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Settling Boundaries for Student Due Process: Rustad v. United States Air Force and the Right to Counsel in Disciplinary Dismissal Proceedings

Wendy Bliss

SETTING BOUNDARIES FOR STUDENT DUE PROCESS: *RUSTAD V. UNITED STATES AIR FORCE* AND THE RIGHT TO COUNSEL IN DISCIPLINARY DISMISSAL PROCEEDINGS

INTRODUCTION

"Due process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.[1]

Chief Justice Warren's short, amorphous and prophetic characterization of procedural due process[2] has been echoed many times during the last twenty-five years by the Supreme Court in its interpretations of the due process clauses of the fifth and fourteenth amendments.[3] During this period, judicial examination of the "elusive concept" of procedural due process has occurred in a wide variety of contexts.[4] A significant amount of this recent due process litigation has emerged from classrooms, schoolhouses and campuses. Initially, courts were reluctant to find that students had constitutional rights in an educational setting.[5] Since the federal courts have recognized the right to due process in this context,[6] however, there have been numerous attempts to define the exact parameters of student due process. Courts have developed different minimum due process requirements for various types of student-school conflicts.

Currently, the least settled area of student due process law occurs in the context of educational disciplinary actions involving dismissal.

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1. Hannah v. Larche, 363 U.S. 420, 442 (1960).

2. Procedural due process rights, as opposed to substantive due process rights, exist only when a government takes action which involves a specific individual. Substantive due process rights, in contrast, exist when a government takes actions which affect a group of people. *See* J. NOWAK, R. ROTUNDA, B. J. YOUNG, CONSTITUTIONAL LAW 417 (2d ed. 1983).

3. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands."); Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961) (" '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.") (quoting Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162 (1951) (Frankfurter, J., concurring); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring) ("Due process is not a mechanical instrument. It is not a yardstick. . . . It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.").

4. Fuentes v. Shevin, 407 U.S. 67 (1973) (prejudgment replevin of goods purchased on an installment plan); Lindsey v. Normet, 405 U.S. 56 (1972) (evicting a tenant); Bell v. Burson, 402 U.S. 535 (1971) (suspending a driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (terminating public welfare assistance); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (garnishing wages before judgment); *In re* Gault, 387 U.S. 1 (1969) (removing delinquent children from their parent's home).

5. *See infra* notes 24-26 and accompanying text.

6. Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

There is general agreement that notice and a hearing are mandatory before a pupil may be permanently expelled;[7] but there is considerable controversy with regard to the procedural rights which must be granted at dismissal hearings. In particular, the lower federal courts are divided on the issue of the student's right to legal representation.[8]

The following discussion reviews the general development of procedural due process. It then highlights some recent federal court decisions addressing educational due process and the split of authority in these decisions on the right to counsel in student dismissal actions. The article then analyzes the recent Tenth Circuit opinion in *Rustad v. United States Air Force*,[9] suggests an analytical framework for future student due process cases, and concludes that *Rustad* will be interpreted as a case that sets an outer boundary for procedural due process in an educational context.

I. BACKGROUND

A. *The Development of Procedural Due Process*

Procedural due process is derived from the fifth[10] and fourteenth[11] amendments, which only provide protection to individuals faced with governmental actions that may deprive them of life, liberty or property.[12] The threshold question facing courts in procedural due process cases is whether the private interest affected by government action can be considered a liberty or property interest. The Supreme Court's definition of liberty and property interests protected by the due process clause has undergone an interesting metamorphosis. Sixty years ago the Court took an expansive view of the concepts of liberty and property; its broad characterization, though, did not include public sector benefits.[13] In 1970 the Supreme Court extended its definition of protected liberty and property interests to include government benefits.[14] From this initial recognition that certain government "entitlements" could not be

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7. *Id. See also infra* notes 31-36.

8. *See infra* notes 37-47 and accompanying text.

9. 718 F.2d 348 (10th Cir. 1983).

10. U.S. CONST. amend. V, § 1 provides, in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

11. U.S. CONST. amend. XIV, § 1 states, in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

12. *See generally* Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 452 (1977).

13. For example, in attempting to describe the liberty interest, the Court in Meyer v. Nebraska, 262 U.S. 390, 399 (1923), stated:

> [L]iberty . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

14. Goldberg v. Kelly, 397 U.S. 254, 265 (1970) (the Court held that welfare benefits were "not mere charity, but a 'means to promote the general Welfare, and secure the Blessing of Liberty to ourselves and our Posterity' ").

taken away from an individual without minimal procedural safeguards,[15] the Court has, since 1972, more narrowly defined the types of public benefits which are liberty or property interests protected by the due process clauses.[16]

