LIBERTY AND JUSTICE FOR *SOME*: DUE PROCESS FOR PRISONERS IN THE TENTH CIRCUIT IN LIGHT OF *TOEVS V. REID*

INTRODUCTION

Pro se prisoner Janos Toevs sued the Colorado Department of Corrections and lost. Twice. Yet, the Colorado Attorney General's Office and the United States Department of Justice requested that the three-judge panel reconsider the judgment or rehear the case en banc.

Mr. Toevs's suit hardly seems irregular on its face. Mr. Toevs challenged his solitary confinement[1] on grounds that the Colorado Department of Corrections unconstitutionally placed him in solitary confinement for seven years, violating his Fifth Amendment Due Process rights. It is similar to the other roughly 700 prisoner cases—civil suits with prisoner plaintiffs—heard by the Court of Appeals for the Tenth Circuit each year, which comprise approximately 30% of the cases considered by the circuit.[2] Like Mr. Toevs, many of the prisoners lose at both the trial level and the appellate level. The decision in *Toevs v. Reid*[3] stands out, though, because in the process of affirming the lower court's decision, the Tenth Circuit clarified the term "indefiniteness" used in the due process analysis. The *Toevs* panel also modified the judicial deference employed by previous panels, a change that increased the viability of prisoners' claims. These refinements precipitated the negative reactions

1. Although there is a technical difference between "administrative segregation" and "solitary confinement," courts typically use the terms interchangeably. The Tenth Circuit in *Toevs* refers to the penological scheme at issue as "administrative segregation," but I have chosen to refer to the punishment as "solitary confinement." For more information on the differences between the two types of confinement, see Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 496–97 (1997) ("Amnesty International has used the term 'solitary confinement' to cover 'all forms of incarceration that totally remove a prisoner from inmate society. It often means that the prisoner is visually and acoustically isolated from all other prisoners, as well as having no personal contact with them.' Yet, this general rubric subsumes many variations. For example, some American correctional systems now are so crowded that even prisoners in 'solitary confinement' units are double-celled and, therefore, not isolated from one another at all. In fact, by some definitions, these prisoners are simultaneously and paradoxically isolated and overcrowded. Similarly, even when they are single-celled it is impossible to completely curtail communication between prisoners in solitary confinement units (under all but the most extreme architectural designs). In some of these units, sensory overload rather than sensory deprivation adversely affects prisoners whose restricted confinement in close quarters means they cannot escape the intrusive noise or presence of others. Moreover, some of the special units that have been most soundly condemned by mental health experts and the courts impose a regimen known as 'small group isolation' on prisoners in which a restricted number of them are housed together but away from everyone else." (footnote omitted)).

2. *U.S. Court of Appeals—Judicial Caseload Profile*, UNITED STATES COURTS http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2011Jun.pl (last visited Feb. 10, 2012) (dividing the sum of prisoner appeals from 2006 to 2011 by the sum of total cases filed between 2006 and 2011).

3. 646 F.3d 752 (10th Cir. 2011).

of the Colorado Attorney General's Office and the United States Department of Justice and the subsequent motions for reconsideration and rehearing en banc.

Part I of this Comment explores the history of solitary confinement and the case law prior to *Toevs*. Part II explains the facts, procedural history, and opinions from *Toevs*. Part III explains three reasons why the government opposes the Tenth Circuit's decision in *Toevs*. Finally, this Comment concludes by opining that the holding from *Toevs* should stand and that the Tenth Circuit should deny the motions to rehear and reconsider the case.

I. BACKGROUND

A. Historical Background of Solitary Confinement

Solitary confinement prisons, known as supermaxes, differ from general population prisons.[4] While not every prison operates in the same manner, characteristics of supermaxes generally include the following: twenty-three hours a day in a small cell, limited opportunity to call or visit with family, eating meals and recreating alone, and restriction or denial of personal property.[5] Frequently, the lights remain on at all times.[6] Although the goals of supermaxes vary from institution to institution, generally the purposes of these prisons are as follows: protecting staff and other inmates from the most violent prisoners; normalizing general population prisons, which allows for more vocational training and psychological therapy; and modifying the violent inmates' behavior.[7] While concrete statistics are difficult to verify, one recent study estimates that at least 25,000 people are confined in state-run supermaxes.[8]

These numbers are the result of a recent explosion in the use of solitary confinement throughout the state and federal prison systems.[9] Since the 1980s, the use of solitary confinement and supermax prisons has grown exponentially.[10] For example, in 1984, only one supermax prison

4. *See* Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 CRIME & JUST. 441, 443 (2006); Myra A. Sutanto, Wilkinson v. Austin *and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. CRIM. L. & CRIMINOLOGY 1029, 1031 (2006).

5. Sutanto, *supra* note 4, at 1031, 1038.

6. Wilkinson v. Austin, 545 U.S. 209, 214 (2005).

7. DANIEL P. MEARS, EVALUATING THE EFFECTIVENESS OF SUPERMAX PRISONS 4–5 (2006).

8. *Id.* at 4.

9. *See* Leena Kurki & Norval Morris, *The Purposes, Practices, and Problems of Supermax Prisons*, 28 CRIME & JUST. 385, 387–93 (2001) (explaining the growth of supermax prisons).

10. *See* MEARS, *supra* note 7, at 31 ("In 1987, over 3,000 Texas prisoners resided in [solitary confinement] and by 2001 the total had tripled to more than 9,000."); Haney & Lynch, *supra* note 1, at 491 ("Notwithstanding this long history of criticism and heightened awareness among mental health professionals about their harmful effects, long term solitary confinement and related practices are now being used on an increasingly widespread basis in prison systems across the United States."). *See generally* Roy D. King, *The Rise and Rise of Supermax: An American Solution in*

existed: the federal penitentiary in Marion, Illinois.[11] Two decades later, over forty prisons across the country operate as supermax prisons.[12] Yet even amidst the growth of solitary confinement in modern prisons, the topic is not without great historical criticism.[13]

American prisons began experimenting with solitary confinement as early as the 1790s.[14] Despite criticisms of the solitary confinement model—specifically, reports of insanity, suicide, and requests to be put to death rather than live in solitary confinement—in 1826, Pennsylvania opened the Western State Penitentiary, which held all inmates in solitary confinement.[15] The Pennsylvania model spread throughout the nineteenth century.[16] Legal criticism caught up with the practice by the turn of the century, leading the Supreme Court to note in *In Re Medley*[17] the inhumane psychological toll imposed by solitary confinement:

> A considerable number of the [solitary confinement] prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.[18]

Although the federal prison system continued to operate solitary confinement prisons throughout the twentieth century—including the infamous United States Penitentiary at Alcatraz and the aforementioned Marion—many states discontinued the practice and instead housed prisoners in general population facilities.[19] General population units afford inmates greater privileges, social interaction with other inmates, prison jobs, educational classes, and the ability to independently leave the cell for recreation or group meals.[20]

Search of a Problem?, 1 PUNISHMENT & SOC'Y 163 (1999) (comparing European and American punishments schemes).

11. Haney & Lynch, *supra* note 1, at 489.

12. *See* MEARS, *supra* note 7, at 4.

13. *See* Haney & Lynch, *supra* note 1, at 558–67 (advocating limiting the use of solitary confinement to prevent psychological harm and inhumane treatment); Smith, *supra* note 4, at 489–94 (reviewing the negative psychological and physiological effects of solitary confinement).

14. Haney & Lynch, *supra* note 1, at 483.

15. *Id.*

16. *Id.* at 484; *see also* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 328 (2006).

17. 134 U.S. 160 (1890).

18. *Id.* at 168.

19. Haney & Lynch, *supra* note 1, at 487; Smith, *supra* note 3, at 442.

20. JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 318 (4th ed. 2010).

In the 1980s, the rapid growth of prison general populations led to overcrowding.[21] Prison gangs and violence followed the rampant overcrowding.[22] As a result, prison officials attempted to control these activities with supermax prisons.[23]

Cries of inhumanity sound as loudly today as they did 100 years ago in the Supreme Court's *Medley* opinion. International human rights organizations and domestic groups concerned with the humane treatment of prisoners have condemned the use of solitary confinement.[24] Mental health experts maintain prolonged solitary confinement imposes horrific psychological burdens on inmates.[25] These modern studies show inmates experience "anxiety, panic, rage, loss of control, appetite and sleep disturbances, self-mutilations, and other recurring themes and symptoms."[26]

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21. Haney & Lynch, *supra* note 1, at 491; Chase Riveland, *Prison Management Trends, 1975–2025*, 26 CRIME & JUST. 163, 179–80 (1999). *See generally* Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499 (examining the connection between psychology and penological policies within the context of cruel and unusual punishment).

