FEDERAL PAROLE PROCEDURES

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The following article (originally prepared as a report) submitted to the Administrative Conference of the United States on January 1, 1972, led to the adoption of recommendations by the Conference for reform of the federal parole system, although those recommendations were different in some respects from those originally proposed by the author. The Parole Board agreed to implement almost all of the Conference's recommendations. Due to the pressure of other commitments, the author has been unable to revise the report for publication at this time.

I. INTRODUCTION

The administration of parole has always been a controversial topic, and so it remains today. Frequently attacked in the past for allegedly showing undue leniency to criminals, parole boards across the nation today face a strong current of criticism from quite another quarter. Legally trained persons are increasingly aware that the parole system does not provide many of the procedural safeguards for prisoners that criminal defendants are commonly granted during the trial process, or that parties to agency proceedings are granted under the law of administrative procedure. For example, at least three recent cases permit state boards to revoke parole without granting a parolee any hearing whatsoever. [See, *In re Tucker*, 5 Cal. 3d 171 (1971); *Morrisey v. Brewer*, 443 F.2d 942 (8th Cir. 1971); *Baxter v. Commonwealth*, 468 N.E. 2d 670 (Mass. 1971).] Federal law does not by any means go to this extreme, and in fact it provides very significant procedural protections in the parole revocation process. Nonetheless, the process is essentially non-adversary, especially when the *grant* of parole is under consideration, and the law places enormous reliance upon the

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good judgment and diligence of the members of the Parole Board. The courts so far have not enforced the requirements of the Administrative Procedure Act nor the specific commands of the Fourth, Fifth, and Sixth Amendments in parole proceedings. Legal observers, trained in the adversary system, are bound to view such a system with grave reservations.

At the same time, the legally-oriented observer has good reason to be cautious and modest when it comes to proposing remedies. Dedication to strict and formal legal rules, and to their administration through proof and cross-examination by adversary advocates, is probably nowhere greater than in the American criminal trial process. Yet many regard that process as far from satisfactory. Certainly its administration seems to require enormous resources and tolerance of lengthy delays. In fact, prosecutors and defense counsel are both so reluctant to submit their cases to the burdens of the trial process and to the formal rules of law that the vast majority of criminal cases are settled through the notorious practice of plea bargaining, which frequently does not protect either the defendant's rights or the public's interest in enforcement of the criminal law. To observe this is not to argue that the parole system should be free of procedural restraints, but rather to urge that the likely practical consequences of any procedural reform ought to be kept squarely in mind. The United States Board of Parole presently conducts approximately 12,000 hearings per year, and it is of the highest importance that it make well-considered decisions very promptly. Any "reform" that distracted the Board from this primary responsibility would be a step in the wrong direction.

The next section of this Report is an analytical description of the structure and procedures of the United States Board of Parole. Following that section, the Report goes on to discuss specific problems in parole procedure, and to make recommendations for improvement. At this point I would like to acknowledge the extraordinary degree of cooperation that has been extended to me by Chairman George Reed and the Members of the Board of Parole, as well as the Board's staff, in preparing this study. Board members and staff spent long hours answering my questions and engaging in frank and vigorous exchanges of views on the issues discussed in this Report. Additionally, the Board freely permitted me to attend policy meetings and hearings, and to examine numerous reports and documents. I was strongly and favorably impressed by this willingness to assist an objective study of Board procedure, and by the fact that the cooperation did not diminish when we occasionally came upon points of strong disagreement.

II. FEDERAL PAROLE PROCEDURES.

A. The Board of Parole

Parole in the federal system is administered by a single administrative board located in the national capitol. The Parole Board has no regional offices: its members and examiners travel throughout the nation to hold hearings. The eight members are appointed by the President, with the advice and consent of the Senate, to serve staggered six-year terms. Their salaries are not fixed by statute, and are presently set at the GS–17 level. Board members are not required by law to have any particular background or training, nor is there any formal requirement that a balance of the parties be maintained. In practice, however, there has been a tradition that minority party representation be maintained on the Board, and members have frequently been appointed by a President of one party and reappointed by a President of another party. Political considerations are of course a factor in appointments to the Board, as with other high-level government positions, but the record indicates that the appointees have generally had considerable professional training, prior correctional experience, or both. Three of the present members are attorneys, and other members have advanced training in psychology, sociology, or related disciplines. The most recent appointee has a lifetime of experience as a prison warden and state Director of Corrections. Certainly membership on the Board is no sinecure. The caseload is heavy, and the burden of responsibility is high. Board members must and do work hard to carry out their duties.

The Board of Parole is within the Department of Justice for administrative purposes, but it is independent of the Attorney General in its decision-making. Statutes [18 U.S.C. §§4203, 4207] place the discretion to grant and revoke parole in the Board, and I know of no instance in which an Attorney General has formally asserted a power to overrule a decision of the Board under these statutes. Informal influence or pressure is another matter altogether, however, and Board members are vulnerable to such pressure because they have little security of tenure. Some members told me that the question of independence has to be settled again with every new Attorney General. I found no evidence that the Board's decisions are not currently based entirely on the independent judgment of its members, but this independence cannot be taken for granted under existing institutional arrangements.

An Attorney General who is dissatisfied with the Board's failure to parole a prisoner may of course recommend that the President exercise

his constitutional power of Executive clemency. This power is exercised through the Office of the Pardon Attorney in the Department of Justice, whose Regulations provide that "a petition for commutation of sentence, including remission of fine, should be filed only if no other form of relief is available, such as from the court or the United States Board of Parole, or if unusual circumstances exist, such as critical illness, severity of sentence, ineligibility for parole, or meritorious service rendered by the petitioner." [28 C.F.R. §1.4] When the President grants Executive clemency, he takes direct responsibility for his decision.

The Board is also independent of the Bureau of Prisons, and its members feel that it is important that they act as a check on the judgment of prison officials who are personally involved with a prisoner or with the problems of institutional administration. The Board has no staff of its own at the numerous federal prisons, however, and it does rely to a great extent on the recommendations of the prison staff. It also must rely heavily on the services of Federal Probation Officers, who have the duty of supervising parolees as well as probationers. Probation Officers are primarily responsible to the local federal district judges, and hence an important part of the Board's responsibility must be carried out by persons over whom it has little direct control.

Five members of the Board specialize in adult cases, and the other three members are designated by the Attorney General to serve as the Youth Correction Division, dealing with the cases of youthful and juvenile offenders. Despite this functional division, any member may legally vote on any matter coming before the Board, and all members do vote on difficult or controversial cases that are referred for *en banc* consideration.

Ordinary cases are decided by a vote of two members, with a third member called in if necessary to resolve a disagreement. Board members initially direct the case file to the member who conducted the hearing, or, if the hearing was conducted by an examiner, to a member selected at random. Members note their votes in the file, frequently adding comments on explanation on an attached worksheet. The Board estimated informally for me that the first two members to receive a file disagree on approximately 30 percent of the decisions, requiring consideration by a third member. The members confer personally on a case only when they feel a particular need to do so, but they have a great deal of personal contact with each other and appear to be well informed on their colleagues' views. The Chairman informed me that staff members assign cases to members strictly at random, and make no effort to direct a particular case to one member rather than another.

B. The Board's Authority

The Board has the power to release federal prisoners on parole, to set the conditions of parole, and to revoke parole for violation of those conditions. It may also grant exemptions from the provisions of Section 504 of the Labor-Management Reporting and Disclosure Act of 1959, which prohibit members of the Communist Party and persons convicted of certain crimes from serving as labor union officers or labor relations consultants. Before describing the procedures by which the Board arrives at its decisions, it may be useful to describe in practical terms how much discretion the Board may exercise.

A federal district judge sentencing a convicted person to prison may choose among several alternative sentencing provisions. First, he may sentence an adult offender to a definite term of imprisonment, which of course must be no greater than the maximum term provided by law for the particular offense. An offender so sentenced becomes eligible for parole after serving one-third of the definite term, or after fifteen years if the sentence was for life or for more than forty-five years. (18 U.S.C. §4202.) Approximately 70 percent of adult felons committed to federal prisons in fiscal 1970 were given definite term sentences. Second, he may specify both a maximum and a minimum term under the provisions of 18 U.S.C. §4208(a)(1), in which case the prisoner becomes eligible for parole after serving the minimum. In these cases the minimum must be no more than one-third of the maximum. Third, he may sentence the offender to a maximum term, specifying that the Board may grant parole at any time. (18 U.S.C. §4208(a)(2).) If the offender is a narcotic addict, the court may commit him for a term of up to ten years. The Board may release such an addict on parole at any time after he has served six months, but only if the Attorney General and the Surgeon General so recommend.

Youthful offenders (those under 22 years and, in some cases, under 26 years of age) may be sentenced under the Youth Corrections Act, either to an indeterminate term of up to six years, or to a specified maximum term greater than six years if the statute governing the offense permits. In either case the youthful offender may be paroled at any time, and he must be paroled at least two years before the expiration of his term. (18 U.S.C. §§5010, 5017.) Finally, a court may commit a juvenile offender to the custody of the Attorney General for the period of his minority, or for a definite term, and the Board may order his release on parole at any time. (18 U.S.C. §5037.)

A prisoner does not necessarily have to serve his full maximum term even if the Board refuses to grant parole, because he may earn a "good time allowance." "Good time" is calculated according to a statutory

formula, and for long-term prisoners it may amount to ten days for each month. (18 U.S.C. §4161.) A prisoner who is entitled to "mandatory release" because he has earned good time credits is not entirely free, however; he is subject to parole supervision, and his "good time" may be forfeited if he gets into trouble.

The reader can obtain some idea of the scope of the Board's work from statistics contained in its most recent biennial report, soon to be published. In fiscal 1970. the courts committed 10,036 persons to federal institutions. In that year, the Board held 11,784 hearings with prisoners in federal institutions, and it made over 17,000 official decisions relating to parole, revocation, or related matters. It granted 5,142 paroles or reparoles, and in 2,038 cases it revoked parole or reinstated the parolee to supervision. Further statistical information is contained in the appendices to this Report.

C. The Decision to Grant Parole

1. *Standards.* 18 U.S.C. §4203 provides that the Board may release an eligible prisoner on parole if "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society." Writing in 1969, Professor Kenneth C. Davis observed, among other pertinent criticisms of Board procedures, that the Board had never announced rules, standards or guides to interpret the generalities of the statute, or even publicly announced the criteria that are considered. (Davis, *Discretionary Justice* 127 (1969).)

The Parole Board's new Rules, effective in 1971, attempt to meet this type of objection by giving a fairly extensive list of the criteria that the Board considers. The list is reprinted in its entirety in the Appendix to this Report. Generally, the Board considers such factors as the offender's sentence, the circumstances of the offense, the offender's prior criminal record, changes in his motivation and behavior, his personal and social history, his behavior and progress in the institution, his release plan, his prospects for success on parole as judged by the use of tests and statistical data, and the personal impression he makes in the parole hearing. The preceding are general categories, and the Board lists specific factors under each. Although a list of this type does give an indication of what the Board will consider, it does not indicate which factors are likely to be the most decisive or how the Board applies its standards to particular cases. Some of the factors—"religion," for example—seem to raise questions rather than answer them. It is not very helpful to be told that the Board considers "length

of sentence" in deciding when or whether to parole, unless one is told how important this factor is when some judges tend to impose much heavier sentences than others.

Board policy is explained to prisoners in a booklet entitled "You and the Parole Board," published in 1971. This booklet explains, among other things, that the Board will not parole an inmate whose "good time" has been forfeited (as opposed to merely withheld), that it does not penalize an inmate for appealing his conviction, that it considers notoriety or community hostility to the individual but only as one factor in the total picture, and that an inmate's divorce "does not automatically argue for or against parole." The booklet answers some 44 common questions about Board procedure and policy, and the Board deserves credit for this first step towards informing prisoners about the parole process. (I am also informed that Board members occasionally meet with groups of prisoners at federal institutions to explain policy and answer questions.) "You and the Parole Board" does not attempt to give prisoners any idea of the amount of time they are likely to have to serve if they do or do not make a good record in the institution, and in at least one respect it is actually misleading. The pamphlet tells prisoners that "the Board's primary interest is in your future and the past is reviewed only as it is necessary or helpful in predicting what the future may be." It is no secret, however, that in deciding when and whether to parole the Board often considers much more than the likelihood that the prisoner will commit an offense in the future. Murderers, tax evaders, and persons who engage in espionage for foreign governments, among others, are not necessarily set free at the earliest parole eligibility date even if the Board is convinced that they are unlikely to commit further crimes. It would be unreasonable to expect the Board to explain precisely what relative importance considerations of retribution, deterrence and rehabilitation have in parole decision-making, when the state of public and expert opinion on the proper goals of a correctional system is so divided, but perhaps a beginning in this direction could be made.

The most valuable source of information on "substantive" parole policy is the Board's latest Biennial Report, which had not been published as of this writing but which I have examined in draft form. The Report contains tables (some of which are reproduced in the Appendix of this Report) that disclose the frequency of parole grants and the average term of confinement in prison served for various types of offenses. Unfortunately, the Biennial Report does not say what percentage of prisoners served more or less than the average term, or how much more or less they served, or why. It does, however, make some

significant statements of Board practice and policy. For example, one paragraph states that:

> Other groups of prisoners who receive parole at a higher rate than the average are those convicted of drug laws or of the Selective Service laws. Drug law offenders tend to receive parole rather frequently because of their long sentences as well as the recognized need for intensive control in the community after release. A significant trend has been for marijuana offenders to be paroled more often than those involved with narcotic drugs. Selective Service violators who receive long sentences generally often receive parole, while those who are given short sentences are not paroled. Thus, for this type of offender, a relative balance between individuals and time served is thus achieved by the Board despite the wide disparity in sentencing practices by the courts.

It would probably not be very difficult to derive specific policy statements from information of this type, stating what the Board feels the "normal" term for draft violators or marijuana smugglers should be and the circumstances under which the Board would require a particular offender to serve more or less than the "normal" term. Policies could be stated with regard to some important, recurring classes of cases even if the Board felt unable to state policies of this sort for every type of offense or offender. Although I believe that the Board should begin to move in the direction of stating policies regarding length of terms, I also think it important to emphasize that doing so would not necessarily lead to greater leniency towards prisoners, and it might have the opposite effect. One reason that discretion occupies so large a role in criminal sentencing is that the legislatively prescribed penalties tend to be so harsh. It may be easier to show mercy in individual cases than to state and defend a general policy of mercy, although the failure to state and follow a policy is likely to lead to both real and apparent inequality of punishment among offenders.