Once it has been determined that a specific private interest is a liberty or property interest, within the meaning of the due process clause, judicial due process analysis must address a second question: whether minimal procedural safeguards were followed before deprivation of the private interest. The Supreme Court's articulation of the procedures required by due process when government implicates a protected private interest has also gone through periods of expansion and retraction. Early cases established notice and hearing as the minimally required procedural safeguards.[17] In the early 1970's it appeared that full evidentiary hearings might be mandated.[18] The Court rapidly retreated from this stance[19] in favor of a balancing of private-versus-governmental interests approach as articulated in *Mathews v. Eldridge*.[20] In the last decade the Court has consistently applied the *Mathews* three-pronged balancing test[21] which maximizes judicial discretion.[22] Moreover, application of the *Mathews* test triggers different levels of due process protection.[23]

B. *Procedural Due Process on Campus*

1. The Dawn of Student Due Process

For a long time, the administrative processes of educational institutions, insofar as they concerned students, were not subjected to close

15. *See* Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 531 (1975) (a review of procedural due process litigation in the early 1970's).

16. *See* Bishop v. Wood, 426 U.S. 341 (1976) (a city police officer's interest in continued public employment is not a protected liberty or property interest unless state law has granted some form of guarantee of permanent employment); Arnett v. Kennedy, 416 U.S. 134 (1974) (nonprobationary federal employee's statutorily created property interest in not being discharged except "for cause," did not require procedural protections beyond those afforded by statute); Board of Regents v. Roth, 408 U.S. 564 (1972) (non-tenured professor's interest in re-employment is not a protected property or liberty interest). *But see* Perry v. Sindermann, 408 U.S. 593 (1972) (non-tenured college professor's property interest in re-employment protected by the due process clause because professor had tenure under college's de facto tenure program).

17. *E.g.*, Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950); Grannis v. Ordean, 234 U.S. 385 (1914).

18. *See* Goldberg v. Kelly, 397 U.S. at 264.

19. Rendleman, *supra* note 15.

20. 424 U.S. 319 (1976).

21. *See* Parham v. J.R., 442 U.S. 584, 600 (1979); Memphis Light, Gas & Water v. Craft, 436 U.S. 1, 15 (1978); Dixon v. Love, 431 U.S. 105, 112 (1977); Ingraham v. Wright, 430 U.S. 651, 682 (1977).

22. Mathews v. Eldridge, 424 U.S. at 334-335. The court indicated the following factors should be considered in determining the "specific dictates" of due process: 1) the private interest affected by the official action; 2) the risk of erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burdens which the additional or substitute procedural requirement would entail.

23. *See supra* note 21 and cases cited therein.

judicial scrutiny.[24] Historically, courts had deferred to academic and disciplinary decisions made by school officials.[25] Both courts and school officials advanced a wide variety of theories to justify judicial abstention in this area of the law. The justifications included: (1) the doctrine of *in loco parentis*, which suggested that schools derived authority to discipline students by assuming the role of a surrogate parent; (2) contract theory, under which a student's receipt of an education was conditioned on student obedience to school regulations; and (3) the view that attendance at a public educational institution was a privilege rather than a right.[26]

In 1961, the Fifth Circuit broke sharply with this tradition of judicial abstention by establishing due process requirements for student disciplinary hearings. In the landmark decision of *Dixon v. Alabama State Board of Education*[27] students at a state college who had participated in demonstrations were expelled without notice or a hearing. The *Dixon* court held that, even if attendance at a state-supported school was a privilege rather than a right, "the state could not condition the granting of a privilege upon the renunciation of the constitutional right to due process."[28] According to the Fifth Circuit, minimum requirements of procedural due process would be dependent on the particular circumstances and interests of the parties involved.[29] In short, the *Dixon* court determined that due process required notice and a hearing which contained the rudiments of an adversary proceeding.[30]

Although *Dixon* radically departed from precedent, other lower federal courts quickly required that procedural due process be afforded students faced with disciplinary dismissal from government supported educational institutions.[31] These courts, however, diverged on the question of whether the due process clause applied to temporary suspensions from school.[32] The Supreme Court in *Goss v. Lopez*[33] provided

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24. *See, e.g.*, Dreyfuss & Knapp, *Due Process as a Management Tool in Schools and Prisons*, 28 CLEV. ST. L. REV. 373, 379 (1979).

25. *See, e.g.*, Comment, *The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions*, 9 CUM. L. REV. 751, 758 (1979).

26. *See* 48 U. CIN. L. REV. 126, 126-27 (1979).

27. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

28. *Id.* at 156.

29. *Id.* at 155.

30. Specifically, the *Dixon* court required that the notice contain a statement of specific charges and grounds for expulsion. The procedures mandated for the hearing included the requirement that the student be told the names of the school's witnesses and the facts to which these witnesses testified. Furthermore, the court held that the student was to be permitted to testify on his own behalf and to produce his own witnesses or written affidavits at the hearing. Additionally, the student was to have the right to inspect the written results and findings of the hearing. *Id.* at 158-59.

