This, it will be remembered, is precisely why the Supreme Court deferred to the district courts in the first instance. The Supreme Court, in Harris v. Nelson, reaffirmed its deference to the district court based on its confidence in the district judge's unique ability to supervise the fact-finding process. There, the Court broadened the district judge's power to order discovery interrogatories in order to permit him to tailor the fact-finding to the particular habeas corpus application. This discovery power supplemented rather than displaced the power to hold evidentiary hearings. Thus the Willis court appears to have misconstrued Harris v. Nelson when it cited Harris for the proposition that district courts should rely on discovery techniques other than the evidentiary hearing. While Willis was correct in stating that "[i]n many recurring instances other fact-finding procedures available to the district court are superior, and thus preferable, to the evidentiary hearing," nonetheless, Harris, Townsend, and Brown stand for the proposition that the district judge is in the best position to assess which procedures are preferable in a given instance.

The traditional roles of the district and appellate courts are not as well defined in practice as they are in theory—in part because the lack of precise guidelines for construing habeas corpus petitions has impeded uniformity on both the trial and appellate levels. For example, it appears that appellate courts often reverse for failure to hold a hearing when in fact one probably was not necessary. Appellate courts sometimes appear to reach for a

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86. See text accompanying notes 26 & 27 supra.
88. Id. at 299.
89. 506 F.2d at 1017.
90. Id.
91. Compare United States ex rel. Hill v. Ternullo, 510 F.2d 844 (2d Cir. 1975) (remanded for evidentiary hearing on whether petitioner understood the sentencing consequences of his guilty plea), and Finklea v. Estelle, 506 F.2d 438 (5th Cir. 1975) (remanded for evidentiary hearing on whether prosecutor violated Brady rule and whether petitioner was denied effective assistance of counsel), United States ex rel. Mattox v. Scott, 507 F.2d 919 (7th Cir. 1974) (per curiam) (remanded for evidentiary hearing on whether petitioner was fully advised of his right to remain silent because state failed to file affidavits to support its position that petitioner had been fully informed), Remmers v. Brewer, 475 F.2d 52 (8th Cir. 1973) (per curiam) (remanded for evidentiary hearing on § 1983 complaint alleging denial of due process at prison disciplinary hearing and infringement of first amendment rights), with United States ex rel. Hayward v. Johnson, 508 F.2d 322 (3d Cir. 1975) (evidentiary hearing unnecessary because claim fully developed at suppression hearing and new evidence held not probative).
92. See, e.g., Haines v. Kerner, 404 U.S. 519 (1972) (per curiam). Haines was a § 1983 action for damages for injuries suffered while in solitary confinement. Prisoner alleged that he had been disciplined without due process, though he conceded that he had hit another prisoner over the head with a shovel, the act for which he was disciplined. The district court dismissed and the dismissal was affirmed on appeal. The Supreme Court reversed and remanded, stating: "Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under
cognizable claim; presumably it is better to err on the side of caution by holding an unnecessary hearing, than it is to deny relief to a legitimate petitioner.

C. Toward Judicial Restraint?

Although Townsend is a relatively recent case, much has changed since it was decided. The decade of Supreme Court activism in the areas of constitutional criminal procedure and habeas corpus led to frequent criticism. New times and a new Court have already resulted in retrenchment in related areas. Three recent decisions merit examination as a barometer of the Court's attitude today toward habeas corpus and prisoner complaints.

1. Wingo v. Wedding—The District Judge's Role Reaffirmed

The traditional emphasis on accurate fact-finding and the district judge's role in assuring such accuracy were reaffirmed in Wingo v. Wedding.

the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Id. at 520-21, quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

93. There is also a practical reason for frequent appellate reversals for failure to conduct an evidentiary hearing: when "a hearing is not held, all of the petitioner's allegations will be accepted as true for purposes of appeal to the extent that they are uncontradicted by the record." R. Sokol, A Handbook of Federal Habeas Corpus § 13, at 68 (1965). "If [the petition] was dismissed summarily without issuing an order to show cause or holding a hearing, the chances of securing a reversal on appeal are quite good." Id. § 16.2.