22. Haney & Lynch, *supra* note 1, at 491–92; Riveland, *supra* note 21, at 179.

23. Haney & Lynch, *supra* note 1, at 491–92; Riveland, *supra* note 21, at 190–91; Scott Tachiki, *Indeterminate Sentences in Supermax Prisons Based Upon Alleged Gang Affiliations: A Reexamination of Procedural Protection and a Proposal for Greater Procedural Requirements*, 83 CAL. L. REV. 1115, 1131 (1995); Andrew J. Theis, *The Gang's All Here: How the Supreme Court's Unanimous Holding in* Wilkinson v. Austin *Utilizes Supermax Facilities to Combat Prison Gangs and Other Security Threats*, 29 HAMLINE L. REV. 145, 148 (2006).

24. *See, e.g.*, Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 98 (2005) ("While solutions exist, the United States has carefully crafted jurisprudence and treaty reservations to prevent interpretations of domestic prison practice under international standards. Numerous organizations, from Amnesty International to the U.N. Committee Against Torture, have condemned the use of segregation techniques and the abrasive conditions in U.S. supermax prisons."); *see generally* Letter from the American Civil Liberties Union to the United Nations Human Rights Council, *Abuse of the Human Rights of Prisoners in the United States: Solitary Confinement* (2011), *available at* http://www.aclu.org/files/assets/ACLU_Submission_to_HRC_16th_Session_on_Solitary_Confinement.pdf; U.N. General Assembly, *Interim Report of Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. DOC. A/63/175 (July 28, 2008); *The Istanbul Statement on the Use and Effects of Solitary Confinement*, 18 TORTURE 63 (2008) (addressing the increasing use of solitary confinement and its harmful effects and created by twenty-four international experts).

25. Grassian, *supra* note 16, at 354 ("The restriction of environmental stimulation and social isolation associated with confinement in solitary are strikingly toxic to mental functioning, producing a stuporous condition associated with perceptual and cognitive impairment and affective disturbances. In more severe cases, inmates so confined have developed florid delirium—a confusional psychosis with intense agitation, fearfulness, and disorganization."); Haney & Lynch, *supra* note 1, at 529–39; Jeffery 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, 107 (2010) ("The professional organizations should acknowledge that it is not ethically defensible for health care professionals to acquiesce silently to conditions of confinement that inflict mental harm and violate human rights."). *See generally* Bruce A. Arrigo & Jennifer Leslie Bullock, *The Psychological Effects of Solitary Confinement on Prisoners in Supermax Units: Reviewing What We Know and Recommending What Should Change*, 52 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 622 (2008) (arguing long-term isolation causes devastating consequences on prisoners' mental health and the lack of adequate medical and psychiatric care compounds these problems).

26. Haney & Lynch, *supra* note 1, at 530; *accord* Grassian, *supra* note 16, at 354; Metzner & Fellner, *supra* note 25, at 104.

In the summer of 2011, prisoners throughout California's Pelican Bay State Prison, a supermax facility, started a hunger strike protesting their solitary confinement and its deleterious effects.[27] The story garnered national and international media attention.[28] Upwards of 6,600 inmates participated in the strike.[29] In describing the Pelican Bay strike and summarizing the use of solitary confinement in the United States, *The Guardian* editorialized: "The widespread use and abuse of solitary confinement in US prisons and jails is one of the nation's most pressing domestic human rights issues, and also perhaps its most ignored."[30]

B. Due Process Case Law

Prisoners use the Fifth Amendment Due Process Clause as one vehicle for challenging prison conditions, including prolonged or indefinite solitary confinement.[31] The Constitution protects citizens from deprivations of life, liberty, or property without the due process of law.[32] In order to show a deprivation of liberty, a plaintiff must (1) possess a liberty interest in the conditions of confinement, and (2) demonstrate the process afford by the prison is insufficient.[33] Prisoners' suits typically allege solitary confinement unconstitutionally deprives them of the right to liberty.[34]

1. *Sandin v. Connor*

Sandin v. Connor[35] describes the Supreme Court's modern jurisprudential approach to due process.[36] In *Sandin*, the prisoner alleged Hawaiian prison officials deprived him of procedural due process when refusing to allow him to present witnesses during a disciplinary hearing.[37] The disciplinary board consequently sentenced him to solitary confinement for misconduct.[38] The district court granted summary judgment in favor of the prison officials.[39] The Court of Appeals for the Ninth Circuit re-

27. Sam Quinones, *6,600 California Prisoners Refused Meals*, L.A. TIMES, July 6, 2011, http://latimesblogs.latimes.com/lanow/2011/07/6600-california-prisoners-refuse-meals.html.

28. Ian Lovett, *California Inmates Fast to Protest Isolations Cells*, N.Y. TIMES, July 8, 2011, at A16; James Ridgeway & Jean Casella, *A Hunger for Justice in Pelican Bay*, THE GUARDIAN (U.K.), July 25, 2011, http://www.guardian.co.uk/commentisfree/cifamerica/2011/jul/25/pelican-bay-prison-hunger-strike; *Solitary Confinement Should Be a Last Resort*, WASH. POST, Aug. 21, 2011, http://www.washingtonpost.com/opinions/solitary-confinement-should-be-a-last-resort/2011/08/11/gIQAxys 6UJ_story.html.

29. Quinones, *supra* note 27; Ridgeway & Casella, *supra* note 28.

30. Ridgeway & Casella, *supra* note 28.

31. *See* BOSTON & MANVILLE, *supra* note 20, at 305–31.

32. Wilkinson v. Austin, 545 U.S. 209, 221 (2005) ("The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake.").

33. *Id.* at 221–24.

34. *See* BOSTON & MANVILLE, *supra* note 20, at 305–31.

35. 515 U.S. 472 (1995).

36. *See id*.

37. *Id.* at 475.

38. *Id.* at 475–76.

39. *Id.* at 476.

versed, holding that the prisoner's "liberty interest in remaining free from disciplinary segregation" properly invoked the Fifth Amendment due process clause.[40]

In overruling prior Supreme Court precedent and the Ninth Circuit, the Court explained that states "may under certain circumstances create liberty interests which are protected by the Due Process Clause," but only in limited circumstances which "impose[] atypical and significant hardship[s] on the inmate in relation to the ordinary incidents of prison life."[41] After comparing the prisoners' immediate circumstances to Hawaiian "inmates inside and outside disciplinary segregation," the Court determined that the State's actions in placing the prisoner in solitary confinement for thirty days did not qualify as a major disruption in his environment.[42] Consequently, the Court reversed the Ninth Circuit and affirmed the district court's ruling.[43]

2. *Wilkinson v. Austin*

The Supreme Court next considered the issue of a liberty interest in *Wilkinson v. Austin*.[44] In *Wilkinson*, prisoners at the Ohio State Penitentiary (OSP)—the state's only maximum-security facility—sued officials within the Ohio Department of Corrections (ODOC), alleging violations of their Fifth Amendment rights because "the [ODOC's] procedures for reviewing an OSP inmate's classification do not provide the prisoner a hearing or even access to the individual deciding the inmate's security classification. [ODOC's] procedures for initially moving someone to the OSP also suffer from the same lack of notice and opportunity for hearing."[45] The *Wilkinson* Court reaffirmed the *Sandin v. Conner* "atypical and significant hardship" standard.[46] However, the *Wilkinson* Court noted that since *Sandin*, ten years earlier, circuit courts had struggled to ascertain the appropriate "baseline" from which to compare the presented conditions of confinement.[47] As the result, the Court identified a series of factors to aid in this process.[48]

40. *Id.* at 476–77.
41. *Id.* at 484.
42. *Id.* at 486.
43. *Id.* at 487–88.
44. 545 U.S. 209 (2005).
45. Austin v. Wilkinson, 189 F. Supp. 2d 719, 731 (N.D. Ohio 2002); *accord Wilkinson*, 545 U.S. at 214, 218.
46. *Wilkinson*, 545 U.S. at 223.
47. *Id.* ("In *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system."); *accord* Michael Z. Goldman, Sandin v. Conner *and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. REV. 423, 441–42 (2004).
48. *See Wilkinson*, 545 U.S. at 223–24.