Significantly, however, the *Dixon* court rejected the idea that due process in this case mandated a "full-dress judicial hearing" with the right to cross-examine witnesses, and reasoned that this type of hearing might be impractical and detrimental to the school's educational atmosphere. *Id.* at 159.

31. *See, e.g.*, Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967).

32. For decisions in which the due process clause was found applicable to removals from school short of expulsion, see for example: Sullivan v. Houston Indep. School Dist., 475 F.2d 1071 (5th Cir. 1973), *cert. denied*, 414 U.S. 1032 (1973); Tate v. Board of Educ.,

the answer to this question by requiring notice and opportunity to be heard in student suspensions of ten days or less. At the same time, the Court rejected the idea that attendance at a state-supported school was a privilege and concluded that students had liberty and property interests in their education.[34] Although notice and a hearing were minimally required for short-term suspensions, the *Goss* majority stated that further procedural protections, such as the right to counsel, and the right to confront, cross-examine, and call witnesses would be left to the discretion of school officials.[35] Observing that longer suspensions or expulsions might require more formal procedures, the Court declined to outline appropriate due process requirements for these situations.[36]

2. Student Due Process and the Right to Counsel

In the wake of *Dixon* and *Goss*, and during a period of widespread student unrest, the federal judiciary attempted to determine the nature and extent of procedural due process in various academic contexts. A considerable amount of student due process litigation has focused on the right to counsel. The right to counsel controversy has arisen in diverse educational settings, including state supported high schools, colleges and universities, and federal military service academies.[37] There is not widespread acceptance of the view that students have an absolute right to counsel in educational proceedings, nor is there widespread acceptance of the view that students have no right whatsoever to counsel in these proceedings. Instead, the trend of the decisions has been to establish procedural guidelines for specific fact patterns. It has become clear that due process hearings will not usually be required at private schools[38] or in academic dismissals;[39] thus, the right to counsel is not an

453 F.2d 975 (8th Cir. 1972). In several cases, however, lower federal courts found temporary suspensions not within the scope of the due process clause. *See, e.g.*, Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973); Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438 (5th Cir. 1973); Linwood v. Board of Educ., 463 F.2d 763 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

33. 419 U.S. 565 (1975).

34. *Id.* at 572-74.

35. *Id.* at 583-84.

36. *Id.* at 584.

37. The due process clause has been found to be applicable both to cadets and midshipmen facing separation at military service academies as well as to students facing dismissal at state supported educational institutions. Love v. Hidalgo, 508 F. Supp. 177, 181 (D. Md. 1981); *see* Andrews v. Knowlton, 509 F.2d 898 (2d Cir. 1975), *cert. denied*, 423 U.S. 873 (1975); Hagopian v. Knowlton, 470 F.2d 201 (2d Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967); *see also* Johnson, *Due Process Requirements in the Suspension or Dismissal of Students from Public Educational Institutions*, 5 CAP. U.L. REV. 1 (1976).

However, courts have recognized that in the process of balancing private versus governmental interests in student due process cases, the government's interest will be greater in military service academy cases than in cases involving students at other tax-supported institutions. Courts have reasoned that this stronger government interest in military service academy dismissals is based on the necessity for prompt action in the conduct of military operations and the desirability of instilling and maintaining discipline and morale in cadets who will be required to bear weighty responsibilities in combat situations. Hagopian v. Knowlton, 470 F.2d 201, 209 (2d Cir. 1972); Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967).

38. *See* Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971) (private school actions

issue in these settings. Similarly, in short-term suspension proceedings a student has no right to legal representation.[40]

The right to counsel seems to be most clearly afforded support in educational dismissal actions based on criminal charges which are the subject of a pending criminal action.[41] In this situation, the dangers of self-incrimination and the student's "awareness of his own inability to evaluate the effect" of his statements on the pending criminal proceedings justify the presence of an attorney.[42]

The students' right to legal representation in disciplinary dismissal hearings has received divisive treatment in the lower federal courts. Generally, due process violations are not found where schools have permitted students to be represented by an attorney.[43] Conversely, where legal counsel is denied, many courts rule that such a denial is not violative of due process.[44] The reasons these courts have advanced for denying legal representation at disciplinary hearings include: (1) the student can defend himself sufficiently; (2) counsel would create overly adversarial school proceedings; (3) the school will not use counsel; and (4) the *Dixon* requirements of notice and hearing are adequate.[45]

In contrast to the arguments against legal representation, the courts that recognize the right to counsel in disciplinary dismissals justify their position in several ways: (1) the risk of dismissal is a serious deprivation

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are not state action); Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968); Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967), *remanded*, 412 F.2d 1128 (D.C. Cir. 1969); *see also* Wilkinson and Rolapp, *The Private College and Student Discipline*, 56 A.B.A.J. 121 (1970).