The Board is currently engaged in a major effort to study its own standards and to improve its parole decisions. A private national agency known as the National Council on Crime and Delinquency has undertaken a long-term study of parole decision making, under the direction of two distinguished scholars, with the assistance of a grant from the Law Enforcement Assistance Administration. The primary aim of the project is to discover, with the aid of computers, the factors in an individual's history that are most significantly related to success or failure on parole. By this method it may become possible to make parole decisions with a far more accurate understanding of the likelihood of violation than has previously been possible. The project will also provide a great deal of statistical information concerning the

types of offenders whom the Board has paroled or refused to parole in the past. It is not possible to discuss this project adequately here, but I mention it as the most important means by which the Board expects to improve the quality and reliability of its own decisions, and to study and clarify its standards. Many state parole boards are also participating.

Finally, one recurrent policy problem deserves separate mention. Many federal prisoners have "detainers" lodged against them by state law enforcement agencies, because they are wanted on state criminal charges or for parole or probation violations. Detainers have vexed correctional officials and caused injustice for prisoners to an enormous extent in the past, because of the uncertainty they inject into the process of planning release. Some involve serious violations of law, and others may be filed casually and never prosecuted further. In the past, in some jurisdictions, prisoners with detainers were often *per se* ineligible for parole or for rehabilitational programs. Some progress has been made in dealing with this problem, and the Board has adopted policies consistent with an Interstate Compact on the subject. The policies state that presence of a detainer is not of itself a valid reason for denying parole, that the present status of detainers should be investigated prior to a parole hearing, that the Board will inform state authorities of the "institutional adjustment" of prisoners subject to detainers (and invite similar communications regarding state prisoners subject to federal detainers), and that the Board will attempt to negotiate arrangements with the states for concurrent supervision of parolees in appropriate cases. Additionally, under recent Supreme Court rulings prisoners may demand prompt trials on any pending criminal charges, and the Bureau of Prisons will make them available for such trials in state or federal courts. The Board may also have its own detainer lodged against a federal prisoner, if he was convicted of a federal crime while on federal parole. Board policy for dealing with this situation is discussed in the section of this Report dealing with parole revocation.

2. *The Parole Hearing.* Except in the case of prisoners sentenced to a term of one year or less, the Board considers granting parole only after holding an initial hearing at the prisoner's institution, when the prisoner becomes eligible for parole. After the hearing, the Board may decide to set a parole date at once, or it may continue the case for a period of up to three years for a further hearing or for further consideration on the basis of a progress report prepared by the institutional staff. The Rules require that every inmate receive a personal hearing at

least every five years, and inmates who have any reasonable prospect of being paroled receive hearings much more frequently than that.

Until recent years nearly all hearings were conducted by a Board member personally, but the Board now employs eight hearing examiners and two-thirds of the hearings are now conducted by the examiners. Board members now travel to institutions only every third month, and the examiners travel two months out of three. Increasingly, the task of the members is to stay in Washington and make parole decisions after studying the file and the report of the examiner who conducted the hearing. This practice has the result that most prisoners have a hearing before a Board employee who does not have the power to decide the case or even to vote on the decision, although his recommendation is influential. On the other hand, having the voting members available in Washington makes it possible to have more frequent consultations and to make swifter decisions.

This Report employs the term "parole hearing" because that is the term the Board, the courts, and the prisoners use, but in fact the "hearing" would be better described as an interview. The only persons present at most hearings are the member or examiner, a stenographer (who makes a shorthand record of the hearing), and the inmate's institutional counselor. The inmate appears personally without the assistance of counsel or any other advocate, and he is not entitled to see the file on which the decision will primarily be based. Normally he is asked to discuss the background of his offense, the factors that caused him to get into trouble, his prospects or progress within the institution, his release plan, and whatever else seems to be important to the hearing officer or to the prisoner. Hearings are brief: as many as twenty may be scheduled for a single eight-hour day, although some of these cases may not be reached by the day's end. Because the hearing officer has to study the file before the inmate appears, and to dictate a summary and recommendation afterwards, the time available for the hearing itself is usually no more than ten or fifteen minutes, although in exceptional cases the hearing may go on much longer. Some observers (and some hearing officers) feel strongly that this time is too short for adequate consideration, but one must remember that the facts in the file and the recommendations of the prison staff are likely to be of great importance in making the decision. At least when an examiner conducts the hearing, the crucial deliberative process occurs when the file is reviewed in Washington. Although some inmates have a great deal to say in their own behalf, others have relatively little to add to the written record, either because they are inarticulate or be-

cause there actually is little to add. Additionally, by no means all parole decisions are difficult. Many inmates plainly are not ready for parole, and many plainly are. Frequently, the only matter in doubt is the exact date of release or the details of the inmate's release plan.

From the point of view of the inmate or the civil libertarian, the gravest defect of the hearing is that the inmate is not given an adequate opportunity to establish or to dispute the determinative facts. He does not have the assistance of an advocate, or the means to act effectively as his own advocate. He does not have the right to inspect the report of the prison staff, which describes his institutional record and recommends for or against parole. He also has no right to see such crucial documents as the presentence report from the trial court or communications received from law enforcement personnel, which may accuse him of unproved criminal activity. Finally, he is not shown a copy of the parole examiner's summary and recommendations, probably the most crucial document in the entire file. In short, the prisoner not only does not have the resources to establish his own version of the facts; he may not even know what facts he ought to be disputing.

In all fairness, there is much to be said in defense of the present system, despite its obvious defects. In the first place, in relying on confidential data for parole purposes the Board is doing only what the federal district courts do when they impose sentence. Rule 32 (c) of the Federal Rules of Criminal Procedure permits but does not require a sentencing judge to allow the defendant or his counsel to see all or part of the presentence report. The primary justification for confidentiality is the same in both cases; it makes it easier to obtain complete and candid information. Second, it would be misleading to suggest that a prisoner is always or usually ignorant of the factors that will govern the parole decision. Informally, he is frequently told a great deal by his prison counselor, with whom he has probably discussed his prospects for parole. Inmates whose hearings I attended seemed quite familiar with their own disciplinary records, job performance ratings, and the like. It is also part of the job of the hearing examiner to discuss the determinative factors with the prisoner. Third, the prison staff may be eager to see that parole is granted to an inmate who has made a good adjustment in the institution, and counselors sometimes assist inmates to make a case for parole.

At the conclusion of the hearing, the inmate leaves the room and the hearing officer dictates his summary and recommendations. The prison counselor remains, and thus he learns and can explain to the inmate the reasons for the hearing officer's recommendation. Such an informal

explanation, if it occurs, is the only means now provided for informing an inmate of the reasons for the Board's action. The Board itself does not give reasons for its decisions. Where a hearing examiner makes a recommendation for parole but the two or three Board members voting in Washington decide to the contrary, both the prisoner and the institutional staff may be left in confusion.

The Board's refusal to give reasons for its decisions is a perennially controversial policy, now again under reconsideration, and a later section of this Report contains recommendations on this subject. The Board does not object to giving reasons, but it does not want to do so carelessly or casually, nor does it want to increase the period of delay between the hearing and the announcement of the decision. No one on the Board disagrees with the proposition that prisoners ought to be told why they are or are not being paroled, but everyone is concerned that the reasons be carefully stated so as to accurately inform the prisoner and also to avoid unnecessary trouble in the courts. At the same time, the members are acutely aware that they have been criticized for keeping prisoners in suspense for periods of up to several weeks before deciding whether or not to grant parole, and it is one of their prime goals to reduce this period to an absolute maximum of thirty days.

It is common to speak of the Board as deciding to grant or deny parole, but more frequently the problem is deciding *when* to parole. If the Board does not set a parole date after the initial institutional hearing, it orders the case continued to expiration of sentence, or to some other date no more than three years in the future. Often this action amounts to a tentative decision to parole at the next scheduled review, which may consist of another personal hearing or merely consideration of a "progress report" prepared by the prison staff. In any event, every prisoner eligible for parole has a personal hearing at least every five years, however unlikely it may be that he will be paroled at that time.

3. *Washington Review Hearings.* Prisoners do have some opportunity for the assistance of counsel, if they have counsel, at the newly instituted Washington Review Hearings. Attorneys, relatives, or other interested persons may submit written statements to the Board at any time, and if they have "significant new information" to present, they may request a personal appearance before two or more members of the Board. If any two members believe that the case is sufficiently important or controversial, the case may be heard as an appeal by the entire Board in *en banc* session. Washington Review Hearings and *en*

banc appeals thus allow interested persons other than the prisoner to appear in favor of or against parole, if they can come to Washington and if they can persuade the Board to grant a hearing. These are not adversary hearings, however. The Board hears advocates' statements or arguments, but it does not permit them to examine the file or to counter any adverse facts by cross-examination. Still, the Washington Review Hearing represents a large step in the direction of allowing the prisoner to be represented by an advocate, especially when compared with past practices of the Federal Parole Board and equivalent state agencies.

4. *En Banc Hearings.* Some cases are referred directly to the full Board for decision after the initial hearing, thus bypassing the normal decision by a panel of two or three members. Any two members may refer a case for original *en banc* consideration if the prisoner's crime involved national security, if the prisoner appeared to be a "key figure in organized criminal activities," if he committed a crime of unusual violence or appears prone to serious violence, if he or his crime received national or unusual attention, or if he received a sentence of forty-five years or more. In short, many notorious, serious, and controversial matters are decided by a quorum of the full Board, a practice which allows more thorough consideration and also spreads the responsibility for a controversial decision more widely. Advocates on behalf of or against parole frequently appear at such hearings, to make statements and to answer the questions of the members. Representatives of the Department of Justice appear occasionally, either to oppose the release of a prisoner whom they believe to constitute an unusual menace to the public order or interest, or to support the release of a prisoner who has assisted federal prosecutors in obtaining convictions of others. Before coming to a decision in such cases, the Board engages in frequently extensive debate and discussion, with outsiders excluded. Currently, it is the Chairman's practice to state the reasons for these decisions for the record when the vote is recorded. Neither the reasons nor the votes of individual members are made public, however. One hundred twenty nine cases received *en banc* consideration in fiscal 1970.

5. *Conditions of Parole and Supervision.* For reasons of efficiency and convenience, the Board does not hire its own parole agents but relies on the services of United States Probation Officers responsible to the local federal district courts. Nonetheless, the Board participates actively in the process of supervision in the following ways:

(a) The Board must approve the adequacy of a prisoner's release plan

and it has a number of regulations under this heading governing the extent and manner of supervision in various types of cases.

(b) The Board sets the conditions of release. All parolees are subject to standard conditions (printed on the back of the parole certificate) requiring that the parolee report regularly to his probation officer, that he not violate any laws or associate with persons engaged in criminal activity, that he not act as a law enforcement "informer," that he maintain employment and support his dependents unless excused from doing so, that he not use drugs or drink alcohol to excess, and that he not associate with persons who have a criminal record or possess firearms without permission. The Board adds special conditions as it sees fit; a common one is the requirement that a drug addict participate in a particular narcotics treatment program.

(c) The Board itself rather than the probation officer must grant approval for any regular or extensive travel. This particular requirement recently landed the Board in litigation when it denied a well-known convicted spy permission to travel to certain political gatherings or demonstrations, and it would not be surprising if similar cases were to occur in the future.

(d) The Board requires probation officers to make regular reports on the progress of parolees. Depending on the content of these reports, the Board may order more or less frequent reports, may change the conditions of parole, or may terminate supervision.

Finally, of course, it is the Board that determines of the parolee should be returned to prison as a parole violator, a subject to be discussed in the following section of this Report. With regard to the conditions of parole and supervision, perhaps the primary question is whether the Board should retain discretion to impose whatever conditions it regards as advisable (subject to the power of the courts to declare a particular condition unreasonable), or whether the permissible conditions should be set by statute. The National Commission on Reform of Federal Criminal Laws has recommended, in its Study Draft of a proposed new Federal Criminal Code, a section which sets out the permissible conditions of parole but also allows the Board to impose "other conditions reasonably related to (the parolee's) rehabilitation." This section seems to leave the Board with practically as much discretion as it has now, but the Board takes the position that conditions should not be spelled out in the statute at all, because in that form they will be difficult to change or modify. In fact, the Comment in the Study Draft itself appears to concede that there is little to be gained by setting out the permissible conditions of parole in a statute. (National Commission on Reform of Federal Criminal Laws, *Study Draft*, §3404 and Comment, pp. 299–300 (1970).)

6. *Parole Revocation: Initial Stages.* Probation Officers report any violation of the conditions of parole to the Parole Executive, a senior employee of the Board in Washington, who recommends that a warrant be issued if the charge seems to be well founded and sufficiently serious to justify a revocation. The warrant is then issued if a single member of the Board approves the recommendation, but a denial requires a concurrence of two members. The decision to issue a warrant is perhaps the most crucial in the entire process of revocation, comparable to a prosecutor's decision to file a complaint or seek an indictment, and the Board is now engaged in an effort to improve and structure its exercise of discretion at this point. A committee of members has been working on new rules specifying the type of factual information that should be required and the standards of judgment that should be applied to the decision to issue a warrant. The new rules have not been finally approved, but the entire effort is extremely commendable and could profitably be imitated by criminal prosecutors, who so far have made little effort to structure or control the decision to initiate prosecution.

Upon issuance of a warrant signed by a Board member, the parolee is taken into custody pending a "preliminary interview" with his Probation Officer. At this interview the officer "explains the Board's policy" and has the parolee complete and sign two extremely important forms.

First, the parolee fills out CJA (Criminal Justice Act of 1970) Form 22, a copy of which is attached to this Report in the Appendix. This form recites that the parolee has been advised that he may have a revocation hearing either locally near the place of the alleged violation or upon his return to a federal institution, and provides space for the parolee to indicate which of these alternatives he prefers. The form also recites that the Probation Officer has advised the parolee that he may apply to the United States District Court for appointment of counsel, and that counsel will be provided if the district judge or magistrate determines that the interests of justice so require and that the applicant is indigent. The parolee must then indicate whether or not he wishes appointed counsel. If he does wish appointed counsel, then he must further indicate which of the charges he wishes to contest, and which (if any) he does not wish to contest. He must also state whether he has been convicted of any offense since his release, and if convicted, state the charge and place of conviction. Finally, he must fill out several items relating to his financial resources.