94. Appellate courts reverse and remand for a hearing not only because petitioner's uncontradicted allegations are taken as true, but because the appellate court knows that reversal will result only in an order to show cause or a hearing. Id.


96. Townsend was decided by the Warren Court. Stewart and White dissented. Between the new Court personnel (Burger, Rehnquist, Powell & Blackmun) and the original two dissenters (Stewart & White), it is possible that Townsend would be decided differently today.


98. See notes 26 & 27 supra and accompanying text.

Wedding challenged a local court rule, formulated pursuant to the Federal Magistrates Act, which permitted a district judge to assign a magistrate to hold a habeas corpus evidentiary hearing, electronically record the hearing, and prepare findings of fact and conclusions of law for the judge. Upon the request of either party, the judge would be required to listen to the recording of the hearing and give it de novo consideration. Wedding argued that neither the text nor legislative history of the Federal Magistrates Act showed an intent to override existing law requiring the judge himself to hold the hearing. The Supreme Court agreed, and held that it was not the intent of the Federal Magistrates Act to empower magistrates to hold habeas corpus evidentiary hearings. Furthermore, the Court stated that the defect was not cured by the judge listening to a recording of the entire hearing and giving it de novo consideration. This is relevant because it involved the Court's implicit recognition of a factor that underlies the question of when and why a federal court would hold a plenary hearing rather than rely on copious records: the physical demeanor of a witness affects the credibility of his testimony and the weight the trier of fact will attach to it. Since the Court maintained that not even a tape recording can compensate for the absence of demeanor evidence, a fortiori a written transcript would be even less revealing.

101. 418 U.S. at 464.
102. Id. at 467.
103. Id. at 467-72.
104. Id. at 473.
105. See notes 27 & 28 supra and note 106 infra.
106. One court of appeals recently demonstrated its concern for safeguarding the integrity of the fact-finding process in a decision that resembles Wingo in some respects. United States v. Bergera, No. 72-2913 (9th Cir., Jan. 21, 1975), held that a district judge may not reject the magistrate's recommendations regarding suppression of evidence unless he conducts a suppression hearing de novo. This holding is anomalous in view of the fact that it is the law in that circuit that the judge may accept the magistrate's recommendation without conducting a hearing of its own. The rationale for the Bergera holding was that the outcome should result from first-hand contact with the evidence. “[T]he law must require whatever is essential to preserve the integrity of the fact-finding process. The method most widely recognized as effective in that regard is imposition of the requirement that the fact-finder actually observe the evidentiary process so as to properly weigh and appraise testimony.” Id. at 4. “Permitting the district court to simply review dry records or listen to tape recordings of the evidentiary hearing conducted by the magistrate would not satisfy the high standard which must be set for factual determinations which by themselves can decide the outcome of a criminal trial.” Id. at 6. So long as the judge adopts the magistrate's recommendation the outcome is linked to first-hand knowledge of the evidence (although it is arguable from Wingo that a magistrate's first-hand knowledge is inferior to a judge's first-hand knowledge). But if the judge rejects the magistrate's recommendation, then the outcome is not directly related to first-hand contact with the evidence. See Donivan v. Henderson, 506 F.2d 434 (5th Cir. 1975) (Wingo applied retroactively). “[T]he crux of the Supreme Court's ruling in Wingo v. Wedding is concern for the integrity of the fact-finding process. The first fact finding may influence heavily, if not dictate, the outcome of the case.” Id. at 435. But see United States ex rel. Hayward v. Johnson, 508 F.2d 322 (3d Cir. 1975) (affirmed district court's denial of writ without evidentiary hearing despite magistrate's recommendation that a hearing be held).
HABEAS CORPUS


Preiser v. Rodriguez\(^{107}\) reaffirmed the expanded use of habeas corpus to challenge prison discipline by finding a prisoner's challenge to unconstitutional deprivation of good time credits to be within the "core of habeas corpus."\(^{108}\) Since the petition was within the "core of habeas corpus," it was of course subject to the traditional habeas corpus requirement that the petitioner exhaust his state remedies prior to filing for federal habeas corpus relief.\(^{109}\)