39. Board of Curators v. Horowitz, 435 U.S. 78 (1978); *see also* Henderson & Isenberg, *The Law and Academic Evaluation and Dismissal in Higher Education*, 13 CUM. L. REV. 475 (1983); Note, *Charlotte's Web: Reflections on the Role of Due Process in Academic Decisionmaking*, 56 IND. L.J. 725 (1981). However, if the academic suspension or expulsion stems from disciplinary charges, some courts have interpreted the due process clause to require that the student be afforded a hearing. *See* Ross v. Pennsylvania State Univ., 445 F. Supp. 147 (M.D. Pa. 1978); Brookins v. Bonnell, 362 F. Supp. 379 (E.D. Pa. 1973) (failure to submit requisite documentation and failure to attend class regularly).

40. Goss v. Lopez, 419 U.S. at 583 stated: "We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel . . . ."

41. Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); *cf.* Nzuve v. Castleton State College, 133 Vt. 225, 335 A.2d 321 (1975) (school permits student facing pending criminal charges to have attorney at disciplinary proceedings).

42. Gabrilowitz, 582 F.2d at 104.

43. *See, e.g.*, Wimmer v. Lehman, 705 F.2d 1402 (4th Cir. 1983); Cody v. Scott, 565 F. Supp. 1031 (S.D.N.Y. 1983); Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975); Center for Participant Educ. v. Marshall, 337 F. Supp. 126 (N.D. Fla. 1972); Kelly v. Martin, 16 Ariz. App. 7, 490 P.2d 836 (1971).

44. As one commentator noted, schools which allow legal representation at disciplinary proceedings do so more "as a matter of grace than compulsion." Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1075 (1969). For decisions which do not recognize legal representation in disciplinary proceedings as a minimum requirement of due process, *see* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968); Kolesa v. Lehman, 534 F. Supp. 590 (N.D.N.Y. 1982); Garshman v. Pennsylvania State Univ., 395 F. Supp. 912 (M.D. Pa. 1975); Barker v. Hardway, 283 F. Supp. 228 (S.D.W. Va. 1968), *aff'd*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); Due v. Florida A&M Univ., 233 F. Supp. 396 (N.D. Fla. 1963).

45. *E.g.*, 48 U. CIN. L. REV. 126, 128 (1979). For the *Dixon* requirements, *see supra* note 30.

which mandates additional procedural safeguards; (2) legal counsel will help to protect student's interests at the disciplinary proceedings; and (3) the intrusions on the school by permitting the student to have counsel present would be minimal.[46] But even in the disciplinary cases where legal representation is considered a minimal procedural due process requirement there are differing views as to whether the proper role of counsel should be adversarial or advisory.[47]

It is against this unsettled background of due process in student disciplinary dismissal proceedings that the Tenth Circuit examined the right to counsel in *Rustad v. United States Air Force*.[48]

II. *RUSTAD V. UNITED STATES AIR FORCE*

A. *Facts*

On February 12, 1982, Kevin M. Rustad, a First Class Senior Cadet at the United States Air Force Academy, was charged with several conduct violations.[49] Some of the alleged conduct violations involved infraction of cadet rules;[50] two of the charges were criminal in nature.[51] Rustad was notified by letter that an administrative hearing would be convened to determine if he should be disenrolled from the Academy. Pursuant to Air Force regulations,[52] Rustad elected to present his case to a hearing officer and to seek the advice of retained counsel prior to the hearing.[53] Rustad also requested, and was denied, the right to have his attorney present at the proceedings against him.[54] The report made by the Hearing Officer[55] and sent to the Academy Board concluded that, although Rustad was not guilty of the two criminal charges, he had violated several Academy rules and regulations.[56] Rustad asked that his retained counsel be allowed to appear with him on April 28, 1982, when

46. French v. Bashful, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969). *See also*, Marin v. University of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974).

47. Some courts have suggested that the attorney be allowed to speak at the hearing. *E.g.*, Speake v. Grantham, 317 F. Supp. 1253, 1257-58 (S.D. Miss. 1970), *aff'd*, 440 F.2d 1351 (5th Cir. 1971); French v. Bashful, 303 F. Supp. 1333, 1337-38 (E.D. La. 1969). Other decisions indicate counsel should be admitted in an advisory capacity only. *E.g.*, Esteban v. Central Mo. State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). *See also* Comment, *The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions*, 9 CUM. L. REV. 751, 753-54 (1979).

48. 718 F.2d 348 (10th Cir. 1983). An earlier Tenth Circuit case addressed the question of whether due process was afforded to an Air Force Academy cadet during disenrollment proceedings, but in that case, the right to counsel was not at issue since the student was represented by counsel. Birdwell v. Schlesinger, 403 F. Supp. 710 (D. Colo. 1975).

49. *Rustad*, 718 F.2d at 349.

50. The alleged infractions included absence from his required duty, maintaining a residence off the United States Air Force Academy and having an unauthorized guest in his room. *Id.*

51. The criminal charges included larceny and use of marijuana. *Id.*

52. *Rustad*, 718 F.2d at 349 (citing Air Force Regulation 53-3, entitled "Disenrollment of United States Air Force Cadets").