First, the Court compared the conditions at OSP with other prisons in Ohio, finding the former the most restrictive in the state.[49] The Court described the conditions thusly:

> Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement. In OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.[50]

Next, the Court noted placement at OSP seemed indefinite because officials offered no indication of release from these restrictive conditions.[51] Furthermore, the Court observed that placement in solitary confinement disqualified inmates from parole.[52] The Court determined that while "these conditions standing alone might not be sufficient to create a liberty interest, taken together they impose an atypical and significant hardship within the correctional context."[53] Since the conditions at OSP exceeded the *Sandin* "atypical and significant hardship" standard, the Court held the prisoners possessed a liberty interest in avoiding OSP.[54] The Court noted that while "OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners[,] . . . [t]hat necessity . . . does not diminish our conclusion that the conditions give rise to a liberty interest."[55] In other words, while prison officials deserved deference in their decision to place certain inmates in solitary confinement, prison officials deserved no deference in the liberty interest determination.[56]

3. *Estate of DiMarco v. Wyoming Department of Corrections*

In *Estate of DiMarco v. Wyoming Department of Corrections*,[57] the Court of Appeals for the Tenth Circuit interpreted the *Wilkinson* "atypical and significant" standard for the first time.[58] The plaintiff, an anatomical man living as a woman, sued the Wyoming Department of Correc-

49. *Id.* at 214; *accord* Sandin v. Connor, 515 U.S. 472, 486 (1995) (comparing conditions in question to other conditions in Hawaii).
50. *Wilkinson*, 545 U.S. at 214 (citation omitted).
51. *Id.* at 224.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* (internal citation omitted).
56. *See id.*
57. 473 F.3d 1334 (10th Cir. 2007).
58. *Id.* at 1340, 1342.

tions, alleging a violation of her constitutional right to due process.[59] Unaware of the plaintiff's gender identity, Wyoming sent her to a women's correctional facility.[60] During the standard body cavity search at inmate intake, prison officials discovered her anatomical identity.[61] Subsequently, prison officials placed her in isolation for fourteen months.[62] Prison officials justified her placement thusly:

> Placement officials nonetheless recommended that she be kept apart from the general population for three reasons: (1) DiMarco's safety and that of the general female inmate population, (2) her physical condition, and (3) the need to tailor programs for her condition. [The] warden testified at trial that a primary concern was that other inmates might try to harm DiMarco if they discovered her physical condition. Furthermore, questions surrounded DiMarco's identity because of DiMarco's use of multiple, unverifiable aliases. The warden felt that she did not know enough about DiMarco to risk placing her in the general population.[63]

After placing her in solitary confinement, prison officials reviewed Ms. DiMarco's confinement every ninety days.[64]

Ms. DiMarco alleged the lack of opportunity to challenge the conditions of her confinement violated her due process rights, asserting that the 438 days she spent in solitary confinement "resulted in an atypical and significant departure from ordinary incidents of prison life, giving rise to a state-created liberty interest that required due process protection," which the state failed to provide.[65] On appeal, the court considered "whether Wyoming had a constitutional duty to provide her an opportunity to challenge the placement and conditions of confinement under the Fourteenth Amendment's Due Process Clause."[66]

In order to dissociate the "atypical and significant" from "the ordinary incidents of prison life," the Tenth Circuit needed to determine an "appropriate baseline comparison."[67] Consequently, the panel articulated four non-exhaustive factors to aid this analysis: "Relevant factors might include whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement . . . ; and (4) the placement is indeterminate . . . ."[68] Three of

59. *Id.* at 1336.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1337.
64. *Id.* at 1342.
65. *Id.* at 1339.
66. *Id.* at 1336.
67. *Id.* at 1341.
68. *Id.* at 1342.

these four *DiMarco* factors originated in *Wilkinson*.[69] The *DiMarco* "extremeness of conditions" factor corresponds with the "conditions" factor as described in *Wilkinson*.[70] The *DiMarco* "indeterminacy" and "increasing the duration of confinement" factors also correspond to factors from *Wilkinson*.[71]

While the *Wilkinson* Court urged the first three factors used by the *DiMarco* panel, the Supreme Court specifically ruled against the use of the "legitimate penological interest" factor in the liberty interest determination.[72] Rather than consider penological interest in the first prong of the due process analysis, the Supreme Court reserved this factor for the second prong: sufficiency of process.[73] In contrast, the *DiMarco* panel considered penological interest in *both* prongs of the due process analysis.[74] This dramatic increase in judicial deference significantly impacted the liberty interest analysis by making the existence of an individual's rights at least partially conditioned on the impact on the government.[75]

The Tenth Circuit then applied these factors to the facts of Ms. DiMarco's case.[76] The court found a legitimate penological interest in Ms. DiMarco's safety and inadequate facilities in normal prison conditions.[77] Then, the court analyzed her conditions of confinement and determined that "[s]he had access to the basic essentials of life, although her access to certain amenities was more limited than the general popula-

69. *Compare* Wilkinson v. Austin, 545 U.S. 209, 223 (2005), *with DiMarco*, 473 F.3d at 1342.

70. *Compare Wilkinson*, 545 U.S. at 223–24 ("For an inmate placed in OSP, almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell; the light, though it may be dimmed, is on for 24 hours; exercise is for 1 hour per day, but only in a small indoor room."), *with DiMarco*, 473 F.3d at 1342 ("Relevant factors might include whether . . . the conditions of placement are extreme; . . . the placement increases the duration of confinement, as it did in *Wilkinson*; and . . . the placement is indeterminate . . . ."). *Contra* Appellants' Opening Brief at 27–29, Rezaq v. Nalley, No. 11-1069 (10th Cir. May 31, 2011) (arguing that the Tenth Circuit improperly imported Eighth Amendment and substantive due process language into a Fifth Amendment analysis).

71. *Compare Wilkinson*, 545 U.S. at 224 ("[B]ut here there are two added components. First is the duration. . . . [P]lacement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration."), *with DiMarco*, 473 F.3d at 1342 ("Relevant factors include whether . . . the placement increases the duration of confinement . . . and the placement is indeterminate.").

72. *Wilkinson*, 545 U.S. at 224 ("OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." (citation omitted)).

73. *See id.* at 225.

74. *DiMarco*, 473 F.3d at 1342–45.

75. *See id.*

76. *Id.* at 1342–45.

77. *Id.* at 1342.

tion."[78] Next, the court noted that the confinement in no way impacted the duration of Ms. DiMarco's confinement or her parole.[79]

Lastly, the Tenth Circuit analyzed the indeterminacy of Ms. DiMarco's confinement.[80] The court noted that Ms. DiMarco eventually left prison and received periodic reviews with prison staff while confined.[81] These two findings supported the court's holding that Ms. DiMarco's confinement was definite.[82] In essence, the court eschewed a common definition of "indefiniteness" by basing the concept of "definiteness" on periodic reviews.[83] In sum, the court found all four factors worked in favor of the prison officials and, thus, found no liberty interest in Ms. DiMarco's confinement.[84] The *DiMarco* panel's interpretation of the Supreme Court's rulings in *Sandin* and *Wilkinson* critically altered Tenth Circuit law with regard to the liberty interest analysis, the first prong of the due process determination.[85]

4. *Mathews v. Eldridge*

In *Mathews v. Eldridge*,[86] the United States Supreme Court considered the second prong in the due process analysis: the sufficiency of the process afforded.[87] Specifically, the Court decided "whether the Due Process Clause of the Fifth Amendment requires that prior to the termination of Social Security disability benefit payments the recipient be afforded an opportunity for an evidentiary hearing."[88] The Court noted that due process requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[89] To determine whether the government afforded the plaintiff sufficient process when terminating his benefits, the Court recognized the need to avoid setting a rigid set of rules.[90] Instead the Court offered three factors to determine process sufficiency:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through

78. *Id.* at 1343. *Contra* Appellants' Opening Brief, *supra* note 70, at 27–29 (arguing that the Tenth Circuit improperly imported Eighth Amendment and substantive due process language into a Fifth Amendment analysis).

79. *DiMarco*, 473 F.3d at 1343.

80. *Id.* at 1343–44.

81. *Id.*

82. *Id.*

83. *See id.*; WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1147 (1993) (defining "indefinite" as "having no exact limits").

84. *DiMarco*, 473 F.3d at 1344.

85. *Compare* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (using a plain-meaning understanding of "indefinite" and rejecting penological interest in the liberty interest determination), *with DiMarco*, 473 F.3d at 1342–44 (using a judicially-created understanding of "indefinite" based on periodic reviews and factoring legitimate penological into the liberty interest determination).

86. 424 U.S. 319 (1976).

87. *Id.* at 334–35.

88. *Id.* at 323.

89. *Id.* at 333 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

90. *Id.* at 334.

