MEMORANDUM

TO: Charlie Ames  DATE: January 29, 1977
FROM: Lewis F. Powell, Jr.

No. 75-6527 Ingraham v. Wright

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As you may well have anticipated, I think Parts I, II, and III are excellent and close to being ready for the printer. I have attached a few minor riders, and have done some editing.

The opinion is too long in the sense that it substantially exceeds the length opinions even in major constitutional cases. My Rodriguez was 47 pages, and it received a fair amount of "flak" on that account. But this case is even more complex and difficult to write than Rodriguez (or, for that matter, the capital cases last spring.) I have had difficulty therefore in identifying ways of reducing the length. I do believe that an effort to summarize, or even omit, some of the paragraphs - and to minimize repetition - is still worthwhile. Possibly some of the footnotes can, on balance, be omitted or substantially shortened.

Part IV is indeed troublesome and no doubt this is the portion of the opinion that has concerned you over the past weeks. I believe I am prepared to accept your analysis, but
I do think it worthwhile to try some rewriting. Here, I am not thinking so much of reducing the length of the opinion as I am of tightening up the analysis. Part IV gives me the impression that we are not quite sure we are right; that we are "overarguing" some of the subpoints; and that we tire the reader out, possibly even lose him, by taking a dozen pages or more to conclude that no procedural process is due, that common law remedies are adequate for the purpose of making procedural due process unnecessary, but that this leaves open the possibility (probability) of a substantive due process right being assertable under 1983.

I know "fed up" you must be with working on Ingraham, but I would appreciate your doing a rather critical "rewrite" of portions of Part IV.

I am taking a copy of the entire opinion with me to Williamsburg. If, by chance, you revise Part IV by the end of the day on Tuesday (and I certainly impose no limit whatever), Sally could mail it to me special delivery.

At the appropriate time, as we have agreed, I am anxious for all five of us here in our Chambers to consider this case with special care. It would be a major case in any term of court, it will be scrutinized critically by scholars, and its implications may well surprise even us. To be sure, we may never get it by four of my Brothers!

L.F.P., Jr.
MEMORANDUM

TO: Charlie Ames

DATE: February 11, 1977

FROM: Lewis F. Powell, Jr.

Ingraham

I have spent much of the last two days mutilating a fine piece of scholarship. I refer to pages 33-58, inclusive, of your February 9 draft of Part IV. I have attempted to revise and shorten your draft, and deliver my effort to you herewith.

There were two objectives: to curtail somewhat the length of our opinion, and to bring the procedural due process analysis somewhat closer to that of prior cases.

A net of some eight or nine pages of text have been eliminated, but the opinion still will be too long. As for the analysis, I do believe my revision has tightened it up, and perhaps has made it somewhat easier for a casual reader to follow. But I am not entirely content with it.

As we have agreed, it will not be easy to obtain a Court in this case - however the opinion is written. The draft is in accord with the majority vote at Conference (no Eighth Amendment right and no procedural due process right), but neither I nor my colleagues at Conference focused on the possibility of a Fourth Amendment right in a liberty
interest. Our identification of this will raise questions - not so much about this case, as to where the precedent will lead us.

This case also will be a "first", I believe, in which we will have held (if we obtain a Court) that a due process right is satisfied by common law remedies. If we cause tremors of anxiety among my "conservative" Brothers by declaring a constitutional right in personal security, the conclusion that claims of deprivation are satisfied by common law remedies will be viewed as a judicial "earthquake" by my "liberal" Brothers.

The only hope of winning a Court in these circumstances, at least as I view it, is to write this case as narrowly as we possibly can, and still remain faithful to the analysis we have evolved. It is as much for this reason (as for a desire to shorten the opinion) that I have omitted some of the fine portions of your draft that reflect thoughtfulness and scholarship. Some few of the omissions may be incorporated, perhaps condensed, in notes. But I would avoid, whenever possible making any generalization of law that is unnecessary to this case.

Although I suggested greater reliance on Eldridge, we could shorten the opinion still further by "telescoping" the Eldridge "three stage" weighing of the competing interests. Most of our prior cases have done just that. You might bear
As unwelcome as the task will be, I would appreciate your tackling Part IV once more. I would like for you to use my revision as a starting point, but feel free - as always - to edit, rewrite and restructure - bearing in mind my comments above.