53. *Rustad*, 718 F.2d at 349.

54. *Id.*

55. The hearing officer in this case was an attorney. *Id.* at 351 (McKay, J., dissenting).

56. *Id.* at 349.

the Academy Board would hear his case. This second request for counsel was denied.[57] At the April 28 meeting the Board decided to disenroll Rustad.[58]

Rustad sought a preliminary injunction in federal district court to enjoin enforcement of the Academy Board's order and to bar his disenrollment. The district court denied this preliminary injunction. On appeal, Rustad argued that since he was charged with felonious misconduct, an "entirely different hue taint[s] the view of the fairness of the hearings" afforded him.[59] Rustad further asserted that representation by an attorney in disciplinary proceedings at the Air Force Academy was a right established by twenty-six years of Air Force common law.[60] Retained counsel, according to Rustad, was minimally required by the due process clause. He also emphasized that the presence of counsel during the hearing would not injure any government interest.[61]

The government, on appeal, contended that Rustad's claim for relief was moot, since the time of his final examinations had passed.[62] Further, it argued that Rustad was afforded sufficient due process because he was permitted to have the assistance of an attorney prior to the hearing.[63] The government also suggested that military academies could be "crippled by the ready availability of injunctive judicial relief" if Rustad's request for counsel was granted.[64] The United States Court of Appeals for the Tenth Circuit affirmed the district court's decision denying injunctive relief, ruling that the due process clause did not give Rustad the right to be represented by retained counsel at Academy disenrollment proceedings.[65]

B. *The Decision*

The Tenth Circuit Court of Appeals viewed the *Rustad* case as raising a single constitutional issue for decision.[66] Both the majority opinion[67] and the dissent[68] addressed the question of whether minimal requirements of procedural due process under the fifth amendment were met when Cadet Rustad was not permitted to have counsel present

57. *Id.*

58. Judge McKay, dissenting, suggested that the Board's written decision indicated that the alleged criminal charges influenced the Board's decision to disenroll Rustad. *Id.* at 350 (McKay, J., dissenting).

59. Brief for Appellant at 7, Rustad v. United States Air Force, 718 F.2d 348 (10th Cir. 1983).

60. *Id.* at 9. The district court characterized the practice of appointing counsel at disciplinary hearings as a "tradition" rather than as a "right." *Id.*

61. *Id.* at 9, 12.

62. Brief for Appellees at 5.

63. *Id.* at 7.

64. *Id.*

65. *Rustad*, 718 F.2d at 349.

66. The majority opinion notes that the appellees raised mootness as an issue which would require dismissal; however, the court declined to dismiss on this ground, reasoning that the court could fashion appropriate relief if Rustad won on the merits of the case. *Id.* at 349-50.

67. Written by Circuit Judge McWilliams and joined by Circuit Judge Barrett.

68. Authored by Circuit Judge McKay.

at the disenrollment proceedings. Although the *Rustad* court had a uniform perception of the problem presented by the case, the majority and dissent split on their interpretation of the facts as well as on their choice of applicable law.

1. Majority Opinion

In a surprisingly short opinion, Judge McWilliams, writing for the majority, based the decision to deny counsel on two Second Circuit military service academy disciplinary dismissal cases, *Wasson v. Trowbridge*[69] and *Hagopian v. Knowlton*.[70] These two decisions, not described in the majority opinion, held that cadets facing expulsion were not entitled to have an attorney present at proceedings against them; however, these cases also implied that counsel might be required in hearings involving criminal charges.[71] The court found no "present pertinency"[72] to the argument that *Rustad* should be distinguished from *Wasson* and *Hagopian*, remarking that the action against Rustad was "purely a disenrollment proceeding from the start."[73] Military misdeeds, stated the court, and not criminal acts, ultimately provided the basis for Rustad's disenrollment.[74]

The majority's minimization of the significance of the criminal charges initiated against Rustad and its classification of the dismissal proceeding as purely administrative is pivotal to its ruling. A different interpretation of the facts, viewed in light of *Wasson* and *Hagopian*, suggests that Rustad had a right to counsel. The court did not decide whether legal representation would have been required at the meeting of the Academy Board if Rustad had not been exonerated of the criminal charges by the Hearing Officer.

2. The Dissent

In his dissent, Judge McKay placed great weight on the fact that Rustad had initially been charged with criminal conduct.[75] Judge McKay argued that counsel should have been available at all stages of the disenrollment proceedings to determine procedural mandates, to set

69. 382 F.2d 807 (2d Cir. 1967).

70. 470 F.2d 201 (2d Cir. 1972).