> the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[91]

These factors juxtapose the plaintiff's interest *against* the government's burden of providing additional process.[92] The *Mathews* Court ensured that deference to the government's interest impacted the due process analysis at *some* level, but balanced this factor against other competing interests.[93] While *Mathews* applies to all due process cases, solitary confinement prisoner cases present additional complexity; at some point the plaintiff was convicted of a crime, resulting in the proper deprivation of some liberty.[94] When a prisoner alleges due process violations and successfully proves a protected liberty interest, the question becomes how to balance the prisoner's right to liberty against government interests and what type of process is constitutionally mandated.[95]

5. *Hewitt v. Helms*

In *Hewitt v. Helms*,[96] the Supreme Court further developed the second prong of the due process analysis.[97] Specifically, the Court scrutinized the periodic review procedures employed by prisons to evaluate the ongoing need to hold the prisoner in solitary confinement.[98] The plaintiff in *Hewitt*, serving a life sentence in a Pennsylvania correctional facility, sued prison officials, claiming that their actions—"confining him to administrative segregation within the prison"—violated his due process rights.[99]

The Court evaluated the administrative reviews afforded to the plaintiff to determine whether prison officials offered constitutionally sufficient process.[100] The Court established that while "administrative segregation may not be used as a pretext for indefinite confinement,"

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91. *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263–71 (1970)).
92. *See id.*
93. *See id.*
94. Price v. Johnston, 334 U.S. 266, 285 (1948) ("Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."), *abrogated on other grounds by* McCleskey v. Zant, 499 U.S. 467 (1991); *see also* Patrick J.A. McClain, Bernard F. Sheehan & Lauren L. Butler, *Substantive Rights Retained by Prisoners*, 86 GEO. L.J. 1953, 1963 (1998) ("Even though lawful imprisonment deprives convicted prisoners of many rights, prisoners do retain certain constitutional rights.").
95. *See* Wilkinson v. Austin, 545 U.S. 209, 224–229 (2005) ("Although *Sandin* abrogated . . . *Hewitt*'s methodology for establishing the liberty interest, these cases remain instructive for their discussion of the appropriate level of procedural safeguards.").
96. 459 U.S. 460 (1983), *abrogated in part on other grounds by* Sandin v. Conner, 515 U.S. 472, 483 (1995).
97. *Id.* at 472–74.
98. *Id.* at 477.
99. *Id.* at 462.
100. *Id.* at 473–77.

prison officials must only provide "*some sort of periodic review* of the confinement of [solitary confinement] inmates."[101] This vague standard afforded prison officials great deference in determining the *substance* of prisoner reviews.[102] To pass constitutional muster *some form* of a review must occur, but the substance of the review is determined by prison officials and outside the purview of the judiciary.[103]

II. *TOEVS V. REID*

Before *Toevs v. Reid*, the Tenth Circuit looked particularly desolate for plaintiff prisoners wishing to challenge their solitary confinement.[104] The extreme deference implemented by the *DiMarco* panel created a tough road for prisoners to hoe just to demonstrate a liberty interest, let alone show a due process violation.[105] *Toevs v. Reid* helped level the playing field, and in the process incurred the disapproval of the Colorado Attorney General's office.

A. Facts

The Colorado Department of Corrections (DOC) employed a program at the Colorado State Penitentiary (CSP) called the Quality of Life Level Program (QLLP).[106] The QLLP, a "stratified quality of life program," used six levels of "privileges" to incentivize "appropriate offender behavior and program compliance" and discourage anti-social behavior.[107] The DOC classified levels one through three as administrative segregation, known more commonly as solitary confinement.[108]

Pursuant to prison regulations, prison officials conducted periodic reviews to determine whether the inmate's behavior warranted progression to the next level.[109] Progression from one level to the next required the inmate to meet certain behavior criteria.[110] After completing Level 6, the inmate became eligible for transfer to a general population prison or unit.[111] Progression through QLLP required a minimum of thirteen months, but there was no maximum.[112]

101. *Id.* at 477 n.9 (emphasis added).
102. *See id.*
103. *See id.*
104. *See* Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1342–44 (10th Cir. 2007) (using a judicially-created understanding of "indefinite" based on periodic reviews and factoring legitimate penological into the liberty interest determination).
105. *See id*.
106. Toevs v. Reid, 646 F.3d 752, 753 (10th Cir. 2011)..
107. *Id.* at 754.
108. *Id.*
109. *Id.*
110. *Id.* at 759 ("The QLLP specifies certain prerequisites for promotion to Level 4.").
111. *Id.* at 754.
112. *Id.*

On March 4, 2002, the DOC placed inmate Janos Toevs into QLLP after a failed escape attempt.[113] In September 2005, Mr. Toevs reached Level 6.[114] During his time in Level 6, the DOC documented negative behavior.[115] As a result, the prison officials regressed him to Level 1 on October 7, 2005.[116]

Mr. Toevs reached Level 2 on October 13, 2005 and Level 3 on January 14, 2006 and Level 4 in October 2007.[117] "From the record . . . it is impossible to determine when [Mr. Toevs] moved from Level 4 to Level 5 and from Level 5 to Level 6 . . . ."[118] During the course of his "re-progression," Mr. Toevs completed numerous educational programs and received favorable reviews for the first three levels.[119] However, the "reviews never informed [him] of the reasons why he was recommended for or denied progression."[120] Furthermore, prison officials never conducted reviews for Levels 4, 5, or 6.[121] The DOC justified the lack of reviews on the fact that Levels 4 through 6 "are classified as 'close custody' rather than 'administrative segregation.'"[122] On January 31, 2009, Mr. Toevs completed QLLP and, in March, was transferred to a general population prison.[123]

B. Procedural History

In his complaint, Mr. Toevs—a pro se litigant—alleged that his confinement in QLLP from 2005 until 2009 "deprived [him] of a liberty interest without due process."[124] He sued his case managers and the wardens of CSP in their official capacities and "requested compensatory and punitive damages and declaratory relief."[125] The magistrate judge who heard the case ruled not only that the "defendants were entitled to qualified immunity," but also "that the review process was constitutionally adequate."[126] Subsequently, Mr. Toevs appealed.[127]

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113. *Id.*
114. *Id.*
115. Supplement to Response to Petition for Rehearing at 7, Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011) (No. 10-1535).
116. *Toevs*, 646 F.3d at 754.
117. *Id.* at 759 ("[H]e spent twenty-one months at Level 3 (eighteen more than the minimum) before being promoted to Level 4."); Toevs v. Reid, No. 06-cv-01620-CBS-KMT, 2010 WL 4388191, at *8 (D. Colo. Oct. 28, 2010).
118. *Toevs*, 646 F.3d at 760.
119. *See id.* at 754, 760.
120. *Id.* at 759.
121. *Id.* at 760.
122. *Id.*
123. *Id.* at 754.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 755. The district court originally dismissed his case for failure to comply with Rule 8 of the Federal Rules of Civil Procedure. Toevs v. Reid, 267 F. App'x 817, 818 (10th Cir. 2008). The Tenth Circuit later reversed and remanded. *Id.* at 820. The appeal referenced in the above sentence refers to the second appeal.

C. Tenth Circuit Opinion

The Tenth Circuit affirmed the magistrate judge's decision on the basis of the defendants' qualified immunity.[128] Nevertheless, the Tenth Circuit reevaluated the question of whether the defendants' actions violated Mr. Toevs's due process rights before affirming.[129]

1. Liberty Interest

The court first analyzed whether Mr. Toevs possessed a liberty interest in his confinement at CSP.[130] In order to determine whether a liberty interest existed, the court applied the four *DiMarco* factors.[131] The court found the "legitimate penological interest" factor in favor of the defendants because of Mr. Toevs's repeated escape attempts and his regression in QLLP for negative behavior.[132] The court also found the "increasing the duration of confinement" factor weighed against finding a liberty interest because Mr. Toevs was serving a life sentence without the possibility of parole.[133]

Based on conflicting descriptions of the conditions at CSP, the court found a material issue of fact regarding the "extremeness of conditions"

128. *Toevs*, 646 F.3d at 761.

129. *See id.* at 756–60; *accord* Camreta v. Greene, 131 S. Ct. 2020, 2031 (2011) ("[A] court can often avoid ruling on the plaintiff's claim that a particular right exists. If prior case law has not clearly settled the right, and so given officials fair notice of it, the court can simply dismiss the claim for money damages. The court need never decide whether the plaintiff's claim, even though novel or otherwise unsettled, in fact has merit. And indeed, our usual adjudicatory rules suggest that a court *should* forbear resolving this issue. After all, a 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' In this category of qualified immunity cases, a court can enter judgment without ever ruling on the (perhaps difficult) constitutional claim the plaintiff has raised. Small wonder, then, that a court might leave that issue for another day. But we have long recognized that this day may never come—that our regular policy of avoidance sometimes does not fit the qualified immunity situation because it threatens to leave standards of official conduct permanently in limbo. Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court both awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive. Courts fail to clarify uncertain questions, fail to address novel claims, fail to give guidance to officials about how to comply with legal requirements. Qualified immunity thus may frustrate 'the development of constitutional precedent' and the promotion of law-abiding behavior." (citations omitted)).

130. *Toevs*, 646 F.3d at 756–57.

131. *Id.* at 756 ("[Relevant factors might include:] whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement . . . ; and (4) the placement is indeterminate." (quoting Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007)) (internal quotation marks omitted)).

132. *Id.* ("Factor[] one . . . work[s] against the existence of a liberty interest. The segregation in this case certainly relates to and furthers a legitimate penological interest (Mr. Toevs originally was committed to the QLLP because of an escape attempt, and he was regressed to QLLP Level 1 in September 2005 due to behavioral problems).").