Second, the parolee is asked to complete the Board's "Revocation Hearing Election Form," also included in the Appendix to this Report. This form explains that it is Board policy to grant a local revocation hearing only if the parolee has not been convicted of any violation of law since his release, however minor, and if he denies violating any of the conditions of his parole. The form is so set up that to request the local hearing, the parolee must simultaneously certify that he meets the requirements. Otherwise he may "request" an institutional hearing or a "postponed preliminary interview." The purpose of the latter proceeding is to allow the parolee to arrange for an attorney or witnesses to testify to mitigating circumstances where he admits violating parole but wishes to argue that he should be reinstated on parole nonetheless. The new revocation rules will make clear, as the existing form does not, that a parolee may request the district court to appoint counsel for this purpose as well as for a formal revocation hearing where the charges are denied. The Criminal Justice Act requires appointment of counsel for persons facing parole revocation only "when the interests of justice so require," and so the magistrate's decision to appoint counsel is discretionary and not automatic.

If the parolee does request appointment of counsel and a local hearing, then the Probation Officer delivers the CJA form to the local federal district court and the Revocation Hearing Election form to the Board. The magistrate or judge then grants or denies the application for appointment of counsel, making such further inquiry as he sees fit. The Board likewise rules on whether a local hearing should be held. Figures are not yet available on the extent of appointment of counsel under the Criminal Justice Act, because the amendment allowing such appointment became effective only in February of 1971. Interesting figures on hearings with *retained* counsel for fiscal 1970 are available, however. In that year the Board issued 1,647 violation warrants that were not subsequently withdrawn, but held only 50 institutional revocation hearings with attorneys or witnesses or both, and 98 local revocation hearings. The number of local or institutional hearings with attorneys or witnesses has been steadily increasing over the years, but most accused violators still do not seriously attempt to contest the revocation proceeding. There may be a number of explanations for this fact, including that most revocations are based on a conviction of another criminal offense. In such cases parolees may correctly assume that their chances of avoiding parole revocation are extremely remote.

One further controversial issue should be pointed out in this connection. The increase in the number of local revocation hearings since

1967 (when there were 39), has been caused in part by a change in policy. When a parolee is charged with a criminal offense, the Board normally does not execute its warrant until he is convicted. Since 1968, however, the Board has followed a practice of taking potentially dangerous offenders into custody before the criminal trial. "This practice has tended to influence the parolee (prior to conviction) to deny that he is a parole violator and to ask for a local hearing to defend himself." (U.S. Board of Parole, 1967–1968 Annual Report, p. 19.) The Board felt this new policy to be necessary because of the liberal provisions of the Federal Bail Reform Act of 1966, which allow most defendants to remain out of custody prior to trial. As one might anticipate, the policy has been attacked as an instance of preventive detention and a frustration of the purposes of the Bail Reform Act. (*See* Note, *Parole Revocation in the Federal System*, 56 Georgetown L.J. 705, 712–14 (1968).) On the other hand, it is normal practice to hold an accused parole violator in custody after a warrant has been issued, and thereafter to give him a prompt revocation hearing, when there are *no* criminal charges pending. One of the primary purposes of parole supervision, from the point of view of society, is to make it possible to return the parolee to custody promptly if he does not obey the conditions on which he was released. Frequently, in any event, there are additional parole violation charges that will not necessarily be affected by an acquittal of the criminal offense.

7. *Local Revocation Hearings* are conducted by a Board member or (more often) an examiner, who travels to the locality for that purpose. The hearing usually lasts a few hours, and the parolee may be represented by retained or appointed counsel, and may introduce the testimony of witness. He does not have either financial assistance or compulsory process to aid him in obtaining witnesses, however.

The current Rules do not contain any provisions regarding such important subjects as the manner in which the hearing should be conducted, the burden of proof, or the rules of evidence. The Board is aware of this deficiency, however, and its forthcoming new Revocation Rules will contain detailed provisions on this subject, for the guidance of hearing examiners and attorneys.

The draft of the new rules that I have examined indicates that the Board's intent is to standardize and improve existing procedure rather than to make any sweeping changes. In the future, as at present, the hearings are to be non-adversary and relatively informal, conducted by members or examiners who, for the most part, are not lawyers. The charges are not usually supported by the testimony of witnesses, but

by reports or documentary evidence which the parolee and his lawyer have no right to see. The "warrant application" which states the charges, however, gives them notice of the details and sets out the supporting evidence. The hearing officer may consider illegally seized evidence, and he may draw adverse inferences from the parolee's failure to testify, although he is instructed to advise the parolee that his testimony may not be used against him in a subsequent criminal proceeding. When witnesses do appear to testify, the parolee does not hear their testimony and may not cross-examine. His own witnesses are not thoroughly cross-examined either, although the hearing officer may question them, because there is no prosecuting attorney except to the limited extent that the Probation Officer fills this role.

After considering the evidence regarding the charged violations and whatever exculpating or mitigating evidence the defense presents, the examiner prepares a report finding the parolee guilty or innocent of each of the charges, and recommending an appropriate disposition. This report is itself a confidential document, and it is not shown to the parolee or his counsel. The parolee remains in custody until the Board itself orders his discharge or return to prison.

8. *Institutional Hearings* are conducted in the same manner as local revocation hearings, except that attorneys and witnesses are less frequently present. Such hearings are scheduled along with the institution's regular parole *grant* hearings, and by the time a Board member or examiner next makes a scheduled appearance the ex-parolee may have been in prison two or three months, and settled into an institutional program. In this context the revocation hearing understandably tends to be concerned more with the prospect of re-parole than with the question of the revocation itself, especially since the ex-parolee has probably admitted some violation. A presumption of guilt is practically inherent in the situation. Nonetheless, attorneys and/or witnesses did appear at 50 such hearings in fiscal 1970.

When a federal parolee is returned to prison because he has committed a new federal crime, the Board ordinarily does not hold a revocation hearing until he serves the new sentence, unless it is ready to parole him again before that time. The effect of this policy is to make the two sentences consecutive, regardless of whether the judge imposing the second sentence has so ordered. (According to statute, the prisoner does not receive credit on the first sentence for the time that he was at liberty on parole.) The Board follows the same practice when a federal parolee is convicted of a state crime, but as previously

described, it attempts to cooperate with state authorities in setting an appropriate parole date on the combined sentences.

9. *Judicial Review* of decisions of the United States Parole Board has been extremely limited. The federal courts have consistently refused to interfere with the discretion of the Board to grant or deny parole, and they have usually accompanied this refusal with statements to the effect that such decisions are left to the absolute discretion of the Parole Board. See, *e.g., Juelich v. U.S. Board of Parole,* 437 F.2d 1147 (7th Cir. 1971); *Thompkins v. Board of Parole,* 427 F.2d 222 (5th Cir. 1970); *U.S. v. Frederick,* 405 F.2d 129 (3d Cir. 1968); *Schwartzenberger v. U.S. Board of Parole,* 399 U.S. 297 (10th Cir. 1968); *Brest v. Ciccone,* 371 F.2d 981 (8th Cir. 1967). Many of the cases repeat the traditional formula that parole is a matter of grace and mercy, granted at the indulgence of the sovereign. None of these cases can be described as carefully reasoned, and probably none were well argued on behalf of the prisoner. Of the cases previously cited, *Juelich, Thompkins, Frederick* and *Brest* simply involved refusals to intervene on behalf of prisoners who claimed that they deserved to be paroled, or that they had a right to parole upon eligibility. *Schwartzenberger* specifically upheld the practice of denying counsel at the parole grant hearing, but it did not consider the possible impact of the provisions of the Administrative Procedure Act (hereinafter discussed) or the Supreme Court's decision in *Mempa v. Rhay,* 389 U.S. 128 (1967). *Mempa v. Rhay* held that a state criminal defendant had a constitutional right to the assistance of appointed counsel at a probation revocation and deferred sentencing hearing. In summary, it would be fair to say that the tenor of federal case law to date is strongly against judicial review of the decision to grant or deny parole, but the cases do not preclude the imposition of specific procedural reforms, whether derived from the Administrative Procedure Act, the Constitution, or elsewhere.

Review of parole revocations has been considerably broader, at least on procedural grounds. The Board's system of preliminary interviews and local revocation hearings, described previously, is an outgrowth of the landmark decision in *Hyser v. Reed,* 318 F.2d 225 (D.C. Cir. 1963). Earlier decisions had held that the Board must allow parolees to be represented by retained counsel, and *Hyser* added to this that the statutory "right to appear before the Board" includes a right to dispute parole violation charges with witnesses in the community before being returned to a distant federal prison. In other

respects, however, the *Hyser* opinion was quite restrictive. Relying on the oft-contested premise that adversary proceedings are unnecessary because the Board has the best interests of the prisoner at heart, the court held that there is no right in such hearings to appointed counsel, to discovery of the Board's files, to confrontation or cross-examination of witnesses, or to compulsory process. Furthermore, *Hyser* held that the sections of the Administrative Procedure Act relating to hearings and adjudications are not applicable to the Board because, in light of its rehabilitative purposes, "the Board does not adjudicate, nor is it required to hold hearings in the sense that those words are employed in the Administrative Procedure Act." 318 F.2d at 237.

Hyser v. Reed is still the basis of federal appellate law regarding parole violation. Most subsequent decisions have dealt with such questions as what constitutes a "reasonable time" within which a revocation hearing must be held. At least one case actually ordered the release of a prisoner for a delay of 141 days in holding an institutional revocation hearing, caused by extreme carelessness. *Hitchcock v. Kenton*, 256 F. Supp. 296 (D.C. Conn. 1966). Many other decisions have enforced the holding in *Hyser*, but few have gone beyond it. In *Earnest v. Willingham*, 406 F.2d 681 (10th Cir. 1969), a Court of Appeals held that the Board must see that indigent parolees are provided with counsel if it allows retained counsel to appear at revocation hearings. The scope of this ruling was trimmed somewhat in succeeding cases, however, and the court's rule now requires appointment of counsel only where the parolee denies that he has violated parole or been convicted of a crime. *See Earnest v. Moseley*, 426 F.2d 466 (10th Cir. 1970).

One recent decision indicates that the courts may now review parole revocation decisions to determine if the evidence produced at the hearing was sufficient to justify the Board's action. In *Arciniega v. Freeman*, ___ U.S. ___, 92 S.Ct. 22 (1971), the "parolee" (actually a convict under supervision after mandatory release) was returned to prison because he associated with other ex-convicts in violation of one of the conditions of his parole. He sought habeas corpus, contending that nothing in the record justified the revocation. The district court and the Court of Appeals for the Ninth Circuit (439 F.2d 776) upheld the Board because the petitioner had admitted at the revocation hearing that he worked at a bar with two other ex-convicts. The Supreme Court reversed *per curiam*, without argument, holding that "incidental contacts between ex-convicts in the course of work on a legitimate job for a common employer" could not be held a violation of the parole condition in question, "absent a clear parole board directive to this effect."

Although *Arciniega v. Freeman* can be regarded as limited to its particular facts, it may also herald a new willingness on the part of the courts to review the adequacy of the evidence at revocation hearings.

Federal parole practice may eventually be affected by principles developed by the federal courts in cases involving *state* parole procedures. There is now a conflict in the Circuit Courts of Appeal as to whether a parolee has a constitutional right to the assistance of counsel in revocation proceedings. [Compare, *Bey v. Connecticut State Board of Parole*, 443 F.2d 1079 (2d Cir. 1971); with *Bearden v. South Carolina*, 443 F.2d 1090 (4th Cir. 1971), and cases discussed therein.] Although the Supreme Court recently ordered the *Bey* case dismissed as moot [92 S.Ct. 196 (1971)], a Supreme Court decision on the rights of parolees in the revocation process may presumably be expected before very long. It is likely that the Court will be asked to hold that *all* parolees facing revocation must be provided with counsel, and that revocation hearings must be adversary in nature, with cross-examination of witnesses. No one can predict what the Court will decide, but it is worth observing that Chief Justice Warren Burger was the author of the majority opinion in *Hyser v. Reed, supra.*

Finally, one recent decision reviewed the reasonableness of a particular *condition* of parole. In *Sobell v. Reed*, 9 Crim. Law Rptr. 2189 (S.D.N.Y. 1971), the district court held that the Board unreasonably restricted Morton Sobell's First Amendment rights by forbidding him to travel to participate in certain political activities. The opinion is extremely significant for its willingness to review the constitutionality of parole decisions under the judicial review provisions of the Administrative Procedure Act, in view of the traditional "hands-off" attitude of the courts.

10. *Administrative Procedure Act.* Some of the Parole Board's practices are arguably in violation of the Administrative Procedure Act. The Board itself takes the position that the APA does not apply to parole proceedings, relying on cases that have held various sections of the Act inapplicable, and on the general absence of cases holding that the Act *is* applicable. See *Hyser v. Reed*, 318 F.2d 225, 236–37 (D.C. Cir. 1963); *Washington v. Hagan*, 287 F.2d 332, 334 (3d Cir. 1960); *Hiatt v. Compagna*, 178 F.2d 42, 46 (5th Cir. 1949). The Board's position probably goes too far, however. The APA itself grants no special dispensation to the Parole Board, and clearly the Board is an "agency" as defined in Section 551. Sections 554, 556, and 557, governing the conduct of hearings and adjudication procedure, apply to adjudications "required by statute to be determined on the record after oppor-

tunity for an agency hearing." In the case of the Parole Board there is no such statute, and it is these sections that *Hyser v. Reed, supra,* held inapplicable to parole revocation hearings.

On the other hand, there seems to be no reason for holding APA §555 (e) inapplicable, and no case as yet seems to have given specific consideration to this point. Section 555 (e) provides that "prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial." To be considered for parole a prisoner must make a written application, and there is nothing inherent in the nature of parole that makes it impossible to tell him why he is not being released.

Likewise, the Parole Board has no apparent exception from the requirements of APA §552, the "Freedom of Information Act." Some of the Board's practices seem clearly to violate this Act. Section 552 (a) (2) requires disclosure of agency "orders, made in the adjudication of cases," and Section 552 (a) (4) requires agencies to "maintain and make available for public inspection a record of the final votes of each member in every agency proceeding." A Department of Justice Regulation (28 C.F.R. 16.2) specifically requires the Board of Parole to make this information available to the public at its offices. Yet, the Board's own Rules (pp. 35–36) provide that whether or when an inmate is to be paroled will be disclosed only when the Board deems that the public interest requires disclosure, and that "there will be no disclosure of how the Board or any member votes regarding parole decisions." It is arguable that Board members ought to have a degree of protection from adverse public reaction to a particular parole decision, especially since they have so little security of tenure, but the statute mandates disclosure.