71. Regarding the right to counsel, the Second Circuit stated:

> The requirement of counsel as an ingredient of fairness is a function of all of the other aspects of the hearing. Where the proceeding is non-criminal in nature, where the hearing is investigative and not adversarial and the government does not proceed through counsel, where the individual concerned is mature and educated, where his knowledge of the events . . . should enable him to develop the facts adequately through available sources, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.

Wasson v. Trowbridge, 382 F.2d at 812, *cited with approval in* Hagopian v. Knowlton, 470 F.2d at 210.

72. *Rustad*, 718 F.2d at 350.

73. *Id.*

74. *Id.*

75. *Id.* at 351 (McKay, J., dissenting).

testimonial constraints, and to avoid dangers of self-incrimination.[76]

The dissent mentioned two facts, not discussed in the majority opinion, to add credence to the view that the case presented extenuating circumstances. The dissent pointed out, first, that appointed counsel had been provided routinely for twenty-six years in similar proceedings[77] and, second, that the hearing officer was an attorney.[78]

After citing *Goss* for the proposition that Rustad was entitled to due process protection, the dissent applied the *Mathews v. Eldrige*[79] three-pronged balancing formula and determined that legal representation was a minimal procedural requisite under the circumstances of this case. In applying this three part test,[80] the dissent found the following interests. First, Rustad had an interest in the benefits of four years of higher education, the opportunity to receive a college degree, and his fifth amendment right against self-incrimination.[81] Second, the government interest was not greater than that of any other college or university because the Air Force was not required to commission Air Force Academy graduates.[82] Judge McKay found "unlikely to the point of being fanciful" the risk that the additional procedure of allowing retained counsel would damage any government interest.[83] Third, the dissent stressed that the additional procedural safeguard of student legal representation would be valuable because of the seriousness of the charges brought against Rustad.[84] To support this application of the *Mathews* test the dissent relied on two other federal circuit court decisions[85] that recognized the right to counsel in student expulsion proceedings under "no more compelling circumstances"[86] than those presented in the instant case.

III. PERSPECTIVES ON *RUSTAD*

A. *Analysis of the Court's Reasoning*

There is a hollow ring to the arguments voiced in the *Rustad* opinion. The majority narrowly and superficially interpreted the facts and applicable precedents, and the dissent erected a broad analytical framework which proves shaky on close examination.

The majority's decision to deny counsel was based on the assumption that the circumstances of the case were factually identical to those presented in *Wasson* and *Hagopian*. The similarities were evident: all

76. *Id.* at 351-52.
77. *Id.* at 351.
78. *Id.*
79. 424 U.S. 319 (1976).
80. *See supra* note 22 (lists the three *Eldridge* factors).
81. *Rustad*, 718 F.2d at 351 (McKay, J., dissenting).
82. *Id.*
83. *Id.*
84. *Id.*
85. Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1978); Black Coalition v. Portland School Dist. No. 1, 484 F.2d 1040 (9th Cir. 1973).
86. *Rustad*, 718 F.2d at 352 (McKay, J., dissenting).

three cases focused on minimum due process requirements in the disciplinary dismissal of a cadet at a military service academy. Since the *Wasson* and *Hagopian* courts had found that a fair hearing could be held without counsel,[87] the *Rustad* court reached the same conclusion. In so doing, the court ignored important, potentially distinguishing circumstances: the criminal nature of the two charges initially filed against *Rustad*[88] and the fact that the service academy was represented by an attorney in its initial hearing.[89]

The court, furthermore, failed to analyze and correctly apply *Wasson* and *Hagopian*. Both opinions emphasized the importance of the balancing of interests analysis and stressed that the circumstances of each case should be carefully examined.[90] The majority opinion in *Rustad* did not, however, articulate which private or governmental interests were at stake nor did it fully analyze the facts; thus, the *Rustad* court ironically ignored the dictates of the very cases it purported to follow.

The dissent, in contrast, examined the "big picture." In addition to presenting important facts omitted in the majority opinion, Judge McKay balanced the individual and governmental interests, as was suggested by *Wasson* and *Hagopian*. The reasoning of the dissent faltered though, when it compared the severity of the *Rustad* case with *Gabrilowitz v. Newman*.[91] *Gabrilowitz* presented more compelling circumstances than *Rustad*. *Gabrilowitz* recognized the right to counsel in a student disciplinary dismissal proceeding when the student faced *pending* criminal charges; Rustad, on the other hand, faced only *possible* criminal charges.

A more forceful argument could have been made by reasoning that *Gabrilowitz* established a precedent "for the truly unusual situation."[92] The *Rustad* case should have been distinguished from *Wasson* and *Hagopian* as an unusual military service academy dismissal because (1) part of the proceedings were conducted by an attorney; (2) the right to retain

87. *See supra* note 71.

88. The dismissal proceedings in *Wasson* and *Hagopian*, unlike the *Rustad* disenrollment proceeding, were instituted solely because the cadets had accumulated an excessive number of conduct demerits. Hagopian v. Knowlton, 470 F.2d at 203; Wasson v. Trowbridge, 382 F.2d at 811.