133. *Id.* ("[G]iven that he is serving a life sentence, the placement did not increase the duration of his confinement.").

factor.[134] Mr. Toevs described the conditions of his confinement in great detail, while the DOC responded by vaguely contesting his description without providing specific evidence of the conditions.[135] The court ruled "at a minimum there is a genuine issue of material fact regarding the question."[136]

With two of the factors weighing definitively against Mr. Toevs and a third factor merely in genuine dispute, the court found the fourth factor dispositive of a liberty interest: "Placement in the QLLP is indefinite. Although there is a minimum time to complete [it], there is no maximum . . . . Mr. Toevs . . . had no knowledge of any end date . . . ."[137] Consequently, the court concluded that Mr. Toevs established a liberty interest in his placement in the QLLP.[138]

2. Sufficiency of Process

Having found a liberty interest, the court next analyzed whether the prison provided Mr. Toevs sufficient process.[139] The court emphasized that "the review must be meaningful; it cannot be a sham or a pretext."[140] Meaningful reviews "consider[] whether the prisoner's conduct during the period since the most recent security review warrants reclassification" and "whether the prisoner is eligible to move to the next level or, if the prisoner already is at the highest level, if he or she is eligible to graduate from the program."[141] When the goal of solitary confinement is behavior modification, then a meaningful review "should provide a guide for future behavior."[142] Furthermore, the court explained that meaningful reviews "provid[e] a guide for future behavior" under the *Mathews* factors.[143] The court concluded its analysis of the law by stating:

> The value of requiring an explicit advisement of progress through the QLLP program is high, in that it promotes the ultimate goal of a behavior-modification program. Moreover, the administrative burden

134. *Id.* at 756–57.
135. *Id.*
136. *Id.* at 756.
137. *Id.* at 757.
138. *Id.*
139. *Id.*
140. *Id.* (citing Hewitt v. Helms, 459 U.S. 460, 477 n.9 (1983), *abrogated in part on other grounds by* Sandin v. Conner, 515 U.S. 472, 483 (1995); Sourbeer v. Robinson, 791 F.2d 1094, 1101 (3d Cir. 1986); McClary v. Coughlin, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000)).
141. *Id.* at 758.
142. *Id.* (citing Wilkinson v. Austin, 545 U.S. 209, 226 (2005) (noting that Ohio's requirement of a statement of reasons "serves as a guide for future behavior"); Greenholtz v. Inmates of Neb. Penal and Corr. Complex, 442 U.S. 1, 15 (1979) (noting that prisoners denied parole were told the reason "as a guide to the inmate for his future behavior")).
143. *Id.* at 758–59; *see* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

> on the government should be relatively low, as the QLLP already requires officials to track prisoners' progress and evaluate their prospects for promotion to the next level.[144]

This list of pronouncements about how the prison could achieve a meaningful review foreshadowed the court's decision.[145]

Within this framework, the court found that the "evidence indicates that the reviews focused on appropriate factors," and would have been considered meaningful, "but for one serious omission—the reviews never informed Mr. Toevs of the reasons why he was recommended for or denied progression, so that he would have a guide for his future behavior."[146] Consequently, the court ruled that the first three levels lacked meaningful review.[147] Furthermore, the court relied on the trial court's finding that no reviews occurred between Levels 4 and 6 to determine that the entire review process lacked meaningfulness and, thus, failed the sufficiency of process prong.[148]

3. Qualified Immunity

Despite finding that prison officials violated Mr. Toevs's due process rights, the court nonetheless affirmed the trial court's decision granting summary judgment to the defendants because they possessed qualified immunity from the plaintiff's claim.[149] Qualified immunity, an affirmative defense, protects government officials from claims springing from unsettled areas of law and attaches unless the law is "clearly established."[150] "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."[151] In determining whether qualified immunity applies, "[t]he 'salient question . . . is whether the state of the law [at the time of the actions] gave respondents fair warning that their [conduct] was unconstitutional.'"[152] The Tenth Circuit found that the law governing meaningfulness and sufficiency of process was unsettled, thus entitling the defendants to qualified immunity.[153]

144. *Toevs*, 646 F.3d at 759.
145. *See id.*
146. *Id.*
147. *Id.* at 760.
148. *Id.*
149. *Id.* at 761.
150. *Id.* at 760.
151. *Id.* (quoting Walker v. City of Orem, 451 F.3d 1139, 1151 (10th Cir. 2006)).
152. *Id.* at 761 (second and third alterations in original) (quoting Hope v. Pelzer, 536 U.S. 730, 741 (2002)).
153. *Id.*

III. ANALYSIS

Toevs v. Reid impacts due process law in the Tenth Circuit in three fundamental ways. First, *Toevs* clarified the word "indefinite," comporting the circuit's use of the word with the common usage. Second, *Toevs* impacted other prisons operating within the circuit other than the Colorado State Penitentiary, vastly increasing the importance of the case. Third, *Toevs* lessened the judicial deference afforded prison officials in the determination of a liberty interest. All three outcomes support prisoner Fifth Amendment claims. Thus, the Colorado Attorney General's Office and the United States Department of Justice opposed the *Toevs* holding and appealed the decision, despite winning the case.

A. A Clarified Interpretation of Indefiniteness

In evaluating Mr. Toevs's liberty interest, the Tenth Circuit found the confinement to be indefinite because it had no set end date.[154] The court noted that while "there is a minimum time to complete [QLLP], there is no maximum, and there is no restriction on how many times a prisoner may be regressed to lower levels."[155] Furthermore, the court found that "[w]hen Mr. Toevs was placed in the QLLP, he had no knowledge of any end date, and as it turned out, he was in the QLLP for nearly seven years."[156] Based on these facts, the Tenth Circuit deemed Mr. Toevs's confinement indefinite.[157]

The *Toevs* court employed a plain-meaning definition of "indefinite" in reaching this conclusion.[158] The panel's use of the word adheres to the standard dictionary definition of the word "indefinite," which is "not precise" and "having no exact limits."[159] In other words, periodic reviews and the existence of a step-down program do not make a placement definite.[160]

A plain-meaning application of "indefiniteness" seemingly conflicts with the Tenth Circuit's application of the word "indefiniteness" in *DiMarco*.[161] There, the Tenth Circuit found "definiteness" because of periodic reviews.[162] However, the duration of overall sentence distinguishes *DiMarco* from *Toevs*.[163] Ms. DiMarco served fourteen months of

154. *Id.* at 757.
155. *Id.*
156. *Id.*
157. *Id.*
158. *See id.*
159. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 83, at 1147.
160. *See Toevs*, 646 F.3d at 757; *accord* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) (finding OSP's prisoners possessed liberty interest despite prison officials providing annual reviews).
161. *See* Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1343–44 (10th Cir. 2007).
162. *Id.*
163. *Compare DiMarco*, 473 F.3d at 1344 (noting Ms. DiMarco's stay in solitary confinement was fourteen months), *with Toevs*, 646 F.3d at 756 (noting Mr. Toev's stay in solitary confinement was nearly seven years).

a two-year sentence in solitary confinement.[164] Mr. Toevs served seven years of a *life sentence* in the same conditions.[165] Ms. DiMarco knew that her solitary confinement would end no more than two years after it began based on the length of her sentence.[166] Mr. Toevs could have legitimately believed that he might spend the rest of his life sentence in solitary confinement.[167] Another way to understand the difference between *Toevs* and *DiMarco* is the duration of the actual time spent in solitary confinement. Mr. Toevs spent *seven years* in solitary confinement, while Ms. DiMarco spent *fourteen months*.[168]

Indeed, the Tenth Circuit and districts courts within the circuit have struggled with how to analyze duration of time spent in solitary confinement and indefiniteness.[169] The *Toevs* panel considered the duration of Mr. Toevs's time spent in solitary confinement in its discussion of "indefiniteness," and concluded the "*indefinite* placement . . . in the type of conditions he alleged, established a protected liberty interest."[170] Combining duration of time in solitary confinement with indefiniteness fits with the rulings of the sister circuits because many circuits find a liberty interest on duration and conditions *alone*.[171] Although difficult to tease

164. *DiMarco*, 473 F.3d at 1344.

165. *Toevs*, 646 F.3d at 756.

166. *See DiMarco*, 473 F.3d at 1344.

167. *See Toevs*, 646 F.3d at 756.

168. *Toevs*, 646 F.3d at 756; *DiMarco*, 473 F.3d at 1344.