I have spent virtually no time on the footnotes. Please cast a "critical eye" on each of these, with the view either to omission or condensation.

In terms of priorities and timing, I hope you can give me Monday Castaneda by/morning, and your rediting of Part IV of this case later in the week. I would be free to work on it Wednesday, and possibly even a few hours on Thursday. In any event, I really must have it by Saturday. As to Abood, it will simply have to wait.

L.F.P., Jr.

* I have now received the Notes to Part IV. I think they are good, & subject to my editing are OK.

L.F.P.

2/12
SUPPLEMENTAL MEMORANDUM

TO: Charlie Ames
FROM: Lewis F. Powell, Jr.

DATE: February 12, 1977

Since my memo to you of February 11, I have had further thoughts about Part IV. I am inclined to think that our best chance to win a "Court" is to return to an idea we discussed some weeks ago; that the analogy between being in "custody" of school authorities of police and in "custody" is sufficiently close for us to rely on it in a primary sense. The way we have now written Part IV (with my approval) is to find a general "right of personal security", using language that is broad enough - at least arguably - to cover the kinds of cases that have worried me and other Justices. Absent some sort of custodial relationship, is there a constitutional right not to be assaulted by a government employee? As we know, all rational content has been drained from the phrase "color of law". Consider the following examples, using the Court and our personnel as the actors:

A police officer evicts a tourist from the Courtroom with unnecessary force; a picket on First Street in front of the Court, calls one of our officers a "flat foot" and the officer slugs him; the deputy clerk of the Court loses
his temper and kicks one of the messengers; a "hot rod" law clerk guns his Alfa Romeo up the ramp from the garage and unintentionally - but grossly negligently/hits Miss Lillian walking on Second Street; or, to use Justice Stewart's favorite example, one of our 'lady' officers, who has not passed her police marksmanship test, pursues a suspected felon out of the Court, takes a shot at him as he departs the building and hits a Senator en route to a rendezvous with one of his "typists". And, when I ordered Sally in writing to "do something about the punch" at the Christmas party, she spiked it with grain alcohol rather than vodka, resulting in blindness of several guests of the Justices.

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Can we not at least foreclose most of this concern by revising, and condensing the first few pages of Part IV? The purpose would be to eliminate (or at least subordinate) the discussion (primarily page 35) that recognizes a general right to personal security. At the top of page 36 we say:
"This right of personal security is most clearly implicated where a private citizen in the custody of the state is subjected to bodily punishment by persons acting under color of state law."

In this case we need go no farther than to deal with the situation where a person in custody is subjected to bodily punishment under color of state law. There are two elements involved: "Custody" and "punishment", and both are present where a child is in school under a compulsory attendance law. Distinctions, of course, may be drawn - as we do in a different context with respect to the Eighth Amendment. But for Fourteenth Amendment purposes, I think there is sufficient "custody" in the case of a school child, and - as the cases cited by you in note 58 indicate - corporal punishment is a "penal" sanction.

Also, I have now looked at most of the cases we cite on page 35 and I doubt that they constitute solid authority for the generalization that "the right of personal security is among the basic liberties protected by the Fourteenth Amendment". For example, and looking only to the two most recent cases cited, Skinner was decided on equal protection analysis and Rochin was largely a Fifth Amendment case (compulsory self incrimination by physical force, analogous to a coerced confession).

I believe relatively little revision would be required to narrow the focus to the infliction of penal sanctions in
a custodial situation. Subject to hearing your views, I am inclined to think this is the way to win a Court. It also leaves for another day some of the more difficult questions.

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I

Facts & Opinion

II

Law of C/P - History, Stalines & Present State

III

Eighth Amendment - Precedent

A

Brief History of 8th - to show it was concerned with Cruikshank (20-23)

B

Review of our Cases to show the 8th limited to Cruikshank (24-27)

C

Must lay People argument that we should extend 8th; that it is alleged to protect criminals more than our children?
IV

14th Amended Analysis

Introduction - 33

Two stage analysis - liberty or property - in necessary.

Premises stated: interest not being "affected" is a "protected" liberty interest, but traditional phone remedying are adequate to provide 4th P.

A.
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