The effect of the Information Act upon disclosure of the Bureau of Prisons files regarding prisoners, which the Board uses, is less certain. Such files presumably come within the category of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," [§552 (b) (6)], and so the Act would not require their disclosure to the public. The important question, of course, is whether the contents of these files should be made available to prisoners, parolees, and their duly authorized representatives. Unfortunately, the Information Act is directed only to the question of access by the public, and gives no guidance as

to when generally restricted files should be open to a party with a particular interest.

The most difficult questions relate to the "right to counsel" provisions of the APA, contained in Section 555 (b). This section permits a person "compelled to appear in person before an agency" to be accompanied, represented, and advised by counsel. It also permits "a party" to appear by or with counsel "in an agency proceeding." Professor Kenneth C. Davis has argued that the former provision grants a right to counsel to prisoners in parole hearings, because a Department of Justice Regulation [2 C.F.R. §2.15] states that they "*shall* appear for such hearing in person." (Emphasis added.) (*See* Davis, *Administrative Law Treatise*, 1970 Supp. at 376.) Regardless of whether unwilling inmates are actually forced into the hearing room, it is obvious that one who wishes parole is under a degree of compulsion to appear. The difficulty with the argument, however, is that it proves too much. Prisoners are under a permanent state of compulsion to appear before an agency (the Bureau of Prisons) in person, and the initial sentence in Section 555(b), if applied literally, would grant them a right to be accompanied by counsel at all times. The second sentence, permitting "a party" to appear by or with counsel "in an agency proceeding," is somewhat more restricted, although it too would seem to mandate allowance of counsel in many correctional matters, including prison disciplinary proceedings, as well as parole hearings. For whatever reason, the courts have so far been unwilling to apply Section 555 (b) to parole proceedings. In *Washington v. Hagan, supra*, the court simply said that it could not believe that this section was intended to apply to parole revocation hearings, and in *Hyser v. Reed, supra*, the court took pains to emphasize that it found a right to the assistance of retained counsel in revocation hearings in the parole statute itself, without regard to the APA.

Federal parole procedure does permit the assistance of counsel in several respects. Parolees may have retained counsel in revocation hearings, and they may petition a court for appointment of counsel. Prisoners are often assisted by retained counsel, who may send written communications to the Board and, upon occasion, make a personal appearance in Washington. Current federal practice does not provide free counsel for indigent prisoners, does not permit counsel to examine the prison file, and does not permit counsel to appear at the parole hearing in the institution, which is now usually conducted by an examiner who does not make the decision. Even if Section 555 (b) were held applicable to parole grant hearings, it would deal only with

the last and least of these three negatives, although constitutional principles of Due Process and Equal Protection might then require provision of counsel for indigents. The primary hindrance to effective advocacy in the existing process is not that counsel may not attend the hearing, but rather that he may not examine the entire record, to correct prejudicial errors, omissions, and misplaced emphasis. Many prisoners also suffer from insufficient assistance in reestablishing contact with the outside world, and in developing workable release plans that will meet with the approval of the Board. Such assistance ought to be provided, but it is by no means certain that it can only or best be provided by persons with law degrees.

11. *New Federal Criminal Code:* The federal law of parole and of sentencing generally will be changed in important respects if Congress acts favorably upon the recommendations of the National Commission on Reform of Federal Criminal Laws. The Commission's *Final Report*, containing an entire new Federal Penal Code, is now before Congress, where it will be extensively studied in committee. [*See* 117 *Cong. Rec.* at §§2968–3006 (92d Cong. 1st Sess. 1971).] The new Code contains the following significant provisions regarding parole:

(a) Eligibility. Nearly all prisoners would have no minimum term, and therefore would be eligible for parole at any time. In exceptional cases the court may impose a minimum term, but it must justify that decision with findings and the defendant may appeal it. Each sentence has a "prison component" and a "parole component" calculated according to a statutory formula. (§§3201, 3202, 3204.)

(b) Parole Grant. The Board must consider a prisoner for parole at least 60 days before expiration of the minimum term, or in the ordinary case where there is no minimum, at least 60 days prior to expiration of the first year of the sentence. There is a presumption against parole during the first year in prison, and thereafter there is a presumption in favor of parole. The Board *must* parole a prisoner after one year (or after expiration of the minimum term), unless it finds that: "there is an undue risk that he will not conform to reasonable conditions of parole; his release at that time would unduly depreciate the seriousness of his crime or undermine respect for law; his release would have a substantially adverse effect on institutional discipline; or his continued correctional treatment, medical care or vocational or other training in the institution will substantially enhance his capacity to lead a law-abiding life if he is released at a later date." In short, early parole is regarded as the norm, and extended confinement the exception to be justified with findings. In addition, persons

who have served in prison the longer of five years or two-thirds of the prison component of their sentence must be paroled unless the Board finds that there is a high likelihood that they will commit further crimes. (§3402.)

(c) Duration of Parole. Currently, a parolee remains on parole (and subject to revocation) until the full period of his sentence expires. Under the proposed Code, the period of parole lasts only as long as the parole component of the sentence, and the Board *may* discharge a prisoner after one year of supervision. If the Board revokes parole, the prisoner receives credit against his sentence for the period of parole prior to the act of violation. (§3403.)

(d) Conditions of Parole. The proposed Code sets out ten specific parole conditions that the Board may impose. The list pointedly omits one significant condition in current use: that the parolee not associate with persons engaged in criminal activities or having a criminal record. The significance of the list is somewhat doubtful, however, because the section also allows the Board to impose "other conditions reasonably related to his rehabilitation." One would suppose that the Board does not now impose conditions that it does not believe to be reasonably related to a prisoner's rehabilitation.

(e) Judicial Review. Under the new Code, the courts have no discretion to review or set aside any discretionary action of the Parole Board, "except for the denial of constitutional rights or procedural rights conferred by statute, regulation or rule." The section does not attempt to explain where denial of procedural rights leaves off and unreviewable discretion begins. Specifically, it is not clear to what extent a court may review findings of the Board justifying a denial of parole to determine whether they are supported by substantial evidence or otherwise reasonable.

The Board has taken a position opposing the key provisions of the proposed Code relating to parole, in a memorandum to Assistant Attorney General Will Wilson dated July 21, 1970. Its strongest opposition is to creating a presumption in favor of parole, especially when the sentencing provisions operate to make prisoners eligible for parole at a very early date. The Board accepts (without enthusiasm) the nearly universal early parole eligibility date, but it feels that the presumption in favor of parole at the earliest time would spark a flood of litigation, and that such a provision "would appear to impugn the competence and professional ability of the Parole Board to formulate policy and criteria for release on parole." It also opposes any limits on its power to set parole conditions, to deny a parolee credit for time

spent on parole before revocation, or to decide when a period of parole should run concurrently with other sentences. Nor does it favor the provisions of §3403 which shorten the period of time a parolee must serve on parole.

The issues raised by the provisions of the proposed Code that relate to parole and sentencing are too complex for adequate discussion here, but a general observation should be made. Some attempt to place limitations upon sentencing and parole discretion is long overdue. Parole Board members themselves frequently cite disparity in sentencing as one of their greatest problems, and the proposed Code would actually place more stringent controls upon judicial sentencing discretion than upon the Parole Board's discretion. Congress could change the language of the parole sections to meet some of the Board's objections, or raise the penalty levels generally to satisfy law enforcement agencies or public opinion, without abandoning the key requirement that both judges and the Parole Board give reasoned justifications for their discretionary decisions.

III. RECOMMENDATIONS AND DISCUSSION

A. The United States Board of Parole should state reasons for denying parole, and should be provided with sufficient additional staff to enable it to do so without delaying the announcement of the result to the prisoner. The Board should state its reasons for granting parole in cases which involve issues of general importance or which have aroused unusual public interest. Where appropriate, a decision in a particular case could be used as a vehicle for stating Board policy in dealing with a recurring situation. Board decisions and opinions should be treated as public records, as required by the Information Act.

Discussion

Giving reasons for denying parole is desirable for both rehabilitational and legal reasons. A prisoner may feel less resentful of a negative decision if he knows the reasons for it, and in planning his activities in the institution he ought to understand clearly what will help him to obtain an early parole. When the nature of his crime is such that early parole is not likely in any event, he should be protected from unrealistic hopes that can only lead to disappointment and bitterness. All this is the job of a prison counselor in any case, but the Parole Board can make that job much easier by formally stating its reasons.

From the legal standpoint, requiring a statement of reasons makes it possible to check abuse or error. There is no way to discover if the Board is denying parole for an unconstitutional or improper reason if the Board never gives reasons for its decisions. It is not to impugn the good faith or competence of the Board to suggest the possibility that in some cases it might rely on reasons for denying parole that the courts would feel were improper or unconstitutional if they knew of them.

Some state parole boards give reasons for their decisions now. A recent New Jersey Supreme Court decision held that that State's board must explain its reasons for denying parole. (*Monks v. State Parole Board*, 277 A.2d 193 (N.J. 1971).) The Pennsylvania Parole Board has given a brief written statement of reasons for years, and some other state boards explain their decision orally to the prisoner immediately after the hearing. This latter method is probably the best when it is possible to have sufficient members of the Board present at the hearing to make an immediate decision. Unfortunately, the federal Board could not do this unless it were greatly enlarged and divided into regional panels, a change which would create new problems in the area of consistency of decisions and overall coordination. Hence, at present, the realistic issue is whether written reasons should be given.

There are three pitfalls to be avoided in the giving of reasons. First, it would be disastrous to introduce any further delay into parole decision-making. One of the most frequent criticisms of the Board today is that it keeps prisoners in suspense for too long. It would be better not to give reasons at all than to give them and spend weeks or months drafting them. Second, it is vital that the reasons be written to give the prisoner a fair and candid statement of why he is not being paroled, and not merely to satisfy the courts. Nothing would be gained by giving reasons if the Board retained a legal staff to draft them with an eye to justifying the decision in the event of litigation. The Board must state why it is denying parole, and not necessarily how it feels the denial might be most persuasively justified in court. Third, the reasons must be reasonably specific. It does no good to tell a prisoner he is being denied parole because he is a danger to society unless he is told why he is so regarded, and whether there is anything he can do to convince the Board otherwise.

Accomplishing these goals will require the whole-hearted cooperation of the Board, and hence it is pleasing to note that giving reasons seems to be an idea whose time has come. The Board has been studying

the idea independently, and Chairman Reed informs me that reasons can be given if the Board is given additional parole analysts, not necessarily legally trained, to assist the members in drafting and agreeing upon the statements.

Although it would be neither necessary nor desirable for the Board to go to the effort of giving reasons for its decision to *grant* parole in every case, in certain cases it would be very helpful to do so. When a particular case has attracted unusual public attention, it is in the Board's own interest to furnish a reasoned justification for the decision to parole. At the present time, the Chairman sometimes responds to letters critical of a particular action by giving what amounts to a statement of reasons. When a decision to grant parole reflects agreement on a question of policy on an issue of recurring importance, it is also desirable to state that policy so that prisoners and other persons may become aware of it. By this means, the Board's *en banc* procedure could be used to promulgate standards on a case-by-case basis. I do not believe that the Board can be expected to produce formulae that can be applied mechanically to cases to produce the "correct" prison term, but many cases today appear to be decided at least in part on the basis of general policies upon which Board members are agreed. Where this is the case, the next step should be to state those policies formally and publicly. Then, the Board can strive to develop general policies in areas where agreement does not presently exist, in the interest of providing equal justice for like cases.

To be useful, Board opinions and statements of policy ought to be publicly available, as the Information Act (5 U.S.C. §552) requires, and they should also be available in the prisons. The goal is of course to publicize Board policy, and not the details of particular prisoners' private lives. Names or identifying details could be omitted or disguised whenever it is necessary to do so to protect personal privacy or to assist a parolee's rehabilitation.

B. The Board should continually review its operating procedures to ensure that parole decisions are made and announced as promptly as possible.

Discussion

Everyone involved in parole agrees upon the importance of prompt decisions, but there is considerable disagreement over methods. In the recent past, the Board experimented with a procedure which allowed practically immediate announcement of the result. The member conducting hearings simply telephoned another member in Washington

at the end of the day to obtain approval of his decisions. Where the two could reach agreement in this fashion, the prisoner could be informed the next day of their decision. It is somewhat more difficult to employ this method when an examiner conducts the hearings, and in any event the Board has decided that it needs more time for consideration. Some observers feel that the practice of telephone consultation had advantages that more than compensated for its disadvantages, but it would be difficult to insist that the Board reinstate a procedure that it considers, after a fair trial, to be unworkable.

Without sacrificing the opportunity for thorough and unhurried consideration of the case, however, it may be possible to speed dispositions. At parole hearings I attended, I observed that a secretary was present to make a shorthand record of the hearing and to take down the examiner's dictated summary. When the examiner returned to Washington after two weeks of hearings, the secretary then transcribed the summaries and sent them on to the Board. If the examiner had simply dictated the summaries into a recorder, the tapes could have been sent to Washington each day and typed immediately, saving up to two weeks in time. Possibly there are other mechanical bottlenecks that could be eliminated or alleviated. I do not mean to imply that the Board has ignored the problem of promptness. The members regularly meet to discuss problems of delay, and the Board's record in this respect would compare favorably with that of other agencies or courts. Moreover, some delays are caused by commendable procedural innovations such as the Washington Review Hearings. The problem, however, is one that requires constant attention.

C. The Board and the Bureau of Prisons should develop new regulations regarding confidentiality of records with the goal of allowing prisoners and parolees to have access to material in their own files except where compelling considerations require confidentiality in specific instances.

Discussion

The Board and the Bureau of Prisons quite properly protect the privacy of persons in federal custody by restricting access to institutional files. Entirely different considerations come into play, however, when the prisoner (or his duly authorized representative) wishes to see material in the file in order to dispute its accuracy or materiality. Anyone would feel uneasy at having his liberty depend upon secret documents which might contain inaccurate or misleading information. Yet present Board rules and practices grant prisoners no right to see

the crucial information bearing upon parole decisions. There may be persuasive grounds for withholding some information, but I am aware of no justification for withholding practically everything.

Perhaps the problem of access can be clarified by giving examples of the type of information relevant to parole that may be found in the institutional file:

(1) *Psychiatric and psychological reports and test scores.* No one would argue that prisoners ought to be kept completely ignorant of these matters, but arguably the institution's professional staff should decide how much to disclose in each case and how to disclose it so as to avoid harming the prisoner himself. Reports might be more guarded and less complete if they had to be shown to the subjects in all cases. On the other hand, a psychiatrist is as capable of writing an inaccurate or biased report as anyone else, and the prisoner might want to challenge what is being written about him.