These positions were motivated not by a desire to strengthen, expand or clarify the scope of habeas corpus, but by a desire to limit the number of section 1983\(^ {110}\) prisoner complaints. Until Preiser, section 1983 and habeas corpus were available to challenge the same substantive complaints. The only differences were procedural: section 1983 is available to state prisoners only;\(^ {111}\) and habeas corpus petitions must meet the exhaustion requirement. Thus state prisoners could avoid having to exhaust state remedies by suing under section 1983 instead of habeas corpus.\(^ {112}\) To prevent this, the Court created substantive distinctions between these formerly interchangeable remedies. It held that injunctive relief to challenges to the fact or duration of confinement are cognizable in habeas corpus only and cannot be brought under section 1983,\(^ {113}\) although actions for damages can be.\(^ {114}\) Challenges to

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\(^{108}\) Id. at 487.

\(^{109}\) 28 U.S.C. § 2254 (1970) provides in part: "(b) An application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner. (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." Id. § 2255 (1970) has a similar provision for federal prisoners: "An application for a writ of habeas corpus . . . shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention." See Fay v. Noia, 372 U.S. 391, 397-99 (1963) (federal courts have power under habeas corpus statute to grant relief despite petitioner's failure to exhaust state remedies; the exhaustion requirement applies only to remedies still open when prisoner files habeas petition; exceptional circumstances may compel ignoring the exhaustion requirement). State remedies would presumably include state administrative remedies as well as state judicial remedies, in view of 28 U.S.C. § 2254(c) (1970) supra, and Preiser. With respect to the latter, see note 120 infra.

\(^{110}\) 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

\(^{111}\) This is because § 1983 requires state action. See Willis v. Ciccone, 506 F.2d at 1014.

\(^{112}\) This practice was encouraged by Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam), which apparently was limited by Preiser.

\(^{113}\) 411 U.S. at 499.

\(^{114}\) Id. at 494. Habeas corpus is not an appropriate remedy for damages. Id.
unconstitutional conditions are still cognizable in section 1983 suits,115 and arguably in habeas corpus as well.116

This attempt to reduce the number of prisoner complaints placed the Court in the position of having to justify the need for an exhaustion requirement with respect to prison discipline challenges. The original policy of the exhaustion requirement was to preserve federal-state comity.117 When this requirement was established the only federal-state comity problem with respect to habeas corpus was the conflict between state and federal judiciaries.118 To bridge this gap the Court was forced to reject the argument that comity is solely a question of judicial conflict and create a new comity—between the federal judiciary and state prison systems. The majority claimed that comity “was defined in Younger v. Harris . . . as ‘a proper respect for state functions,’ and it has as much relevance in areas of particular state administrative concern as it does where state judicial action is being attacked.”119

Preiser indicates that comity is relevant whether the state conduct under federal scrutiny is judicial or administrative. The need to limit the number of prisoner complaints goes hand in hand with the Court's deference toward prison administrators.120 Although this appears to be a movement toward more judicial restraint, it does not appear to be a retreat to “hands-off.”121

3. Wolff v. McDonnell—Due Process and Deference

Wolff v. McDonnell122 can be viewed as a radical departure from the hands-off doctrine123 and an achievement for prisoners' rights in that it held