169. *See* Payne v. Friel, 266 F. App'x 724, 728 (10th Cir. 2008) ("Nonetheless, the district court dismissed his due process claim at the pleading stage without inquiring into whether the duration of his confinement in segregation alone constituted an atypical and significant hardship. This was error."); Trujillo v. Williams, 465 F.3d 1210, 1225 (10th Cir. 2006) ("Where, as here, the prisoner is subjected to a lengthy period of segregation, the duration of that confinement may itself be atypical and significant."); Smith v. Ortiz, No. 05-1211, 2006 WL 620871, at *2 (10th Cir. Mar. 14, 2006) ("The duration of confinement may itself be atypical and significant."); Gaines v. Stenseng, 292 F.3d 1222, 1226 (10th Cir. 2002) (remanding to determine whether the 75-day duration of plaintiff's confinement in segregation was itself atypical and significant); *cf.* Jordan v. Fed. Bureau of Prisons, 191 F. App'x 639, 652 (10th Cir. 2006) ("Clearly, we do not condone a murder investigation which takes almost five years, during which time an inmate is subjected to conditions which are atypical or pose a significant hardship. However, in this case, we have already determined the conditions or restrictions Mr. Jordan encountered did not pose the requisite *Sandin* atypical or significant hardship. Even if we considered the five-year duration of the confinement alone, this court has held certain prison actions which might impinge on an inmate's constitutional rights may be valid if they are reasonably related to legitimate penological interests."); Saleh v. Fed. Bureau of Prisons, No. 05-cv-02467-PAB-KLM, 2010 WL 5464294, at *5 (D. Colo. Dec. 29, 2010) ("Finally, plaintiffs argue that the magistrate judge did not properly consider the length of time they had been incarcerated at ADX as relevant to the extremity of the conditions there, in part because she improperly allowed this fact to be overridden by defendant's legitimate penological interest. However, in considering whether the duration of plaintiffs' confinement made such confinement extreme, the magistrate judge also noted that plaintiffs had been incarcerated at ADX for approximately the same length of time as the inmates in *Jordan* and *Georgacarakos*." (citations omitted)); Georgacarakos v. Wiley, No. 07-cv-01712-MSK-MEH, 2010 WL 1291833, at *13 (D. Colo. Mar. 30, 2010) (finding indefinite solitary confinement not rising to level of a liberty interest); Rezaq v. Nalley, 07-CV-02483-LTB-KLM, 2008 WL 5172363, at *9 (D. Colo. Dec. 10, 2008).

170. *Toevs*, 646 F.3d at 757 (emphasis added).

171. Marion v. Columbia Corr. Inst., 559 F.3d 693, 698 (7th Cir. 2009); Harden-Bey v. Rutter, 524 F.3d 789, 793 (6th Cir. 2008); Williams v. Norris, 277 F. App'x 647, 648 (8th Cir. 2008) ("[Plaintiff]—who is serving a life sentence without the possibility of parole, imposed in 1981—has continuously spent almost nine years in ad seg confinement in Arkansas, plus more than three years

out precisely what swayed the panel to differentiate *Toevs* and *DiMarco*, these two panel decisions accord with one another on the issue of indefiniteness.

The *Toevs* court's plain-meaning application of "indefiniteness" makes the liberty interest determination not only more common sense, but also less subjective, which makes the process fairer.[172] Plain-meaning indefiniteness removes all subjectivity from the analysis: either the prisoner knew of the release date from solitary confinement or the confinement is indefinite.[173] In this sense, solitary confinement intended for behavior modification becomes more like disciplinary segregation, which holds prisoners for a set period of time.[174] By refocusing the analysis away from periodic reviews, the Tenth Circuit makes the finding of indefiniteness clearer.[175]

B. Impact on the Federal Prison System in the Tenth Circuit

The *Toevs* ruling affects not only the Colorado DOC, but also the federal prisons located within the Tenth Circuit.[176] In the six states comprising the Tenth Circuit[177] the Federal Bureau of Prisons (BOP) operates nine facilities, with six in Colorado alone.[178] Those nine facilities house approximately 6,200 inmates.[179] This population includes the most notable inmates in the entire BOP system: inmates housed in the United

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in ad seg in Utah, and we agree with the district court that this constitutes an atypical and significant hardship, considering the particular restrictions imposed on [Plaintiff] in relation to his ad seg status during this time, and thus he had a liberty interest protected by the Due Process Clause."); Iqbal v. Hasty, 490 F.3d 143, 161 (2d Cir. 2007) ("Numerous cases in this Circuit have discussed the 'atypical and significant hardship' prong of *Sandin*. Relevant factors include both the conditions of segregation and its duration."), *rev'd and remanded sub nom.* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Stephens v. Cottey, 145 F. App'x 179, 181 (7th Cir. 2005) ("In determining whether prison conditions meet [the *Sandin*] standard, courts place a premium on the duration of the deprivation."); Sealey v. Giltner, 197 F.3d 578, 586 (2d Cir. 1999) ("Both the conditions and their duration must be considered since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical." (citation omitted)).

172. *See Toevs*, 646 F.3d at 757.

173. *See id.*

174. *See* BOSTON & MANVILLE, *supra* note 20, at 169.

175. *See Toevs*, 646 F.3d at 757.

176. *See id.* at 760; Appellees' Amended Petition for Panel Rehearing or Rehearing En Banc at 4, Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011) (No. 10-1535) ("The Toevs published opinion is not expressly limited to DOC inmates in the QLLP program but is seemingly applicable to any inmate held in any penal institution anywhere within the jurisdiction of the Tenth Circuit, including the Federal Supermax facility in Florence, Colorado, the United States Penitentiary at Leavenworth and innumerable other Federal and state penitentiaries across the six states."); Brief of the United States as Amicus Curiae in Support of Petition for Rehearing or Rehearing En Banc at 2, Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011) (No. 10-1535) ("The federal Government has a strong interest in the correct disposition of this matter. . . . [T]he federal Government is the custodian of numerous prisoners within this Circuit, many of whom are subject to restrictive conditions of confinement.").

177. Colorado, Kansas, Oklahoma, Utah, Wyoming, and New Mexico.

178. *Weekly Population Report*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/locations/weekly_report.jsp (last updated Feb. 12, 2012).

179. See *id.*

States Penitentiary Administrative Maximum Facility, known more commonly as the ADX.[180]

Opened in 1994 outside of Florence, Colorado, the ADX "houses offenders requiring the tightest controls."[181] As the only administrative maximum facility in the BOP, the ADX is "the only [federal] prison specifically designed to keep every occupant in near-total solitary confinement."[182] Like the most restrictive levels of QLLP at CSP, the ADX inmates spend twenty-three hours per day in lockup, eat alone, and recreate alone.[183] One inmate described the conditions as "total sensory deprivation,"[184] while a former ADX warden described the conditions as "a cleaner version of hell."[185] Some of the 442 inmates housed in ADX[186] include Theodore Kaczynski,[187] Zacarias Moussaoui,[188] Terry Nichols,[189] Richard Reid,[190] and Eric Rudolph.[191]

Toevs implicates these inmates in two very significant ways. First, the finding of a liberty interest at CSP could bolster future prisoner litigation challenging the conditions of confinement at the ADX.[192] Remarkably, no Colorado district court has ever found a liberty interest based on placement at the ADX.[193] Both the ADX and CSP operate as supermaxes with substantially similar conditions of confinement.[194] A liberty interest

180. *See Inmate Locator*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/iloc2/LocateInmate.jsp (last visited Feb. 12, 2012) (enter first and last name, for example "Theodore Kaczynski," "Zacarias Moussaoui," "Terry Nichols," "Richard Reid," "Eric Rudolph").

181. *USP Florence ADMAX*, FEDERAL BUREAU OF PRISONS, http://www.bop.gov/locations/institutions/flm/index.jsp (last visited Feb. 12, 2012).

182. Michael Taylor, *The Last Worst Place: The Isolation at Colorado's ADX Prison is Brutal Beyond Compare. So Are the Inmates*, S.F. CHRON., Dec. 28, 1998, at A3.

183. *Id.*

184. Chris Francescani, Emily Unger & Kasi Carson, *How to Survive a Supermax Prison*, ABC NEWS (Aug. 2, 2007), http://abcnews.go.com/TheLaw/story?id=3435989&page=1.

185. CBSNews, *Supermax: A Cleaner Version of Hell*, CBS NEWS (June 21, 2009, 8:48 PM), http://www.cbsnews.com/stories/2007/10/11/60minutes/main3357727.shtml.

186. *Weekly Population Report*, *supra* note 178.

187. *Inmate Locator*, *supra* note 181 (the "Unabomber").

188. *Id.* (a conspirator in the September 11, 2011 attacks).

189. *Id.* (a conspirator in the 1995 Oklahoma City bombing).

190. *Id.* (the "Shoe Bomber").

191. *Id.* (a conspirator in the Atlanta Olympic Village bombing).