(2) *Institutional progress reports.* As a rule, prison counselors discuss these reports with the prisoners, who in any event are likely to know if they have been cited for disciplinary violations or if they have a good work record. Still, it is just what the prisoner does not know that may hurt him. The very counselor who, through confusion or otherwise, misdescribes someone's institutional performance may neglect to discuss the points completely with his subject.

(3) *Statements from relatives or acquaintances of the prisoner, which may tend either to support or oppose parole.* Persons are more likely to submit frank or negative statements about someone they know if they believe that their statements will be kept confidential. Of course, such statements may also be inaccurate or malicious, and secrecy may protect error rather than truth.

(4) *The presentence report from the trial court, if one was made.* Under present federal rules, this report or portions of it may or may not be shown to the defendant or defense attorney in the discretion of the judge. The arguments on both sides of the confidentiality issue here are basically the same as with the items previously discussed.

(5) *Statements from law enforcement agencies describing the prisoner's alleged background in crime.* An outstanding example of this type of information is the "Organized Crime Reports" filed by the Criminal Division of the Department of Justice in the cases of prisoners believed to be major figures in organized crime. The Board understandably takes these reports very seriously, because members of professional criminal organizations are extremely poor parole risks. The Department of Justice does not want these reports disclosed to their subjects,

because it wishes to protect its sources of information from exposure or retaliation. On the other hand, the reports typically allege criminal behavior that has never been proved in court. It is not easy to justify reliance on this type of information in any case, and the difficulty is all the greater when the subject of the report is not even told what is in it.

The present members of the Parols Board unanimously and vigorously oppose granting inmates or parolees free access to the information in their parole files, and so far their position has not been successfully challenged in court. I do not believe, however, that the Board has as yet given adequate consideration to possible intermediate steps that would at least to some degree provide persons with access to the crucial material without ignoring other considerations. Most files do not seem to contain information that should not be disclosed, and many inmates are already aware, by one means or another, of the contentts of their own files. In cooperation with the Bureau of Prisons (which maintains the files used by the Board), the Board could devise instructions to prison counselors setting guidelines for disclosing material relevant to the parole decision to inmates, based on the principle that disclosure should be made except where compelling considerations require otherwise. Finally, in my opinion a prisoner or parolee should always be informed fully of any material accusing him of criminal activity so that he can present his own version of the facts. The Board cannot conduct a trial on every factual allegation in the record, but it should make its overall assessment with a full understanding of what is conceded and what is disputed.

D. The Board should revise its revocation hearing procedures to provide: (1) that the parolee may have a local revocation hearing whenever parole violation charges are substantially in dispute; (2) that disputed violation charges should be proved, whenever possible, by the testimony of witnesses appearing in person at the hearing; (3) that the parolee or his attorney may hear the testimony of witnesses and have a reasonable opportunity to cross-examine them, subject to the approval of the presiding member or examiner; (4) that the parolee or his attorney may examine any written statements or documentary evidence that may be relied upon by the Board in deciding whether to revoke parole; (5) that the parolee or his attorney shall be provided a copy of the hearing officer's summary and recommendations and shall, upon request, have a reasonable opportunity to respond in writing; and (6) that any order revoking parole shall state the findings and reasons that support the Board's action.

Discussion

The institution of the local revocation hearing and the recent statutory provision for appointed counsel have already greatly improved the revocation process, but considerably greater protections could be given the parolee without unduly burdening the Board. Presently, the Board's stated policy is to grant a local hearing only when the parolee does not admit *any* violation of his parole conditions, or *any* criminal conviction, including traffic offenses. The parolee who admits a violation, however, may request a "postponed preliminary interview," at which he may appear with counsel to argue that, notwithstanding the violation, he should be reinstated to parole supervision. The primary difference between a postponed preliminary interview and a local revocation hearing is that the former is conducted by the Probation Officer who probably preferred the charges in the first place, and the latter is conducted by a Board member or examiner from Washington. The Board makes the eventual decision in any case, by its normal voting procedures. Probation Officers could lawfully conduct all local hearings, but the Board feels that its own personnel should preside over serious factual disputes. It does not grant local hearings in all cases because of the expense and time involved, and because many or most revocations are based primarily on undisputed facts. For example, a parolee who has been convicted of a crime while on parole may not relitigate the matter in his revocation hearing.

The problem at which the first part of this recommendation is directed arises when the parolee admits a "technical" violation, or a very minor conviction, but his liberty is actually in jeopardy because of more serious allegations which he desires to dispute with witnesses in a local hearing. The rules deny him a local revocation hearing, and the postponed preliminary interview is not designed or intended to resolve basic factual disputes. I do not know how frequently this situation arises in practice, but the conditions of parole are sufficiently strict that it could arise fairly often. I am informed that in practice the Board does grant local hearings sometimes in circumstances of this type, but the rules themselves do not reflect any such flexibility. A revised rule or policy statement should provide for a local hearing whenever revocation is not clearly justified on the basis of admitted violations or criminal convictions of a serious nature.

Undoubtedly the most serious defect in the present procedure is that the parolee and his counsel are not permitted to hear the testimony of adverse witnesses or to cross-examine them, or even to examine the written statements of witnesses who do not appear in person. Members

of the Board and the General Counsel defended the practice of secrecy to me on the ground that the "warrant application," which is given to the parolee, states the charges and the evidence in sufficient detail to permit the preparation of an effective defense. Moreover, they pointed out, the Board members and staff examine the evidence carefully before issuing a warrant or ordering a revocation. This position does not explain, however, what harm would be done by allowing the parolee or his attorney to see and hear the evidence so he can challenge statements that he believes to be inaccurate. If the warrant application does not state all the relevant details, then the parolee needs to see the evidence. If it does, then no harm is done by showing him the evidence. No one contends that secrecy at this stage is justified by a need to protect informers from reprisal, or anything else of the sort.

Having the key witnesses testify in person whenever possible, and permitting them to be cross-examined, may result in longer hearings. This fact is not in itself determinative, of course, because the parolee has a great deal at stake and he is entitled to a fair opportunity to dispute the charges. In any event, it is by no means necessary for the hearing officer to tolerate delaying tactics, or to listen to lengthy speeches or repetitive cross-examination. When the United States Court of Appeals for the Second Circuit held that parolees have a constitutional right to the assistance of counsel in state parole revocation proceedings, it took up a suggestion by Professor Kenneth C. Davis (See Davis, *Administrative Law Treatise, 1970 Supplement* 357–58), and described the proper role for counsel at the hearing in the following terms:

> We stress once again that the participation of the lawyer at a parole hearing should be limited to investigating and explicating to the board, evidence bearing on the occurrence or nonoccurrence of events during the parolee's period of release and their significance, provided these are relevant to the disposition of the prisoner's case. Counsel should not be permitted to employ trial tactics utilized in an adversary context. For example, he should not employ as his forensic text the parolee's entire life history prior to his release on parole. Nor is it counsel's function by cajolery or blandishment or oratory to interfere with the Board's judgment in applying its special expertise to the facts of the case at hand. We emphatically stress that our decision does not detract in the least from the Board's power to limit counsel's participation in revocation proceedings so that parole hearings do not become legal battles. Counsel's proper role is to *assist* the Board, not to impede it, and the Board may take appropriate measures to assure that the counsel appreciates his limited role and presents his client's case accordingly. *Bey v. Connecticut State Bd. of Parole*, 443 F.2d 1079, 1089 (2d Cir. 1971), *dismissed as moot*, 92 Sup. Ct. 196 (1971).

In keeping with a policy favoring full disclosure, I recommend that a copy of the hearing officer's summary and recommendations be made available to the parolee or counsel, and a reasonable opportunity given for response. Strict time limitations could be imposed to curtail unnecessary detail at this point, and in any event is seems reasonable to suppose on the basis of recent history that relatively few revocations will be fought with every weapon available to the defense. Finally, any order revoking parole should state the Board's findings on each violation charged and the reasons for returning the parolee to prison. The Board presently states such findings and reasons for its own use, and there is no apparent obstacle to stating them publicly, for the record.

E. A Joint Committee should be formed of representatives from the Parole Board, the Bureau of Prisons, and the Judicial Conference. The Committtee should be directed to prepare proposals for legislation and for administrative reform concerning: (1) improving both pre-release planning and post-release supervision for parolees; and (2) providing legal services for prisoners.

Discussion

Responsibility for parole release and supervision is fragmented. The Parole Board decides when to grant or revoke parole, but the Bureau of Prisons assists inmates in making adequate release plans (including finding employment), and the United States Probation Service supervises and assists parolees after release. Because the Probation Officers are primarily responsible to the District Judges, they are not always able to give a high priority to their duties as parole agents. In any event, resources are scarce, and both prison counselors and probation officers often have heavy caseloads. The result is that persons remain in prison who could be paroled if they had sufficient assistance in making release plans, and if the Board felt confident that they would be adequately supervised and assisted in the community.

Public figures of all political persuasions currently profess a strong interest in prison and parole reform, and it may be that they are even willing to provide the funds to make it a reality. Individual agencies make their own plans and proposals, of course, but there is a need for overall planning, and proposals with broad inter-agency support may meet with more success in Congress.

The need of prisoners for legal services is not restricted to matters pertaining to parole. A prison legal adviser could assist inmates in preparing petitions for judicial relief (thus aiding the courts as well as the inmate), protect inmates from unlawful or arbitrary treatment by

prison officials, and bring relevant legal or factual arguments to the attention of the Parole Board. He could assist prisoners, in appropriate cases, to take advantage of important procedural safeguards such as the Washington Review Hearings. This is not to say that it would be necessary or desirable to permit or require attorneys to attend parole hearings. The parole hearing or interview is the Board's only opportunity to discuss the case with the prisoner, and any change that tended to convert it into a more formal proceeding might simply reduce its value. Unlike the contested revocation hearing, it does not exist to resolve specific disputed factual charges on the basis of evidence. Counsel could provide effective assistance by adding a written statement or argument to the file when he has something important to say. Prisoners who have retained counsel may now have the benefit of this type of assistance, and there is no persuasive reason (beyond financial considerations) for not providing similar assistance to indigents.

F. The independence of the Parole Board should be strengthened by legislation. The Board should be removed from the Department of Justice and reconstituted as an independent agency or commission. Congress should also consider lengthening the terms of Board members, and requiring that a balance of the political parties be maintained in appointments.

Discussion

Like other federal and state agencies, the United States Board of Parole is inherently subject to political influence. One must have political support to be appointed to the Board in the first place, and one must retain that support to be reappointed or reconfirmed for another six-year term. In addition, the Board's budget is subject to the approval of the Department of Justice, not to mention the Congress, and its members' salaries are fixed by administrative regulation rather than by statute. Representatives of the Department of Justice appear before the Board as "litigants," to seek or to oppose parole for particular prisoners, while at the same time the Attorney General is the administrative superior of the Board and recommends the appointment and reappointment of its members. In addition, it is not unusual for a Congressman or Senator to inquire into the status of a particular case. Many federal prisoners are notorious, and some have considerable local, or even national, reputation and connections.

Vulnerability to political pressure is a common problem with administrative agencies, of course, since their members do not have the life tenure and other protections granted federal judges. Nor is it al-

together an evil for agency heads to be held to account for their decisions by elected representatives of the public. The Board's situation is different from that of many agencies in two respects, however; first, it is incorporated within a cabinet department, and second, its members are particularly dependent upon reappointment. It has often been observed, and as frequently deplored, that federal regulators tend to retire to well-paid positions in the industries they had previously been charged with regulating. Due to the nature of the clientele, this option is not generally open to retiring members of the Parole Board. They come primarily from positions in state or federal correctional agencies to which it is not always easy to return. Appointment to the Parole Board is thus frequently a dead end, a circumstance which removes one influence and strengthens another. Any Board member who is not near retirement age is bound to be deeply concerned with being reappointed.

I do not mean to suggest that politicians are constantly threatening Board members with retaliation, or that the members themselves lack the courage to decide cases on the merits. On the contrary, the members whom I have been able to interview impressed me as having more than their share of personal integrity. Moreover, the practice of deciding important or controversial cases in *en banc* confidential sessions gives a measure of protection to any individual member who is under pressure. Yet it may be worth considering additional measures to protect the Board's independence.

First, it would be simple and inexpensive to remove the Board from the Department of Justice and establish it as an independent agency or commission. A previous Attorney General offered to support the Board in obtaining the necessary legislation to achieve independence, but the Board was unwilling to take the lead in so political an undertaking. The entire purpose of formal independence would be to protect the Board from real or suspected political influence, but, ironically, lobbying to obtain that independence might have the opposite effect. If the change to full independence is to be made, it must be strongly supported by some other agency.

Second, members might be given more security of tenure. I do not favor life tenure for Parole Board members (or for judges, if it comes to that), but I would support a single term of twelve years, perhaps without possibility of reappointment. Alternatively or additionally, some provision for partial retirement benefits might be made for non-reappointed members. At the present time I offer this proposal only as a basis for further discussion, because I presume that the members of

the Administrative Conference have their own views concerning the appropriate terms of appointment for federal agency members.

Finally, political influence in the selection of Board members is inevitable in our system, and perhaps the best solution is to recognize this fact frankly and require that the Board be bipartisan. Although a Republican's parole philosophy will not necessarily be different from a Democrat's, maintaining a balance of the parties in appointments contributes to the Board's independence of whatever Administration is in power. Although there is a tradition of minority power representation on the Board, that tradition is insecure and not universally acknowledged.

APPENDIX A

U.S. Parole Board Standards and Forms

GENERAL FACTORS IN PAROLE SELECTION

The grant of parole rests in the discretion of the United States Board of Parole. In general it is granted, when in the judgment of the Board, a prisoner who has made a satisfactory adjustment and is otherwise eligible will avoid further violation of law and when the factors which will affect him and his dependents upon release, assure adequate public security. These factors vary in every case. The Board evaluates each case on its merits and acts as its judgment indicates to grant or to continue the case.

The membership of the Board is composed of individuals who represent various professional disciplines and experiences. From this multidisciplined background, the individual case is viewed in a manner that will allow all pertinent factors to be considered and evaluated.

The following factors are considered by the Board in its decision making.