115. Id. at 498-99.
116. Id. at 499.
118. Since habeas corpus was not available to challenge prison discipline or prison conditions when 28 U.S.C. §§ 2254(b) & (c) were enacted, but was used primarily to collaterally attack state convictions, comity did not extend beyond the judiciary. But cf. Carothers v. Follette, 314 F. Supp. 1014, 1019 (S.D.N.Y. 1970) (dictum).
119. 411 U.S. at 491. The dissent objected to this reference to Younger v. Harris, 401 U.S. 37 (1971), because Younger was concerned solely with the relations between federal and state courts. 411 U.S. at 521 (Brennan, Douglas & Marshall, JJ., dissenting). Moreover, the dissent argued, since § 1983 was designed specifically as a remedy against state misconduct it is contrary to the purpose of § 1983 to inject a comity problem. Id. at 522.
120. “It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.” 411 U.S. at 491-92. “Since these internal problems of state prisons involve issues so peculiarly within state authority and expertise, the States have an important interest in not being bypassed in the correction of those problems. Moreover, because most potential litigation involving state prisoners arises on a day-to-day basis, it is most efficiently and properly handled by the state administrative bodies and state courts, which are, for the most part, familiar with the grievances of state prisoners and in a better physical and practical position to deal with those grievances.” Id. at 492.
121. See note 123 infra.
123. The “hands-off” doctrine was the name given to judicial refusal to review prisoner com-
that prison disciplinary hearings are subject to procedural due process and are not merely a matter of prison policy. However, the limited due process mandated, the questions left unresolved, and the guarded language in which the opinion is couched indicate that the Court was more judicious than it might seem. Specifically, the Court held that cross examination and confrontation are not mandated. The prisoner has a limited right to call witnesses and collect evidence, but this can be abridged without explanation by the prison officials. In addition, if they feel institutional safety so requires, prison officials may delete evidence from the record and need only indicate that an omission has occurred. The Court was not willing, at least at that point, to hold that the prisoner has a right to counsel. Instead it remanded to the district court for a determination of whether the institutional legal advisor system satisfied the Johnson v. Avery guarantee of access to the courts. Lastly, the Court declined to rule on whether the discipline committee satisfied the requirement of impartiality.

Thus Wolff left prison officials with considerable leeway in the conduct of disciplinary proceedings. This may have been necessary, for prison administration should not be subject to “unduly crippling constitutional impedi-

plaints. For a good discussion of the doctrine see Beyond the Ken, supra note 2; Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 Va. L. Rev. 841 (1971).

124. 418 U.S. at 555-57.
125. The Court refused to extend all of the procedural safeguards of Gagnon v. Scarpelli, 411 U.S. 778 (1973), and Morrissey v. Brewer, 408 U.S. 471 (1972), to this context.
126. “Prison disciplinary proceedings . . . take place in a closed, tightly controlled environment peopled by those who have chosen to violate the criminal law . . . . Many are recidivists who have repeatedly employed illegal and often very violent means . . . . They may have little regard for the safety of others on their property or for the rules designed to provide an orderly and reasonably safe prison life. . . . We must realize that . . . many . . . inmates are closely supervised and their activities controlled around the clock. Guards and inmates co-exist in direct and intimate contact. Tension between them is unremitting. Frustration, resentment, and despair are commonplace. Relationships among the inmates . . . [may be] subject to the unwritten code that exhorts inmates not to inform on a fellow prisoner.

“It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security institution as well as those where security considerations are not so paramount.” 418 U.S. at 561-62.

127. The Court has exercised some caution in its due process decisions. E.g., compare Morrissey v. Brewer, 408 U.S. 471 (1972), with Gagnon v. Scarpelli, 411 U.S. 778 (1973). In Morrissey the Court declined to pass on the question of right to counsel at a parole revocation hearing. In Gagnon the Court held that the question should be disposed of on a case-by-case basis. A similar progression may occur in the Court’s disposition of prison discipline complaints. Note the Court’s disclaimer that their Wolff decision “is not graven in stone.” 418 U.S. at 571.

128. 418 U.S. at 568.
129. Id. at 566.
130. Id. at 565.
131. Id. at 570.
133. 418 U.S. at 580.
134. Id. at 570-71.
ments.\textsuperscript{135} There are those who might regard the decision as not only necessary, but wise, because it did not impose the full adversary-adjudicatory model on a context involving goals that model was not designed to achieve.\textsuperscript{136} On the other hand, others have proposed that leeway provided for at this stage of the proceeding should be compensated for by decreased judicial deference if and when a habeas corpus petition challenges the proceeding.\textsuperscript{137} At best, it is contended, the \textit{Wolff} guidelines do not assure the prisoner an adequate defense;\textsuperscript{138} at worst, they leave open an avenue for abuse of discretion by the officials conducting the disciplinary hearing.\textsuperscript{139} Given these two distinct possibilities, proponents of the adversary-adjudicatory model would ask whether a disciplinary hearing conducted in accordance with \textit{Wolff} should be entitled to the presumption of fairness implicitly afforded it by \textit{Willis}.\textsuperscript{140} More importantly, assuming the hearing was conducted in accordance with \textit{Wolff} and was therefore procedurally fair, does this justify conclusive acceptance of the findings and conclusions of the committee on the basis of \textit{any} evidence in the record?\textsuperscript{141} An argument can be made that the district court

\textsuperscript{135} Id. at 566-67.