192. See Appellees' Amended Petition for Panel Rehearing or Rehearing En Banc, *supra* note 176, at 5 n.5.

193. Silverstein v. Fed. Bureau of Prisons, No. 07-cv-02471-PAB-KMT, 2011 WL 4552540, at *12 (D. Colo. Sept. 30, 2011).

194. *Compare* Rezaq v. Nalley, No. 07-CV-02483-LTB-KLM, 2008 WL 5172363, at *1 (D. Colo. Dec. 10, 2008) ("Plaintiff Omar Rezaq filed a federal lawsuit to address his incarceration at the United States Penitentiary, Administrative Maximum Prison in Florence, Colorado ('ADX'). . . . As an inmate in the general population unit at ADX, Plaintiff claims that his freedom is severely limited. He is confined alone to an 87.5 square foot cell for at least 23 hours per day. He eats his meals alone in his cell, and when he is allowed recreation (usually around 2 hours per week), he must recreate alone. For at least one two-month period, he claims that he was denied outdoor and indoor exercise. When he is transported from his cell, he is handcuffed and shackled. Finally, the location of Plaintiff's cell prevents him from experiencing direct sunlight." (citations omitted)), *with* Toevs v. Reid, 646 F.3d 752, 756–57 (10th Cir. 2011) (analyzing the conditions alleged by Toevs, including " the amount of time spent in his solitary cell, the provision of solid metal cell doors with

at CSP persuasively supports a finding a liberty interest at the ADX.[195] However, finding a liberty interest is only the first step in the process.[196]

Second, the ruling in *Toevs*—requiring meaningful reviews and guides for future behavior—supports the finding of insufficient process and applies to the 6,200 inmates in the federal system in the Tenth Circuit, including the men housed in the ADX.[197] In other words, as a result of *Toevs* the government would be required to provide the nation's most dangerous inmates with reasons for their continued solitary confinement and ways in which it might improve the conditions.[198]

The BOP and the U.S. Attorney's Office contend *Toevs* directly and negatively implicates federal inmates within the Tenth Circuit.[199] Accordingly, the U.S. Attorney's Office filed a petition requesting the Tenth Circuit to rehear *Toevs* en banc in order "to prevent the unnecessary and erroneous creation of constitutional rules that may apply to nonparties."[200] The BOP recognized that because of the ADX and other federal facilities within the circuit, "many of [which] . . . subject [inmates] to restrictive conditions of confinement," the *Toevs* requirement has "the potential to impose a significant new burden on the federal Government to the extent that the ruling requires a 'guide for future behavior' . . . every time a prisoner's restricted status is reviewed."[201] The Attorney General's Office echoed this sentiment in its motion to reconsider and rehear the *Toevs* ruling, stating, "there is no other jurisdiction within which [reworking the prison administrative segregation systems in the court] . . . carries such important national security and penological implications."[202]

The logic behind these motions is faulty.[203] The required guidelines for future behavior need not evolve into a contract for release from soli-

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metal strips on the sides and bottom to prevent communication, and the requirement that he eat all his meals in his cell").

195. *See Toevs*, 646 F.3d at 757.

196. Wilkinson v. Austin, 545 U.S. 209, 224 (2005) ("A liberty interest having been established, we turn to the question of what process is due an inmate whom Ohio seeks to place in OSP.").

197. *See Toevs*, 646 F.3d at 761; Appellees' Amended Petition for Panel Rehearing or Rehearing En Banc, *supra* note 176, at 5 n.5; Brief of the United States as Amicus Curiae in Support of Petition for Rehearing or Rehearing En Banc, *supra* note 176, at 2.

198. *See Toevs*, 646 F.3d at 759; Appellees' Amended Petition for Panel Rehearing or Rehearing En Banc, supra note 176, at 10; Brief of the United States as Amicus Curiae in Support of Petition for Rehearing or Rehearing En Banc, supra note 176, at 2.

199. *See* Brief of the United States as Amicus Curiae in Support of Petition for Rehearing or Rehearing En Banc, *supra* note 176, at 2.

200. *Id.*

201. *Id.*

202. Appellees' Amended Petition for Panel Rehearing or Rehearing En Banc, *supra* note 176, at 15.

203. *See* Response to Petition for Rehearing at 14–15, Toevs v. Reid, 646 F.3d 752 (10th Cir. 2011) (No. 10-1535).

tary confinement.[204] Merely providing inmates the reasons for their confinement should not supersede sound correctional judgment should the inmate comply with the guidelines.[205] In other words, compliance with the guidelines does not become a "get out of jail free card."[206] The guidelines are not contractual or legally binding.[207] Thus, in the event that prisoners file suits demanding release from solitary confinement based on these guidelines, courts should dismiss these suits under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim.[208] The *Toevs* panel ordered guidelines for future conduct, not contracts for release from solitary confinement.[209]

In addition to the procedural safeguards inherent in the judiciary, prisoners face an additional burden from the Prisoner Litigation Reform Act (PLRA).[210] "Congress enacted the [PLRA] . . . in 1996 in the wake of a sharp rise in prisoner litigation in the federal courts. The PLRA contains a variety of provisions designed to bring this litigation under control."[211] One provision at the heart of the legislation is an exhaustion clause requiring prisoners to exhaust all available remedies with prison officials before filing suit.[212] This added burden further prevents inmates from suing on the basis of "breach of contract" springing from behavioral guidelines.[213]

C. Departure from the Deference Established by DiMarco

DiMarco imparted great judicial deference to penological expertise within the liberty interest framework.[214] Scholars refer to the hesitance of

204. *See* Toevs v. Reid, 646 F.3d 752, 759–60 (10th Cir. 2011); Response to Petition for Rehearing, *supra* note 203, at 14–15 ("I'm sure the court would refuse to entertain the notion that a guide for future behavior constitutes some kind of binding contract that would mandate the worst of the worst be released to [general population] despite there being every indication the inmate still posed a threat.").

205. *See Toevs*, 646 F.3d at 759–60; Response to Petition for Rehearing, *supra* note 203, at 14–15.

206. *See Toevs*, 646 F.3d at 759–60; Response to Petition for Rehearing, *supra* note 203, at 14–15.

207. *See Toevs*, 646 F.3d at 759–60; Response to Petition for Rehearing, *supra* note 203, at 14–15.

208. Fed. R. Civ. P. 12(b)(6); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56 (2007) ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" (first alteration in original) (citations omitted)); *see also* Response to Petition for Rehearing, *supra* note 204, at 14 ("If an inmate in the future tries to misconstrue the Opinion as the Appellees predict I am confident any court would recognize the arguments' lack of merit.").

209. *See Toevs*, 646 F.3d at 759–60.

210. *See* Alexander v. Hawk, 159 F.3d 1321, 1324–25 (11th Cir. 1998) (citing statistics giving rise to the PLRA).

211. Woodford v. Ngo, 548 U.S. 81, 84 (2006).

212. *Id.* at 84–85.

213. *See id.*

214. Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007) ("[A]ny assessment must be mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts.").

the courts to interfere with penological matters as the "hands-off doctrine."[215] Some scholars argue the hands-off doctrine stopped in the 1960s and 1970s—ostensibly with the Supreme Court's decision in *Wolff v. McDonnell*:[216] "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country."[217] Others believe the doctrine still influences courts.[218] Some even argue "rigid due process requirements eviscerate prison officials' ability to segregate prisoners for administrative reasons in an era when prison gangs pose an increasing threat to institutional security."[219]

The panel decision from *DiMarco* serves as evidence for the scholars who believe the hands-off doctrine still applies.[220] Recall that the *DiMarco* panel injected legitimate penological interest into the determi-

215. *See, e.g.*, David M. Adlerstein, *In Need of Correction: The "Iron Triangle" of the Prison Litigation Reform Act*, 101 COLUM. L. REV. 1681, 1684 (2001) ("Traditionally, the federal judiciary was reluctant to address prisoner grievances because of concerns involving the separation of powers doctrine, its lack of expertise in penology, and the possibility that judicial intervention might undermine prison discipline. This 'hands off' doctrine, long prevalent, eroded in the face of the social ferment of the 1960s and 1970s. Armed with 42 U.S.C. 1983 (Section 1983), prisoners aired a host of claims in federal court, and succeeded in obtaining some meaningful reforms. Yet litigation came at a cost—states grew resentful of perceived federal micromanagement, and the federal docket became increasingly choked with noncognizable or frivolous prisoner claims." (footnotes omitted)); Melissa Rivero, *Melting in the Hands of the Court: M&M's, Art, and a Prisoner's Right to Freedom of Expression*, 73 BROOK. L. REV. 811, 817–18 (2008) ("The hands-off doctrine embodied the Court's unwillingness to review prison administrators' decisions. Under the doctrine, federal courts avoided addressing whether prisoners retained any constitutional rights. The primary function of the courts was to ensure the freedom of illegally confined individuals, not to 'superintend the treatment and discipline of prisoners.' Although the Court acknowledged some claims of racial discrimination and unsafe prison conditions as egregious, the hands-off doctrine prevented the Court from addressing these claims. Because the Court believes prison administrators are better suited to make prison regulations, it avoided any judicial interference in prison administrative decisions. Prison administrators have to deal with inmates on a daily basis. Thus, there is a fear that judicial review may threaten prison officials' authority." (footnotes omitted)).