A. Sentence Data
   1. Type of sentence
   2. Length of sentence
   3. Recommendations of Judge, U.S. Attorney and other responsible officials

B. Facts and Circumstances of the Offense
   1. Mitigating and aggravating factors
   2. Activities following arrest and prior to confinement, including adjustment on bond or probation, if any

C. Prior Criminal Record
   1. Nature and pattern of offenses
   2. Adjustment to previous probation, parole and confinement
   3. Detainers

D. Changes in Motivation and Behavior
   1. Changes in attitude toward self and others
   2. Reasons underlying changes
   3. Personal goals and description of personal strengths or resources available to maintain motivation for law-abiding behavior

E. Personal and Social History
   1. Family and marital

2. Intelligence and education
3. Employment and military experience
4. Leisure time
5. Religion
6. Physical and emotional health

F. Institutional Experience
   1. Program goals and accomplishments in areas:
      (a) Academic
      (b) Vocational education, training or work assignments
      (c) Recreation and leisure time use
      (d) Religion
      (e) Therapy
   2. General adjustment:
      (a) Inter-personal relationships with staff and inmates
      (b) Behavior, including misconduct
   3. Physical and emotional health, and treatment

G. Community Resources, Including Release Plans
   1. Residence; live alone, with family, or others
   2. Employment, training, or academic education
   3. Special needs and resources to meet them

H. Use of Scientific Data and Tools
   1. Psychological and psychiatric evaluations
   2. Pertinent data from the uniform parole reporting system
   3. Other statistical data
   4. Standardized tests

[Rules of the United States Board of Parole, pp. 14–16 (1971).]

Parole Form F–2
(Temporary Revision)
February 1971

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D. C. 20537

REVOCATION HEARING ELECTION FORM

LOCAL HEARING

The Rules of the Board of Parole provide that an alleged parole or mandatory-release violator shall be afforded a preliminary interview by an official designated by the Board, and shall be held in custody of

the United States Marshal until the interview has been completed and until further disposition is made by the Board. The Rules also provide that, following the preliminary interview, the alleged violator shall be afforded a revocation hearing by the Board, either in a Federal institution or in the community near the place of the alleged violation. If desired, the alleged violator may be represented by an attorney of his own choosing and/or present voluntary witnesses having information relevant to the charges. In all such cases, the attorney and witnesses must be notified by the alleged violator and secured at his own expense.

If the alleged violator desires counsel to be appointed and is financially unable to employ an attorney, he may request the United States district court in the district where the revocation hearing is to be held, to appoint an attorney. Counsel may be appointed if it is found that the interests of justice require such appointment and that the alleged violator is financially unable to employ counsel of his own choosing.

The following procedures will govern the preliminary interviews and local revocation hearings:

1. *Return to a Federal Institution.* The prisoner will be returned to Federal institution where he will receive a revocation hearing if he admits or does not deny that he is guilty of violating the conditions of his release, or if he has been convicted of violating the law since his release. He will also be returned to a Federal institution even though he denys his guilt if he requests that his revocation hearing be held in a Federal institution instead of in the local community.

2. *Postponement of a Preliminary Interview.* If requested, the preliminary interview will be postponed to a time and place to be set by the official conducting the interview so that the prisoner may make arrangements for the appearance of an attorney and/or witnesses at that interview. Following the preliminary interview, the prisoner may be returned to a Federal institution for a revocation hearing.

3. *Local Revocation Hearing.* If requested, in order to obtain an attorney and/or voluntary witnesses who can present information relevant to the alleged charges of violation, the Board may conduct a local revocation hearing reasonably near the place of the alleged violation. If two or more violations are charged, the Board will determine the place of such hearing and will notify the alleged violator. The prisoner is not entitled to a local revocation hearing, however, if he admitts he has violated any of the con-

ditions of his release or if he has been convicted of violating a law while under supervision.

A preliminary interview or a local revocation hearing will be postponed, upon request, for a period up to 30 days in order that the prisoner may arrange for counsel and/or witnesses to appear at the interview or hearing. A postponement beyond 30 days will not be granted except at the discretion of the Board.

NOTE: The reverse side of this form is to be completed by the alleged violator.

_____
(date)

Having read or been fully advised of the Rules of the Board as stated on the face of this form:

1. I REQUEST THAT I BE AFFORDED A REVOCATION HEARING BY THE BOARD OF PAROLE UPON MY RETURN TO A FEDERAL INSTITUTION.
   (a)_____I admit that I violated one or more of the conditions of my release.
   (b)_____I have been convicted of violating the law while under supervision.
   (c)_____Although I deny that I violated any of the conditions of my release and have not been convicted of violating the law while under supervision, I desire to be returned to a Federal institution for my revocation hearing instead of receiving a local revocation hearing near the place of my alleged violation.
2. I REQUEST THAT MY PRELIMINARY INTERVIEW BE POSTPONED.
   _____I desire a postponement of my preliminary interview in order to arrange for an attorney and/or witnesses to appear in my behalf at such postponed interview in order to provide information bearing on whether I should be reinstated to supervision or returned to a Federal institution for my revocation hearing.
3. I REQUEST A LOCAL REVOCATION HEARING.
   _____I desire a local revocation hearing near the place of my alleged violation in order that I may arrange for the

services of an attorney and/or the appearance of voluntary witnesses to present testimony in my behalf bearing upon one or more of the parole or mandatory-release violations charged. I deny that I violated any of the conditions of my release, and also deny that I have been convicted of a law violation while under supervision.

NOTE: Each alleged violator is to choose only one of the three alternatives listed above, and indicate his choice by writing his *initials* at the appropriate place.

_____ _____

(Signature of Witness) (Title) (Name) (Register No.)

_____

(District)

Instructions: Names and addresses of attorneys and witnesses are to be listed below. Complete this form in triplicate: original to the Board, a copy to the Federal institution from which the prisoner was released, and a copy to be retained by the probation officer.

CJA Form 22
(Feb. 1971)

UNITED STATES DISTRICT COURT

for the

_____ district of _____

In the Matter of Statement of

(Parolee

_____(Mandatory Releasee, concerning

Appointment of Counsel under the Criminal Justice Act

Register No. _____

U.S. Court Docket No. _____

Statement of Parolee or Mandatory Releasee
Concerning Appointment of
Counsel under the Criminal Justice Act

I, _____, being under arrest for

alleged violation of parole) at _____
mandatory release)
acknowledge the following to be true and correct:

That I have been fully advised by United States Probation Officer _____ that I am charged with a parole) violation or violations as set forth in the attached mandatory release)
copy of Application for Warrant, which has been read to me;

That United States Probation Officer .....
has fully explained to me that I may be afforded a revocation hearing by the United States Board of Parole either locally near the place of my alleged violation at _____ or upon my return to a Federal institution;

That I have requested that the hearing be held
_____ locally;)
_____ at a Federal institution;)

That United States Probation Officer _____
has advised me that I may apply to the United States District Court for appointment of counsel to represent me at my revocation hearing before a representative of the United States Board of Parole, and that such representation by counsel will be furnished to me if the United States Magistrate or the Court determines that the interests of justice so require and if the United States Magistrate or the Court also determines that I am financially unable to obtain attorney representation;

Pursuant to such notification concerning appointment of counsel,

1. _____ I do not wish to apply to the District Court for appointment of counsel to represent me in my revocation hearing.

2. _____ I wish to apply to the District Court for appointment of counsel in my revocation hearing and in connection with this application I state as follows:

A. Concerning the numbered charges on the United States Board of Parole warrant application attached hereto, I wish to contest the following:

Change Number:

_____
_____
_____
_____
_____

List in left column all charges you wish to contest, identifying each charge by the number corresponding to the number of the warrant application.

I do *not* contest the following:

_____
_____
_____
_____
_____

List in left column all charges *you do not contest,* identifying each such charge by the number corresponding to the number on the warrant application.

B. I [have] [have not] been convicted of an offense since my release. If convicted:

1. State the charge:

_____

_____

2. State the place of conviction:

_____

_____

C. In applying for appointment of counsel I make the following statement to the court concerning my financial condition:

I am _____ Employed _____ Unemployed _____
If employed, state weekly income _____ $_____
If self-employed, state average weekly income ___ $_____
Cash on hand and in bank _____ $_____
Number of dependents _____ _____
Property owned: _____

_____

I certify the above to be correct.

_____
(Signature of Applicant)

Witness:

_____
United States Probation Officer

Date: _____

A false or dishonest answer to a question in this application may be punishable by fine or imprisonment or both, (18 U.S.C. 1001).

APPENDIX B

PAROLE BOARD STATISTICS

U.S. BOARD OF PAROLE BIENNIAL REPORT
SELECTED TABLES

TABLE I

COMMITMENTS OF ADULT PRISONERS TO DEFINITE SENTENCES AND TO INDETERMINATE SENTENCES, FISCAL YEARS 1966 TO 1970

Sentence*	1966	1967	1968	1969	1970
Definite	7,792	7,010	6,905	5,994	5,880
Indeterminate	1,775	2,001	2,099	2,265	2,544
Percent Indeterminate	18.6	22.2	22.2	27.4	30.2

*Does not include NARA commitments.

TABLE VI

AVERAGE NUMBER OF PRISONERS IN FEDERAL INSTITUTIONS, AND NUMBER OF HEARINGS CONDUCTED, FISCAL YEARS 1966 TO 1970

Year	Number of prisoners	Number of hearings
1966	22,560	12,027
1967	21,845	12,271
1968	20,337	12,265
1969	20,183	12,524
1970	20,687	11,784

TABLE VII

DECISIONS OF THE BOARD, BY DISPOSITION AND TYPE OF CONSIDERATION, FISCAL YEAR 1970

Type of decision		Number
Parole and reparole:		5,142
Adults	(3,307)	
Youth offenders	(1,506)	
Juveniles	(299)	
Continue to expiration (adults)		3,906
Continue for further review		5,902
Revoke or reinstate to supervision		2,038
Washington review hearings		65
Appellate reviews*		129
Warrant disposition reviews		400
Total decisions		17,582

*Includes all *en banc* considerations.

TABLE IX

NUMBER AND PERCENT OF ADULT PRISONERS PAROLED, FINAL DECISIONS ONLY, FISCAL YEARS 1966 TO 1970

Year	Decisions	Continued to expiration	Paroled*	Percent paroled
1966	8,718	5,102	3,616	41.5
1967	8,188	3,878	4,310	52.6
1968	8,096	4,443	3,663	45.2
1969	6,068	2,658	3,410	56.2
1970	6,894	3,755	3,139	45.5

*Does not include decisions to review at a later date. Does not include reparoles.

TABLE XII

PAROLES GRANTED, ADULT PRISONERS, BY TYPE OF OFFENSE, FISCAL YEAR 1970

Offense	Decisions	Paroles*	Percent paroled
All offenses	*6,894*	*3,139*	*45.5*
Crimes of force†	469	334	71.2
Drug laws	710	489	68.9
narcotic	(430)	(257)	(59.8)
marijuana	(280)	(232)	(82.9)
Selective service	370	253	68.4
Counterfeiting	265	149	56.2
"White-collar" crimes[1]	400	221	55.0
Liquor laws	487	184	37.8
Forgery	491	178	36.3
Auto theft	1,665	594	35.7
Theft, postal	354	124	35.0
Theft, interstate commerce	185	52	28.1
Immigration laws	372	75	20.2
Other[2]	1,126	486	43.1

*Does not include reparoles.

†Includes assault, kidnapping, and robbery.

[1]Includes embezzlement, fraud, bankruptcy, securities, and income tax violations.

[2]Includes all federal offenses not listed separately.

TABLE XIII

AVERAGE SENTENCE, AVERAGE TIME SERVED AND PERCENT OF SENTENCE SERVED PRIOR TO PAROLE ADULT PAROLEES, BY TYPE OF OFFENSE FISCAL YEAR 1970

Offense	Average sentence (months)	Time served (months)	Percent of Sentence served
All offenses	*55.1*	*20.0*	*36.3*
Crimes of force*	141.8	47.7	33.2
Drug laws:	67.1	19.4	28.9
narcotic	(79.7)	(20.0)	(25.1)
marijuana	(55.8)	(18.8)	(33.6)
Counterfeiting	53.8	17.2	32.0
Forgery	48.3	17.6	36.3
White-collar crimes†	45.6	18.3	40.1
Selective Service laws	43.2	18.4	42.7
Theft, postal	41.4	14.7	35.5
Theft, auto	39.0	16.9	42.3
Liquor laws	36.4	11.0	41.8
Theft, interstate	36.0	17.0	47.3
Immigration laws	20.1	7.4	36.7

*Includes assault, kidnapping and robbery.
†Includes embezzlement, fraud, bankruptcy, securities, and income tax violations.

TABLE XIV

AVERAGE TIME SERVED PRIOR TO PAROLE, BY TYPE OF SENTENCE, FISCAL YEARS 1966 TO 1970

Type of sentence	Year				
	1966	1967	1968	1969	1970
"Regular" adult	17.4	20.8	18.1	19.1	20.7
Indeterminate sentence*	18.7	20.9	18.8	19.0	20.4
Narcotic Addict Rehabilitation Act	—	—	—	12.8	14.8
Youth Corrections Act	20.1	19.3	20.3	20.7	21.7
Juvenile Delinquency Act	15.5	16.0	16.1	16.0	14.9

*Section 4208 (a) (2), Title 18, U.S.C.

TABLE XVI

REVOCATION HEARINGS WITH ATTORNEYS AND WITNESSES, FISCAL YEAR 1966 TO 1970

Hearings	Year				
	1966	1967	1968	1969	1970
Institutional hearings:					
with attorneys	12	9	11	30	10
with witnesses	13	8	5	14	8
with attorneys and witnesses	4	7	4	6	3
Local revocation hearings	23	38	83	98	65

TABLE XVII

NUMBER OF RELEASES ON PAROLE, NUMBER OF WARRANTS ISSUED, AND RATIO OF RELEASES TO WARRANTS, FISCAL YEARS 1966 TO 1970

Year	Number released*	Number warrants†	Percent with no warrant
1966	5,708	1,681	70.6
1967	6,253	1,907	69.5
1968	5,181	2,110	59.3
1969	4,758	1,772	62.8
1970	4,100	1,647	59.8

*Includes reparoles.

†Does not include warrants withdrawn during year of issue (102 in 1970).