\textsuperscript{136} See note 81 supra. But see Clutchette v. Procunier, 497 F.2d 809, 819-21 (9th Cir. 1974) (right to confrontation, cross-examination, impartial hearing body and, in some cases, to counsel or counsel substitute) and Walker v. Hughes, 386 F. Supp. 32, 41-43 (E.D. Mich. 1974) (right to impartial hearing body and limited right to confrontation, cross-examination and counsel), imposing due process requirements beyond those imposed by \textit{Wolff}.

\textsuperscript{137} This position was persuasively articulated in Beyond the Ken 526-30.

\textsuperscript{138} "Without the enforceable right to call witnesses and present documentary evidence, an accused inmate is not guaranteed the right to present any defense beyond his own word. Without any right to confront and cross-examine adverse witnesses, the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way. The hearing will thus amount to little more than a swearing contest . . . with only the prisoner's story subject to being tested by cross-examination." \textit{Wolff} v. McDonnell, 418 U.S. at 581-82 (Marshall & Brennan, JJ., dissenting in part). "The right to present the testimony of impartial witnesses and real evidence to corroborate his version of the facts is particularly crucial to an accused inmate, who obviously faces a severe credibility problem when trying to disprove the charges of a prison guard." Id. at 583 (Marshall & Brennan, JJ., dissenting in part).

\textsuperscript{139} "[T]here is a significant potential for abuse of the disciplinary process by 'persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy' . . . whether these be other inmates seeking revenge or prison guards seeking to vindicate their otherwise absolute power over the men under their control." Id. at 585-86 (Marshall & Brennan, JJ., dissenting in part) (quoting Greene v. McElroy, 360 U.S. 474, 496 (1959)). See note 71 supra.

\textsuperscript{140} See text accompanying notes 58-60 supra. Some commentators contend that external review of prison discipline is necessary to insure not only that the rules afford due process but that the rules are complied with as well. See, e.g., Kraft, supra note 2, at 72-74; Tibbles, supra note 2, at 386.

\textsuperscript{141} See notes 68-72 supra and accompanying text. One commentator has suggested that the weight of the presumption should vary with the "reasonableness" of the prison discipline hearing. Reasonableness is determined by factors such as the prisoner's opportunity to be heard, the separation of prosecutory and adjudicatory functions of the reviewing body, and bias of the reviewing body. Beyond the Ken 528. "[T]he mere existence of a review procedure should not determine the degree of deference to be accorded [the prison's] decisions. A court should not
should at least have discretion to go beyond a record that is sustained by only a minimal standard of proof and is the product of a proceeding which, though constitutional, is a far cry from the full and fair hearing contemplated by *Townsend*. Since the *Wolff* hearing is all that is mandated, perhaps federal courts should retain plenary power to review findings of fact and sufficiency of evidence adduced at such disciplinary hearings until a better alternative is proposed.

V. CONCLUSION

A. The Habeas Corpus Problem—Lack of Uniform Guidelines

Habeas corpus is not simply an administrative problem of determining if and when a hearing should be held. It is also a definitional problem of what is a cognizable claim. The two questions are interrelated. Evidentiary hearings are held because the judge is uncertain as to whether a stated claim can be proven. But sometimes it seems that a hearing is held because the judge is uncertain as to whether a claim is even stated. This uncertainty is manifested by inconsistent decisions of the appellate courts, some remanding rather spurious claims for a hearing, others refusing to remand a borderline case. This lack of uniformity was almost inevitable, since the area developed from a grant of broad discretion with few reliable guidelines. The problem, then, is to bring uniformity of definition and administration—at least to the use of habeas corpus to challenge prison discipline and conditions—so as to afford prisoners due process.