216. 418 U.S. 539 (1974).

217. *Id.* at 555–56.

218. Barbara Belbot, *Where Can a Prisoner Find a Liberty Interest These Days? The Pains of Imprisonment Escalate*, 42 N.Y.L. SCH. L. REV. 1, 3 (1998) ("The Supreme Court's recent decision in *Sandin v. Conner* is testimony to the proposition that the 'hands-off' doctrine never completely expired." (footnote omitted)).

219. Theis, *supra* note 23, at 149; *see also id.* at 175 ("Prison administrators are charged with one of the hardest jobs in our country. Limiting their ability to run prisons as they see fit is clearly contrary to public policy. They have the task of overseeing entire populations of people who have been convicted of felonies, some of whom will never return to public society because their crimes were so egregious. As diverse as the crimes that brought the inmates to prison, so too are their personalities: some shrewd, some aggressive, some remorseful, and some incorrigible. The Supreme Court's holding in *Wilkinson v. Austin* validates what should have been the obvious: prison officials who oversee the day-to-day administration and procedures of specific, unique prisons are the best situated and the best informed to make decisions that implicate the lives of prison staff and inmates.").

220. *See* Hewitt v. Helms, 459 U.S. 460, 467 (1983), *abrogated in part on other grounds by* Sandin v. Conner, 515 U.S. 472, 483 (1995) ("We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected liberty interests."); *DiMarco*, 473 F.3d at 1342 ("[A]ny assessment must be mindful of the primary management role of prison officials who should be free from second-guessing or micro-management from the federal courts.").

nation of a prisoner's liberty interest, which augmented the impact of penological interest beyond the sufficiency of the process analysis, its traditional realm.[221] The Supreme Court in *Wilkinson* specifically rejected injecting penological interest into the liberty interest determination.[222] Despite this directive from the Supreme Court, district courts within the Tenth Circuit, prior to *Toevs*, applied the *DiMarco* "legitimate penological interest" factor to situations analogous to the confinement conditions and review procedures at CSP.[223] Of the three courts applying the factor in summary judgment rulings or appellate reviews, all three found a legitimate penological interest.[224] Even in the four motion-to-dismiss-rulings—with legal standards favorable to the plaintiff[225]—the courts evenly split on this issue of penological interest.[226]

The *Toevs* court afforded the DOC less deference than previous courts in two specific ways. First, the *Toevs* court found indefiniteness of Mr. Toevs's confinement determinative in finding a liberty interest.[227] Despite finding the government possessed an interest in keeping Mr. Toevs in solitary confinement, the court found that his indefinite confinement overrode this deference.[228] In effect, the *Toevs* court shifted the weight of penological interest back into the more appropriate analysis—sufficiency of process or the outcome of the process—and out of the liberty interest determination.[229]

Second, the *Toevs* court afforded the DOC less deference than previous courts by finding the government's reviews insufficient to pass

221. *DiMarco*, 473 F.3d at 1342 ("Relevant factors might include whether . . . the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation . . . .").

222. Wilkinson v. Austin, 545 U.S. 209, 224 (2005) ("OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." (citation omitted)).

223. *See, e.g.*, Saleh v. Fed. Bureau of Prisons, No. 05-cv-02467-PAB-KLM, 2010 WL 5464294, at *4–6 (D. Colo. Dec. 29, 2010) (analyzing the confinement at ADX).

224. Schmitt v. Rice, 421 F. App'x 858, 862 (10th Cir. 2011); *Saleh*, 2010 WL 5464294, at *4; *see also* Thompson v. Rios, 07-CV-00025-PAB-KLM, 2010 WL 749859, at *1 (D. Colo. Mar. 2, 2010) (accepting judgment of magistrate judge founding no penological interest).

225. *See* Fed. R. Civ. P. 12(b)(6); *see also* 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed. 2004) ("A proposition that is at the heart of the application of the Rule 12(b)(6) motion, and one that is of universal acceptance, . . . is that for purposes of the motion to dismiss, (1) the complaint is construed in the light most favorable to the plaintiff, (2) its allegations are taken as true, and (3) all reasonable inferences that can be drawn from the pleading are drawn in favor of the pleader.").

226. *See* Stine v. Lappin, No. 07-cv-01839-WYD-KLM, 2009 WL 103659, at *9 (D. Colo. Jan. 14, 2009); Rezaq v. Nalley, No. 07-cv-02483-LTB-KLM, 2008 WL 5172363, at *8 (D. Colo. Dec. 10, 2008). *Contra* Matthews v. Wiley, 744 F. Supp. 2d 1159, 1171 (D. Colo. 2010); Powell v. Wilner, No. 06-cv-00545-WYD-MEH, 2009 WL 840756, at *14 (D. Colo. Mar. 30, 2009).

227. Toevs v. Reid, 646 F.3d 752, 756–57 (10th Cir. 2011).

228. *See id.* at 761.

229. *See id.* at 759–60; *accord* Wilkinson v. Austin, 545 U.S. 209, 224 (2005) ("OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." (citation omitted)).

constitutional muster.[230] *DiMarco* muddied the waters by placing government interest in the liberty interest determination.[231] While the Supreme Court in *Hewitt*, *Sandin*, and *Wilkinson* all encouraged deference to prison officials in the sufficiency of process determination,[232] *Hewitt* stressed that "administrative segregation may not be used as a pretext for indefinite confinement. Prison officials must engage in *some sort of periodic review* of the confinement of such inmates."[233] The *Toevs* court in effect equated meaningless process with no process, which functionally makes more sense than allowing literally *any* form of review to count towards the second due process prong.[234] By ordering prison officials to explain the reasons and guidelines for future conduct for continued solitary confinement, the *Toevs* court inserted judicial influence into penological matters.[235] Increased judicial attention to prisoner matters comports with the judiciary's "duty to protect the unpopular from irrational persecution and to defend the rights of the marginalized."[236] As one scholar notes, "despite being on the fringe of societal acceptance, inmates do not check all of their constitutional rights at the prison door."[237] However, without judicial attention provided by the *Toevs* panel, prisoners' rights remain in jeopardy.[238]

IV. CONCLUSION

Solitary confinement is a dangerous penological tool because it takes such a serious toll on inmates' mental health. Many American human rights organizations argue against the use of solitary confinement. American allies abroad consider solitary confinement inhumane. Nevertheless, when inmates use the judicial system to challenge the inhumanity, they face serious procedural hurdles. Before *Toevs v. Reid*, proving that solitary confinement created a liberty interest or that behavioral reviews failed constitutional muster were just two of many such hurdles. *Toevs*, though, clarified due process law in the Tenth Circuit. Because

230. *Toevs*, 646 F.3d at 760.

231. *See* Estate of DiMarco v. Wyo. Dep't of Corr., 473 F.3d 1334, 1342 (10th Cir. 2007). *But see* Wilkinson, 545 U.S. at 224.

232. *Wilkinson*, 545 U.S. at 228 ("[C]ourts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior."); Sandin v. Conner, 515 U.S. 472, 482 (1995) ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment."); Hewitt v. Helms, 459 U.S. 460, 472 (1983) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."), *abrogated in part on other grounds by Sandin*, 515 U.S. at 483.

233. *Hewitt*, 459 U.S. at 477 n.9 (emphasis added).

234. *See Toevs*, 646 F.3d at 757–60.

235. *See id.* at 759–60.

236. Maximilienne Bishop, *Supermax Prisons: Increasing Security or Permitting Persecution?*, 47 ARIZ. L. REV. 461, 462 (2005).

237. *Id.*

238. *See id.*

the ruling from *Toevs* clarified the term "indefiniteness" in a way unfavorable to prisons, it implicates the due process procedures for the infamous prisoners held at the ADX. Furthermore, *Toevs* tactfully shifts judicial deference to prison officials out of the liberty interest determination and back into the sufficiency of process analysis, its proper sphere. Despite the fact that Mr. Toevs's appeal lost at the Tenth Circuit, the holding nevertheless helps future prisoners' due process claims against prison officials.

Not surprisingly, the Colorado Attorney General's Office and the U.S. Department of Justice contest the ruling. However, the ruling in *Toevs* improves due process jurisprudence by clarifying the legal standard and better protecting thousands of inmates across the Tenth Circuit. Although requiring prison officials to conduct more meaningful reviews seems onerous, the reviews provide guidelines for prisoner conduct, not contracts for release from solitary confinement. Moreover, by removing *some* judicial deference from the due process analysis, inmates receive more reliable and fairer reviews. As a result, the Tenth Circuit should deny the Attorney General's motions to reconsider and rehear en banc and let *Toevs* stand.

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