TABLE XXI

COMMITMENTS BY THE COURTS, PERSONS BETWEEN THE AGE OF 18 THROUGH 21, BY TYPE OF COMMITMENT, FISCAL YEARS 1966 TO 1970

Year	Type of Commitment				
	"Regular" adult	Youth Corrections Act*	"Indeterminate" adult	NARA	Juvenile
1966	768	871	158	—	128
1967	892	928	243	—	141
1968	894	848	248	—	171
1969	880	938	263	21	140
1970	811	790	259	37	100

*Does not include those under the age of 18 or over the age of 21 who may, as exceptional cases, be committed under the Youth Corrections Act. (370 in 1970)

TABLE XXIII

AVERAGE POPULATION IN YOUTH INSTITUTIONS AND NUMBER OF HEARINGS CONDUCTED BY THE YOUTH CORRECTION DIVISION FISCAL YEARS 1966 TO 1970

Year	Average population	Hearings conducted
1966	4,965	5,258
1967	4,069	4,927
1968	5,203	4,976
1969	4,797	4,916
1970	5,031	4,622

APPENDIX C

STUDY OF PAROLE BOARD FILES

John Cushman—Martha Fleischman

The parole board bases its decision on whether or not to parole an individual on the information contained in his file, yet the file is not available to the prisoner. Therefore, the Committee on Informal Action requested that the Office of the Chairman examine a representative number of Parole Board files in order to determine the kinds of information contained in these files, and to make a judgment as to whether all or parts of the files could be revealed to the prisoner.

Selection of Files

The Committee decided that about thirty files should be examined and various types of offenses represented, including selective service, bank robbery, auto theft, narcotics, and white-collar crimes. It further suggested that six youth offenders' files and six organized crime files should be included. The attached chart shows the offense, disposition, mandatory release time, and size of the file in each of the thirty-one cases.

There is a constant flow of parole applications to the Parole Board. The Board suggested that the researchers intercept files after the applications had been acted on but before the files were returned to the file room. Nineteen adult offender cases were selected at this point, but in order to obtain the variety of cases needed, the researchers looked through more than 100 files. The files on youth offenders are handled separately by the Board's Youth Correction Division. Six of these files were selected in exactly the same manner described above, but in that separate division. The six files containing "organized crime reports" were supplied as they are handled separately; they were, however, applications currently being processed.

Five of the 31 cases examined involved grants of parole; the rest resulted in either a postponement to another review (usually based on a parole progress report with no further hearing), or were continued to expiration. It was noted that in most of the cases continued to expiration, the mandatory release date was in 1972 and would be earlier than a date for another review by the board.

It is believed that the 31 cases selected provide a fair sample of the kinds of information contained in the files. However, they do not represent a random sample since they were chosen to obtain variety and are weighted in the direction of more difficult cases (particularly the or-

ganized crime cases). The judgment that file documents could be shown to the prisoner also needs to be qualified in view of the small number of files examined.

Contents of Files

The following is a brief description of the contents of a parole board file.

The file is contained in a legal-size manila folder. The documents tend to be separated so that items 1-5 below are usually filed on the left side of the folder and items 6-14 are filed on the right side. Not all files were separated and, of course, not all the documents described below appear in every file:

1. *Sentence Computation Record.* This is a mimeographed form that contains the basic data about the statute that was violated, the plea, the sentence, parole eligibility date (where applicable), mandatory good time release date, expiration date, etc. This document could be disclosed to the prisoner or his representative.

2. *Photograph of Inmate.* (Front and side views).

3. *Commitment Form.* Shows place originally detained, date of commitment, subsequent transfer, etc. Could be disclosed to the prisoner or his representative.

4. *Pre-sentence Report.* This is usually the most informative document in the file—from 7 to 10 pages long. It is a standard report in the sense that it is prepared with the following headings of subjects to be covered:

(a) Offense—official version
(b) Offense—defendant's version (sometimes an informant's version is also included)
(c) Prior criminal record
(d) Family history
(e) Siblings
(f) Marital history
(g) Home and neighborhood
(h) Education
(i) Religion
(j) Leisure-time activities
(k) Health
(l) Military service
(m) Employment
(n) Financial condition
(o) Evaluation and recommendation on sentence

Much of the information in the presentence report would appear to be supplied by the prisoner, the rest does not appear to be sensitive, and accordingly it could be disclosed to the prisoner or his representative.

5. *Prior Arrest Record.* This form is usually present and consists of a list setting forth the date of arrest, the charge, the jurisdiction, and the disposition. It is furnished by the FBI and contains no comments or explanations. This document could be disclosed to the prisoner or his representative.

6. *NARA Report.* If the inmate is committed under the Narcotic Addiction Rehabilitation Act, there will be an initial medical evaluation and regular progress reports by the special prison NARA staff until they are satisfied that the inmate can be released to parole supervision for continued narcotic addiction treatment. Several files contained this report and the information did not appear to be sensitive.

7. *Classification Summary.* This study of the inmate is prepared immediately after commitment. It is a form document and contains the results of educational physical and psychiatric tests. There is a statement of the rehabilitation program and work assignment. It almost always contains a caseworker's analysis and a staff evaluation. These often reiterate much that is in the pre-sentence report but also provide a personal evaluation of the prisoner and a judgment as to how long he should remain in prison.

Most of the information in the classification summary is non-sensitive. Occasionally, however, (in about 3 out of the 31 cases examined) the psychiatrist's report probably should not be shown to the prisoner without the advice of the doctor who made the report. It probably could be shown to his attorney or representative.

8. *Parole Progress Report.* A Parole Progress Report (sometimes a Special Progress Report) is prepared in most cases within a year of admission and often sooner. This is prepared by the prison staff (case worker) and is usually a two to three page memorandum which as a minimum describes the offense, progress in institution, a personal character evaluation, and release plan (always important where parole is anticipated) and a recommendation as to parole. This report is updated annually or in connection with each parole review. The parole progress reports examined contained no information that could not be shown to the prisoner.

9. *Letters.* Typical letters will be: inmates correspondence with Congressmen; letters in support of parole from friends; Bureau of Prison letters in response to congressional inquiries, etc.; Board of

Parole letters re Washington hearing requests; employment offers. No reason why correspondence should be withheld.

10. *Legal Documents.* Several of the files inspected contained lengthy petitions filed by prisoners contesting legality of commitment; court decisions thereon. This information is known to the prisoner and need not be kept from him.

11. *Organized Crime Reports.* The six files called "organized crime" files were handled separately by the Board although no special identifying label was placed on the jacket. Five of these files contained memos which described the prisoner's alleged association with organized crime. These memos came from two sources: the Criminal Division of the Department of Justice and the Bureau of Prisons. They tended to be fairly limited in content, naming only the alleged associates of the prisoners, not the informants. In the one file where there wasn't a memo, the information was included in the pre-sentence report, with the FBI listed as the source of information. In this instance, one source was named—but the individual in question was dead. In all but one case, the prisoners seemed to know that they were considered to be members of organized crime. Nothing in the six files examined need be kept from the prisoner or his representatives.

12. *Other.* Documents reflecting forfeiture, withholding and/or restoring good time; reports on escapes; Special medical documents; record of phone inquiries about prisoner; information related to release plan. These documents could be shown to the prisoner.

13. *Examiner's Recommendation.* This one to two page document normally summarizes all important material in the file and includes a brief description of the offense, prison record, occasionally impressions on interview and a description of the release plan. It usually concludes with a recommendation as to parole, stating reasons for or against. This document is prepared by a Board member if he conducted the interview. It is placed on the jacket of the file for ready reference by the Board when the application is being acted on. There would appear to be no reason why the prisoner should not see this document.

14. *The Board's Decision.* This is a printed 5" x 7" form (Parole Form H-6). Normally it contains only a statement of disposition (*e.g.*, "Continue with Progress Report to November 1972") and the signatures of the sitting Board members. While the Parole Form H-6 does not contain a statement of reasons for Board action, in organized crime cases (and presumably others heard *en banc*) a separate informal memorandum of minutes reflecting Board action and reasons

is prepared and included in the file. No reason appears why a reasoned Board Decision could not be made available to the prisoner.

SUMMARY OF CASE REPORTS*

ACUS No.	OFFENSE AND DATE OF COMMITMENT	DISPOSITION AND MANDATORY GOOD TIME RELEASE[1]	SIZE OF FILE[2] (PAGES)
1	Mann Act 1970	Parole—Nov. 1972	48
2	Escape 5/15/70	Continued to Expiration M.G.T.R. 2/13/72	68
3	Robbery 12/16/64	Continued to Expiration M.G.T.R. 1/10/75	93
4	Auto Theft 11/25/70	Continued to Nov. 1972	35
5	Theft	Continued to Expiration M.G.T.R. 12/22/71	35
6	Armed Robbery 8/16/69	Continued to Nov. 1972 M.G.T.R. 5/13/75	50
7	Theft and Conspiracy 4/13/71	Continued to Expiration M.G.T.R. 11/16/72	27
8	Counterfeit and Escape and Bank Robbery 10/67	Continued to Nov. 1973 M.G.T.R. 4/30/93	100
9	Illegal entry 7/1/71	Continued to Expiration M.G.T.R. 7/16/72	17
10	Narcotics (sale) 4/26/71	Continued to Nov. 1972 M.G.T.R. 9/21/75	30
11	Fraud (check) 7/1/71	Continued to Dec. 1972 M.G.T.R. 10/27/74	35
12	Selective Service 10/22/71	Parole to Induction M.G.T.R. 1/20/74	25
13	Forgery 4/10/69	Continued to Nov. 1972 M.G.T.R. 9/29/73	125
14	Kidnapping 11/16/67	Continued to Oct. 1972 M.G.T.R. 9/13/77	75

ACUS No.	OFFENSE AND DATE OF COMMITMENT	DISPOSITION AND MANDATORY GOOD TIME RELEASE[1]	SIZE OF FILE[2] (PAGES)
15	Mail Fraud 6/26/71	Continued to Oct. 1972 M.G.T.R. 2/27/74	20
16	Juvenile—Stolen Explosives 9/7/71	Continued to Aug. 1972 M.G.T.R. 12/15/73	20
17	Juvenile—Parole Violation (Counterfeit) 1/17/70	Continued to Mar. 1972 M.G.T.R. 11/8/72	65
18	Juvenile—Bank Embezzlement 3/29/71	Parole to college Jan. 1972 M.G.T.R. 3/11/75	30
19	Juvenile—Forgery (check) 12/10/70	Parole to Ark. Detainer M.G.T.R. 11/22/74	27
20	Juvenile—Auto Theft 6/4/69	Continued to Expiration M.G.T.R. 10/11/72	120
21	Selective Service 2/18/71	Continued to June 1972 M.G.T.R. 3/15/74	25
22	Bank Robbery 7/24/70	Continued to Nov. 1973 M.G.T.R. 9/10/75	59
23	Organized Crime Perjury 4/30/71	Parole—Dec. 1971 M.G.T.R. 12/21/74	54
24	O.C.—Commerce Threats of Violence 2/14/68	Continued to Nov. 1973 M.G.T.R. 10/17/74	32
25	O.C.—Commerce Threats of Violence 1/6/68	Continued to Jan. 1972 M.G.T.R. 8/8/74	63
26	O.C.—Conspiracy (Counterfeit) 10/3/69	Continued to Expiration M.G.T.R. 10/30/72	80
27	O.C.—Forgery 5/9/69	Parole Feb. 8, 1972 M.G.T.R. 5/23/72	329
28	O.C.—Perjury 4/15/69	Continued to Expiration M.G.T.R. 7/6/72	193

ACUS No.	OFFENSE AND DATE OF COMMITMENT	DISPOSITION AND MANDATORY GOOD TIME RELEASE[1]	SIZE OF FILE[2] (PAGES)
29	Selective Service 10/1/70	Parole March 1, 1972 M.G.T.R. 9/23/73	40
30	Income Tax 5/16/71	Continued to Expiration M.G.T.R. 12/19/72	30
31	Firearms 12/7/69	Continued to Nov. 1973 M.G.T.R. 4/26/73	54

*The cases selected were in the processing line that was acted on by the Board during the period Dec. 20, 1971 to Jan. 5, 1972.

[1]Abbreviated M.G.T.R.

[2]Files often contain duplicates.

APPENDIX D

COMMENTS OF U.S. BOARD OF PAROLE
ON FEBRUARY 1, 1972 DRAFT OF
COMMITTEE RECOMMENDATION

UNITED STATES DEPARTMENT OF JUSTICE
United States Board of Parole
Washington, D.C. 20537

Office of the Chairman

May 9, 1972

Mr. Warner W. Gardner
Chairman
Committee on Informal Action-ACUS
SHEA & GARDNER
734 15th Street, N.W.
Washington, D.C. 20005

Dear Chairman Gardner:

We are in receipt of the revised draft and recommendations of the Informal Action Committee of the Administrative Conference of the United States dated April 6, 1972.

The Board has carefully studied the proposals of the tentative draft and although we continue to have some reservations regarding the recommendations of your Committee as were expressed at our joint meeting on February 23, 1972, we feel, nevertheless, that a number of constructive recommendations are contained in the report.

As you know, this Board made every effort to cooperate with Professor Phillip Johnson who did the original study and we look forward to working with you and Mr. Cramton as well as other members of the Administrative Conference of the United States in improving the procedures of the U.S. Board of Parole.

Sincerely,

George J. Reed
Chairman

Form DJ–150
(Ed. 4–26–65)

UNITED STATES GOVERNMENT
DEPARTMENT OF JUSTICE

Memorandum

DATE: February 16, 1972

TO: MR. WARNER W. GARDNER, Chairman
Committee on Informal Action
Administrative Conference of the United States

FROM: GEORGE J. REED
Chairman
U. S. Board of Parole

SUBJECT: Recommendations of the Committee on Informal Action (3d draft)

The Board of Parole has carefully considered the recommendations submitted in the "3d draft report," of your Committee dated February 1, 1972, relative to procedures of the Board.

Addressing ourselves first to the introduction, the draft of the Committee states that procedures of the United States Board of Parole are "in general inadequate measured by accepted standards of fairness." The Board of course strives to be fair in its procedures, and we do not read the report as impugning the basic approach or philosophy of the Board. As to this, our concern goes beyond "fairness" in parole procedures, reaching questions of how rehabilitation is best effected, whether or not "fairness" requires given procedures. (For example, the Board is currently experimenting with a program for giving reasons for parole denial, although the courts have not required this.) We might add that the court which has most comprehensively dealt with parole proceedings has complimented the Board on its efforts to build fairness into its procedures; see *en banc* opinion of the D.C. Circuit Court in *Hyser v. Reed.*

The phrase "inadequate measured by accepted standards of fairness" seems somewhat amorphous; it suggests the questions (1) "accepted by whom?" and (2) "what type of procedures the Board's procedures are measured against." The Board's procedures (discussed in the Committee's draft) have been frequently judged and reviewed by the courts and not found wanting; it would seem appropriate to say that accepted standards of fairness are those standards which the courts have agreed are "fair" in parole procedings. Conversely, it would appear inappro-

priate to refer to the Board's procedures as unfair by "accepted" standards when the Committee's proposed standards have not received acceptance in the courts.