The *Willis* court should be credited for proposing a new solution to this two-pronged problem instead of blindly applying problematic, and arguably distinguishable, precedent. However, like the Supreme Court in *Preiser*, the *Willis* court's position on habeas corpus was apparently dictated by a desire to overlook the extent to which the review mechanism may be incapable of truly policing the system because of an interest in vindicating the judgment and bolstering the authority of the official whose action it is reviewing. Where the reviewing body is accountable to an authority altogether different from the body charged with the actual administration of the prison system, its decisions are more likely to reflect that impartiality to which the greatest weight should be accorded. Thus, recognition by the courts of the ego involvement of prison officials in covering up abuses, coupled with an awareness of the community of interest among prison employees and the relationship of personal advancement to continual vindication in all conflicts with inmates, may lead courts to utilize the degree of bias present in order to define the intensity of review and the strength of the presumption of reasonableness to be accorded an official's action or decision.” Id. at 529. The presumption of reasonableness is weakest as regards the prison official who disciplined the inmate, since he is interested in vindicating his own conduct. The greatest presumption of reasonableness should be accorded impartial review boards, as they have no interest to vindicate.

142. “Even where the procedure employed does not violate the Constitution, if it appears to be seriously inadequate for the ascertainment of the truth, it is the federal judge's duty to disregard the state findings and take evidence anew.” *Townsend v. Sain*, 372 U.S. at 316.
143. See Beyond the Ken 530-31.
144. See cases cited in notes 91 & 92 supra.
145. See text accompanying notes 10-24 supra.
146. See text accompanying note 110 supra.
limit prisoner complaints. There are two difficulties with this solution. First, the abrogation of power to hold a hearing on a disciplinary complaint is too extreme: in effect it instructs district courts to turn a deaf ear on prison discipline complaints. Second, although habeas corpus administration and prison administration are interrelated by virtue of the extension of the writ to challenge duration and conditions of confinement, these two problems are sufficiently complex and important to warrant equal attention and revision. However, since the disposition of the habeas corpus problem was only a means to an end, it arguably received subservient consideration. Perhaps the court's approach was a practical necessity and therefore should not be impugned. Ideally, however, changes in the administration of habeas corpus should be motivated primarily by a desire to reform the writ without sacrificing its importance. It is questionable whether this could ever be achieved in the adjudicatory context.

B. Proposed Alternatives

No one could seriously argue that Congress intended habeas corpus as a remedy for unconstitutional prison discipline or conditions. That is not to say that there was no respectable rationale for judicial extension of the writ. Rather, there must have been a compelling reason, external to the rationale of the writ itself, to motivate the courts to act. It seems apparent that the compelling reason was the judiciary's recognition of the need for some remedy for legitimate inmate grievances. If the legislatures had attempted prison reform, or at least if workable internal or external grievance procedures had been developed, habeas corpus might not have been extended to challenge duration and condition of confinement. If and when prisons implement and make use of adequate hearing and review procedures, 147 it will become unnecessary to resort to plenary habeas corpus hearings to insure impartiality and integrity of fact-finding. 148

Extension of the writ, then, occurred in response to the prison situation and it is probable that the continued development of habeas corpus will be as much a function of the state of prison reform as it will be a function of any deliberate effort to define and administer the writ. 149 Nonetheless, it must at

147. The Bureau of Prisons Policy Statements on inmate discipline and administrative remedy of prisoner's complaints, see note 60 supra, do implement hearing and review procedures for federal prisoners. It is submitted, however, that until prison authorities dispel the reputation they have earned, the courts should be alert as to whether these procedures are actually utilized. See text accompanying notes 58-63 supra; note 140 supra.


149. Cf. Modern Administrative Proposals, supra note 1, at 733.
least be examined independently of the prison administration problem, even though any solution ultimately will have to be addressed to the context in which it must be implemented.