89. No similar qualifications of service academy disciplinarians were noted in either *Wasson* or *Hagopian*.

90. The importance of this approach was initially enunciated by the *Wasson* court: "Thus to determine in any given case what procedures due process requires, the court must carefully determine and balance the nature of the private interest affected and of the government interest involved, taking account of history and the precise circumstances surrounding the case at hand." Wasson v. Trowbridge, 382 F.2d at 811. A similar view was echoed in *Hagopian*:

> [D]ue process is not a rigid formula or simple rule of thumb to be applied undeviatingly to any given set of facts. On the contrary, it is a flexible concept which depends upon the balancing of various factors . . . .
>
> . . . .
>
> Because . . . the factors controlling what process is due usually vary from case to case, prior decisions on the subject cannot ordinarily furnish more than general guidelines which might give the reader a "feel" for what is fundamentally fair in a particular instance.

Hagopian v. Knowlton, 470 F.2d at 207, 209.

91. 582 F.2d 100 (1978).

92. *Id.* at 106.

counsel was denied when counsel had been routinely appointed for many years; and (3) the dismissal was initially based on criminal charges. Given this unusual situation, the *Rustad* court should have required the additional procedural safeguard of retained counsel to assure a truly fair hearing.

B. *Implications of the Decision*

The *Rustad* decision, if followed by other federal courts, may serve to restrict the types of procedural safeguards granted to students facing disciplinary dismissal at public educational institutions when there are no related criminal charges pending against the student.

Critics of the right to counsel in disciplinary dismissals will be heartened by this possible establishment of an outer boundary for procedural due process. Such critics would argue that if *Rustad* had recognized a right to counsel, the doors would be open to claims to the right in almost all student disciplinary proceedings because conduct serious enough to warrant disciplinary action is likely to involve at least a "colorable misdemeanor."[93] Furthermore, the critics would contend that the benefits of passive assistance of counsel can be afforded by consultation between the student and attorney prior to and during breaks in disciplinary proceedings.[94]

Those who disagree with the *Rustad* ruling may conclude that the outer boundaries of procedural due process established by the case seem suspiciously similar to minimally required due process protections for student disciplinary dismissals. *Goss* definitely mandated notice and hearing, but it appears that *Rustad* foreclosed the requirement of an adversarial or even a semi-adversarial proceeding. Even if other rudiments of an adversarial proceeding such as the right to confront, cross-examine and call witnesses are recognized as minimally required by the due process clause, these rights may well be meaningless without the assistance and advice of an attorney.[95]

C. *Suggestions for Future Judicial Examination of the Right to Counsel in Disciplinary Dismissals*

It is difficult to argue that the analysis of the majority opinion in *Rustad* comports with the traditional approach to procedural due process controversies. The court's mechanical application of precedent and its superficial examination of the factual context of the dispute makes a troublesome departure from the traditional approach which balances governmental and private interests on a case-by-case basis. Admittedly, one can criticize the balancing approach because it allows a significant degree of judicial discretion, making outcomes unpredictable and splits of authority among jurisdictions more likely. However, these negative

93. *Gabrilowitz*, 582 F.2d at 107 (Campbell, J., dissenting).
94. *Id.* at 107-8.
95. Goldberg v. Kelly, 397 U.S. 254, 270 (1969) (quoting Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

effects of a flexible approach to student due process and the right to counsel can be minimized in the future if the lower courts would give specific consideration to a number of factors which affect the strength of the student's or the educational institution's interest in a particular situation. Although additional factors may also be important in a specific controversy, the following considerations should be evaluated by courts in each student due process case that reviews the right to counsel in a disciplinary dismissal.

On the private interest side, several factors should be scrutinized to determine the weight of the individual's interest: the nature of the charges brought against the student, the amount of time the student has spent at the school and the benefits the student expects to attain by completing his education at the particular school. An analysis of these factors should aid the court in determining the weight of the private interest at stake. An analogy can be made to criminal law where the amount of procedure afforded the defendant increases as the potential sanction grows more severe. Where the charge against the student not only subjects him to possible expulsion but also exposes him to potential civil or criminal proceedings the student's interest in having the assistance of an attorney is substantial. Thus, if criminal proceedings are actually pending against the student for acts which are also the subject of the dismissal hearing, the individual's interest in protecting himself from self-incrimination becomes even greater.[96] The court should also consider the severity of the charge and the possible punishment, with allegations of criminal misconduct or conduct punishable by imprisonment being viewed as factors which substantially increase the individual's interest in a due process right to legal representation.