One proposal addressed to the problem of administering the volume of habeas corpus petitions, and favored by Chief Justice Burger, was to turn the evidentiary hearing over to federal magistrates. Although the majority in *Wingo v. Wedding*, was the design of the Federal Magistrates Act. Although the majority in *Wingo* held that the fact-finding process would be better protected by requiring judges to hold the hearings themselves, Chief Justice Burger argued persuasively that if magistrates were permitted to hold hearings, more hearings would be held because the magistrates would have time to hold them, and the petitioner would likely get speedier, if not more thorough, consideration. The arguments go both ways on the merits of delegating fact-finding to magistrates, as indicated by the majority and dissent in *Wingo*. If Congress should agree with Chief Justice Burger's analysis, or if he were correct in stating that Congress actually intended to allow judges to delegate this hearing power to magistrates, then it is not too late for Congress to manifest this intent. *Wingo* did not pass on the question whether Congress could give district judges the power to delegate this activity, but merely held that Congress did not manifest such an intent in the Federal Magistrates Act.

Perhaps a more meritorious proposal is suggested by Justice Harlan's dissent to *Harris v. Nelson* where he argued that habeas corpus discovery procedures should not be determined on a case-by-case basis by the district courts because this would result in lack of uniformity and make the outcome dependent upon the attitude of each judge toward discovery. If uniformity were to be achieved, he argued, it would take a long time and would occur on the appellate level. However, appellate courts are, he felt, poorly situated to adjudge what discovery is necessary. Therefore, there may be uniformity of result through appellate courts, but the result might leave something

152. 418 U.S. at 475-76 (Burger, C.J. & White, J., dissenting).
154. See notes 102-05 supra and accompanying text.
155. 418 U.S. at 476 n.3 (Burger, C.J. & White, J., dissenting).
156. Id. at 475-76 (Burger, C.J. & White, J., dissenting).
157. Id. at 467.
159. Id. at 305-06 (Harlan, J., dissenting).
160. Id. at 306-07 (Harlan, J., dissenting).
161. "Appellate courts . . . are imperfectly informed both about the extent of the need for additional discovery in habeas corpus and about the procedures best suited to meet those needs and to achieve prompt dispatch of habeas proceedings. They are, therefore, poorly situated to lay down guidelines for the district courts." Id. at 306 (Harlan, J., dissenting).
to be desired. Justice Harlan suggested that better discovery rules could be prepared by the Judicial Conference of the United States which would approach the problem in the abstract rather than under the pressure of adjudication.

The Judicial Conference in fact has attempted to formulate rules governing habeas corpus administration. While the proposed rules are innovative in emphasizing other forms of discovery in lieu of or in addition to the evidentiary hearing, they provide minimal guidance, and instead continue the tradition of reliance on the district judge's discretion.

There are those who question the wisdom or necessity of burdening the district judge with unguided discretion. In the decade since Townsend and the two decades since Brown there has been an opportunity to observe the feasibility of relying so heavily on the district judge. While revocation of the district judge's discretion, as in Willis, is too extreme, the broad rules proposed by the Judicial Conference are not extreme enough. The Judicial Conference should amend these proposed rules to provide more definitive guidelines for the district judge, particularly regarding the use of habeas corpus to challenge prison conditions and prison discipline. As Justice Stewart noted in his dissent to Harris v. Nelson, this would mean sacrificing some flexibility for uniformity. Perhaps that is precisely what is needed. Moreover, it is time to approach habeas corpus as a sui generis area of the law in need of its own framework, instead of continuing to analogize to the Federal Rules of Civil Procedure, which were written with a different purpose in mind.

Better defined guidelines need not foreclose change—rules are subject to interpretation, litigation and amendment—but hopefully will eliminate counterproductive uncertainty and arbitrariness.

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Mary Ellen Kris

163. See id. at 62-67 (proposed rules 6 & 7 regarding discovery and expansion of record).
164. See id. at 63-66 (Advisory Comm. Note to Proposed R. 6).
165. "Is it appropriate to make the right to a plenary hearing on habeas corpus a matter of discretion at all? And consider the position of a district judge who has to exercise this discretion: given what is at stake, is it sound, psychologically, to ask him to decide without providing him with firm legal standards?" Hart & Wechsler 1504.
166. See 394 U.S. at 307 (Stewart, J., dissenting).