The student's status at the school should also be reviewed by courts when they balance the private interests against the governmental interests. An individual's interest in completing his education at a particular institution is necessarily greater the further the student has advanced toward graduation. This consideration is particularly important given that a great number of disciplinary dismissal cases involve students in their final year at school.[97]

Since *Goss*, courts have recognized that all students have liberty and property interests in their education. However, in certain situations the student's interest in completing a program at a specific school will be greater than the normal interest. In such situations the amount of procedural due process which is minimally required should increase. For example, where the academic program or training offered at the school is only available at a limited number of schools, the student will have an interest in receiving the benefits of completing his education at his particular school. Thus, in cases involving dismissal from military service academies or professional schools, which are quite limited in number,

96. *See supra* note 41 and accompanying text.

97. *E.g.*, *Rustad*, 718 F.2d 348; *Gabrilowitz*, 582 F.2d 100; Cody v. Scott, 565 F. Supp. 1031 (S.D.N.Y. 1983); Keene v. Rogers, 316 F. Supp. 217 (N.D. Me. 1970).

courts should place the individual interest at a higher level and more readily find a right to counsel.[98]

In determining the strength of the government's interest in denying the right to counsel, the following questions should be considered.

First, what is the scope of the requested participation of counsel? If the student wishes to have counsel represent him in an adversarial rather than advisory capacity, with the right to argue the case, make objections and cross examine witnesses, the school's interest in denying counsel should be given greater weight. When counsel takes an active, adversarial role, the proceeding is likely to be more burdensome on the school in terms of time required for preparation and conduct of the hearing than it would be if the attorney's services to the student were strictly consultative.[99]

Second, what is the nature of the school's representation at the disciplinary proceedings? It is obvious that the government's interest in denying counsel will be less when it proceeds with the assistance of its own legal counsel or if the hearings are conducted by attorneys appointed by the school, as in the *Rustad* case.[100] Furthermore, it seems to violate basic principles of fundamental fairness to allow one party legal representation yet deny it to the other, especially when the party denied counsel is the one facing the deprivation of a protected liberty or property interest.

Third, is appointed counsel requested by the student? The government's interest in refusing student legal representation will be less when the school bears no cost in allowing the student the right to be represented by an attorney.

Fourth, what type of school wishes to deny the right to counsel? Is it a military service academy or is it a civilian public educational institution? Courts have been inclined to weight the government's interest more heavily if the school is a military service academy.[101]

While not providing an exhaustive list of the considerations which should be reviewed by courts in every disciplinary dismissal case involving the right to counsel, the above mentioned factors are elements which should be taken into account by courts in order to avoid the sort of shallow reasoning displayed in *Rustad*. If the courts choose to weigh these factors as suggested, it is likely they will move toward recognition of a right to counsel not only in cases which are similar to *Rustad*, but also in a wide range of student disciplinary dismissal cases in which the

98. To date, courts have not advanced this line of reasoning in student disciplinary dismissal cases involving the right to counsel.

99. *See, e.g.*, Hart v. Ferris State College, 557 F. Supp. 1379, 1388 (W.D. Mich. 1983).

100. Several decisions have concluded that the use of counsel by the educational institution in a disciplinary dismissal proceeding is a pivotal factor in determining whether the student has a right to counsel. *E.g.*, Texarkana Ind. School Dist. v. Lewis, 470 S.W.2d 727, 735 (Tex. Civ. App. 1971); *see also* Wasson v. Trowbridge, 382 F.2d 807, 812 (2d Cir. 1967); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1075-76 (1969).

101. *See supra* note 37.

costs to the government are minimal and the student's interests are obvious and substantial.

IV. CONCLUSION

It seemed that the schoolhouse door had been opened wide for the expansion of student due process when *Goss* was decided almost a decade ago. Some jurists feared this possibility,[102] while some commentators held their breath hopefully.[103] Inch by inch, though, the door opened by *Goss* is closing. Post *Goss* rulings by the Supreme Court indicate that procedural due process on campus will only be required when discipline of the student includes the sanctions of suspension or expulsion.[104] And, in this one context where due process must be afforded the student, lower courts have been divided as to the exact procedural safeguards which must be provided. Unless future decisions re-examine factors relevant to the traditional procedural due process balancing of interests analysis, the *Rustad* decision will mark another step towards ensuring that student due process will be rigidly interpreted in almost every student disciplinary dismissal proceeding to require nothing less, and nothing more, than notice and a hearing.

Wendy Bliss

102. Justice Powell, dissenting in *Goss*, first articulated these doubts: "No one can foresee the ultimate frontiers of the new 'thicket' the Court now enters. Today's ruling appears to sweep within the protected interest in education a multitude of discretionary decisions in the educational process." *Goss*, 419 U.S. at 597.

103. *See, e.g.*, Comment, *The Right to Counsel in Disciplinary Proceedings in Public and Private Educational Institutions*, 9 CUM. L. REV. 751, 765-66 (1979).

104. *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78 (1978) (no hearing necessary for students dismissed for academic purposes); Ingraham v. Wright, 430 U.S. 651 (1977) (the use of corporal punishment does not require notice and hearing prior to punishment).