We might guess that the standards to which the report refers are those applicable to a criminal trial or perhaps to the procedures used in hearings under the *Administrative Procedure Act.* On the latter, the courts which have seriously considered this question have ruled that the *Administrative Procedure Act* is not applicable to the proceedings before the United States Board of Parole. As to criminal proceedings, there are, of course, many decisions which hold unanimously that the standards of a criminal trial are not applicable. Thus, for example, the report's assumption that the procedures are similar to those involved in sentencing (and so requiring counsel) have been specifically rejected by the courts.

Finally on this point, since the Board's procedures have been found not unfair by the courts, we do not believe that it is appropriate to suggest, as the draft does, that the holding of the courts, which is still majority law, that parole is a matter of grace has been used by the courts or the Board to justify any "unfairness."

The balance of this response will deal specifically with the recommendations contained in your Committee's report, and in the order presented.

A. *HYPOTHETICAL ILLUSTRATIONS*

Committee recommendation: "It is recommended, however, that the Board set out in its Rules a dozen or so hypothetical (or real) situations which illustrate the most recurrent patterns and indicate the reasons for the Board's decision thereon."

Comment: The Committee's draft takes note of the three-year research project on "Improved Parole Decision-Making," which this Board developed over two years ago in cooperation with the Uniform Parole Reports Section of the National Council on Crime and Delinquency. The Committee's report suggests that "any generalized formulation of the standards of decision-making would be difficult and should in any case, await the development of a body of reasoned decisions and the results of a current study now being prosecuted in depth by the National Council." This unique and innovative research project makes use of modern computers in storing data regarding parole decision-making of all fifty states, as well as the United States Board of Parole.

Our preliminary research has documented the validity of using 20 "base expectancy" factors that are applicable to all typologies of Federal inmates. This added scientific information will, in addition to federal statutory criteria for granting parole (as well as the Board's current criteria), aid the Members of the Board in exercising their discretion in parole decision-making.

The primary goal of this study is to improve parole decision-making to the end that: (a) the Board will release from prison inmates who have arrived at the psychologically right period of maturation to be able to make a satisfactory community adjustment under parole supervision; (b) the Board will better protect society by continuing to provide institutional treatment for those inmates who are not yet ready to adjust in the community under parole supervision; and (c) the Board will be able to better define its parole decision objectives, alternatives, and information needs. The testing of experience tables and their relationship to improved parole decision-making with a five-year follow up of paroled inmates in the community will now be possible under this new research procedure for the first time because the Federal Bureau of Investigation has agreed to provide its *Record of Arrest* form ("rap sheet") for a five-year period on all inmates released under this project.

During the history of corrections, and especially parole, there has always been a specialized multi-disciplined input into the concept of rehabilitating the individual who violates the law. With regard to parole, there has been a growing body of knowledge and experience combining the several sciences of human behavior and the law. While the law relies heavily upon precedent in court decision, the science of human behavior is not so easily defined as to precedent. The real danger to effective rehabilitation of convicted offenders may occur if we overly legalize or overly categorize the correctional and parole processes until individual diagnosis and treatment become impossible. Because the United States Board of Parole feels that the "Improved Parole Decision-Making" project is a new scientific method not only of improving parole decisions but also of reducing disparity in decisions of the Board by developing a method of measuring precedent by a multi-disciplined quasi-judicial body, we feel that we must wait until the research project is completed before we know how well we can scientifically measure precedent in parole decision-making.

Board's position: With our present techniques it is not now possible to publish "hypothetical illustrations" of parole decisions.

B. *ACCESS TO THE PRISONER'S FILE*

Committee recommendations: "It is recommended that under guidelines issued by the Board the prison counsellor in advance of the parole hearing show the prisoner (or his representative) the file, except for any part as to which disclosure is clearly imprudent, and give him an oral summary of the nature of any adverse information which is not directly disclosed."

Comment: In reaching a decision as to parole, the Board considers information from many sources, including criminal history, prior employment, prison work record, conduct record, release plan, etc. Much of the data in the file has been provided by the court and other agencies. Hence, the Board does not fully control the release of such data, since the agencies which provided it must be protected from disclosure without their permission.

From the personal background data described above, the Board must make a prediction concerning the future. The Board's judgment is an over-all assessment of the inmate as a person, rather than a judgment of any single act. Even in the type of parole proceeding in which attention is focused on an act (such as in revocation of parole) it is settled that the concepts of an adversary proceeding do not apply—thus a fortiori these concepts are not applicable to a parole decision.

Data such as arrest records, school records, dates of employment, etc., could be freely seen by the inmate, but the more subjective data and information concerning inter-personal relationships create a more uncomfortable situation. Considering all sides of the question, privacy of the report and denial of access to the inmate is, in the opinion of the Board, still the best rule. Supporting this rule is the majority of the judiciary, those persons in the field of the science of human behavior and all of the case law to date. There are many times when a skilled probation officer or caseworker can disclose matter in the file with good effect, and it would be desirable to permit this as an exceptional procedure in a given case. Meanwhile, it seems safest to let disclosure be the exceptional practice, while the general rule should be that such reports and files are private and not available to the inmate or his representative.

The reasons underlying the comments made above are as follows:

1. Once guilt has been determined, the Board has every right to receive confidential reports to help it arrive at a parole decision.

2. Parties who supply information may later be harmed physically. Other damaging effects might be the break-up of a family, arousal of

"hard feelings," and development of other such personal conflicts, both in the home and the community from which the inmate came and to which he might return.

3. The probation officer, caseworker, and others who handle the prisoner files are professionally-trained officials and will make use of only the data which is pertinent to the case and which can be substantiated.

4. Granting the inmate access to his file would tend to result in the lessening of the quality or value of the report.

5. There would be a very large number of lawsuits to question, under the inmate's interpretation, the records and reports of all agencies involved.

6. False information and rumors would occur among prisoner populations.

7. Police reporting and other sources of information would "dry up," and the data in the file needed for a parole decision would therefore be diminished.

8. The United States District Courts would have to be contacted regarding whether, in given cases, the presentence report had been given to the defense counsel at the time of trial. The Federal Rules of Criminal Procedure give discretion to the courts in this matter, and disclosure by the Board without court approval is not permitted.

9. Major attack for minor, inconsequential errors in the record would be probable.

10. Information in the file, such as diagnostic information in a psychiatric report, may be harmful to the inmate himself, causing irreparable personal harm.

11. The file is used jointly by the Board of Parole and the Bureau of Prisons. It contains documents from both agencies. The file is compiled, maintained, and kept in the custody of the Bureau of Prisons. The Board, therefore, does not have exclusive jurisdiction of the file.

12. The *Code of Federal Regulations*, Title 28, Chapter One, Part XVI, Sub-part b, containing the Attorney General's Order regarding confidential records, would be violated if the inmate is granted access to such records.

Board's position: The present system of keeping the prisoner's file confidential should be retained.

C. *THE PAROLE INTERVIEW*

1. Additional Hearing Examiners

Committee recommendation: "It is recommended as an initial step

that the staff of examiners be doubled, in order that more careful consideration can be given to the individual cases and to permit where indicated more frequent follow-up interviews."

Comment: The Board's Rules use the term "hearing" synonymously with the term "interview" as used by the Committee on Informal Action. For the purpose of this paper, the term "interview" will be consistently used, especially since it is not a "hearing" in the usually-defined legal sense. Approximately one-third of the Board's decisions are made on the basis of study of the file alone, without a personal interview with the inmate. This occurs when the Board reviews a previous decision on the basis of a written progress report submitted by institution officials; when the sentence is one year or less (where time does not permit the conducting of a personal interview); and also on the basis of new and significant information received by the Board following a previous decision. These types of decision-making will be explained in greater detail below.

The process of decision-making in the cases where a personal interview is conducted with the inmate is as follows:

(a) The Hearing Officer* studies the institution file on the inmate just prior to the interview. A standardized filing and report system and the ability of institutional staff to summarize the important factors in a consistent and meaningful manner make it possible for the Hearing Officer to extract the pertinent information within a period of five to ten minutes. Exceptions occur when the material is lengthy or complicated; in those instances, as much time as is necessary is used.

(b) The inmate is given an opportunity to describe his offense, his prior record, his social background, his institutional progress, and any special areas of his choice. He may be assisted by careful questioning by the Hearing Officer to encourage him to explore any personal areas. An interview is never terminated until the inmate has been given all the time he needs to "tell his story." Most inmates do not require or request an extended period of time for this. Special attention is paid to

*A Hearing Officer, who may be a member of the Board or an Examiner appointed by the Board, conducts parole interviews as used in this memorandum and also conducts revocation "hearings." He is therefore both a Hearing Officer and an Interview Officer.

inmates who seem to have difficulty expressing themselves, and an extra effort is made to establish rapport with the inmate. The interview is conducted and the file is studied with the view of reaching an objective analysis of the man and his problems and needs—*not* to explore legal issues or confront him with damaging information with a demand that he must refute it. The Hearing Officer's goal is to *help* the applicant—not to argue with him or in any way become an adversary.

(c) Following an interview, a summary of the facts relevant to a parole decision is dictated to a stenographer (or a recording device) for later transcription. The summary follows a general guideline and includes pertinent information in such areas as the nature of the present offense, the extent and type of prior criminal record, personal history background of the inmate, data relative to intelligence and personality testing, adjustment to confinement, vocational and other training received in the institution, plans for the future, and other such material. The summary is concluded with an evaluation and recommended Board Order. It is not a legal brief but, rather, is a document containing primarily social and psychological data.

(d) In Washington, D.C., at least two Members of the Board, and more when there is a difference of opinion, study the inmate's complete file in their individual offices; read the Hearing Officer's summary; confer and deliberate with one another when indicated; and cast their vote relative to parole. They may or may not concur in the Hearing Officer's recommendation. When two Members concur, the case is docketed and a *Notice of Action* is mailed to the institution and the inmate.

Incidentally, in some cases, the Hearing Officer may "continue the case to Washington" to make a more complete study of the file before making his recommendation to the Board.

From the above description, it seems clear that the mere addition of Hearing Examiners would not, of itself, substantially improve or expedite decision-making since all parole decisions must, in the final analysis, be made by Board Members. Although more time could be used for file study, conducting an interview, and final consideration with additional Examiner staff, improved decision-making rests, however,

upon more knowledge of offender types, better institutional reports, better release planning, and an increased number of institutional case-work staff. Merely spending more time doing what is currently being done does not, of itself, improve decision-making.

Board's position: Because of the time constraints in replying to the Committee's report, the Board requests an opportunity to appear before the Committee at a later date to further pursue the pressures of case processing and problems in decision-making, as well as to propose remedies.

2. Right to Counsel

Committee recommendation: "It is recommended that the prisoner be allowed to be assisted by counsel, or other representative of his choice, both in the examination of his file and at his interview."

Comment: The *Administrative Procedure Act* does not require the presence of counsel at a parole interview. The federal parole statutes, for that matter (except in the case of youth offenders), do not require an interview. The parole decision in all but youth offender cases could be reached solely on the basis of the file. The case of *Hyser v. Reed*, as cited earlier, has reaffirmed that the *Administrative Procedure Act* does not apply to parole interviews.

With regard to philosophy, as opposed to legal requirements, the Board's ever-present goal is to act in a fair and just manner toward all parole applicants. It believes that an experienced and competent parole official is fair and just—notwithstanding the fact that an attorney may or may not be present or that full "due process" is not provided.

The purpose of a parole interview is not a marshaling of legal issues or confrontation of testimony but, rather, is a device for obtaining a more complete picture of the parole applicant to form the basis for the Board's judgment with regard to the appropriateness of release to society before the expiration of the sentence imposed by the court.

Board's position: The Board's present policy of excluding counsel or other representatives of the inmate from the parole interview and from examination of his file should be continued.

D. *THE PAROLE DECISION*

1. Furnishing Reasons for Parole Denial

Committee recommendation: "It is, however, recommended that in all instances a statement of reasons for the deferral or denial of parole be

given the prisoner, and that reasons also be stated in significant cases for granting parole."

Comment: The Board has now put into operation an experimental program for giving reasons, through the caseworker, to inmates denied parole. This program is to be reviewed during the trial period every 30 days, using during the trial period a form (*Reasons for Board Action*), copy of which is attached. It will be noted that the Board has framed its prepared reasons, both in the generic terms of the statutory criteria as well as in more specific terms set out under the criteria. The Board's plan conforms with the Committee's suggestion that different or special reasons can be stated under the heading "Other." The Board intends, before final decision on the program in July 1972, that correctional caseworkers in every institution will have been carefully instructed in use of the form for advising inmates of the Board's reasons for denial of parole.

The matter of giving reasons is, at this time, in a trial stage and subject to revision. Further, the Board has decided that if, after trial of its described plan, it should find this system may have caused extensive delays in the delivery of parole decisions to inmates, resulting in rehabilitative damage outweighing any advantages, it will discontinue this program and seek new ways for dealing with the problem. The Board has, in this regard, concluded that no increase in delivery time for decisions can be tolerated, nor can any proposed procedure be utilized which would unbalance the Board's operations in other major areas of responsibility such as revocation hearings.

With respect to the Committee's suggestion that, in some proportion of the cases, the Board might simply adopt the Examiner's recommendation as its decision, it should be noted that the Board's Examiners are generally not attorneys and accordingly they do not produce the type of record which would be applicable under the *Administrative Procedure Act*.

Board's position: The Board will continue to experiment and evaluate the feasibility of furnishing reasons for deferral or denial of parole.

2. Public Availability of Board Decisions

Committee recommendation: "It is recommended that the Board decisions be made available to the public."

Comment: The recommendation encompassed in the Committee's draft discloses that there is perhaps a misunderstanding of the Board's operation in conducting parole interviews. On its own motion, many

years ago, the Board adopted the policy of interviewing all inmates eligible for parole if they were serving sentences of more than one year. At these interviews the contents of the file, together with the inmate's progress or lack of progress at the institution and his release plans, are discussed. At the youth institutions the interview often takes the form of a discussion between the inmate, caseworker, and the Member or Examiner conducting the interview. If it is an initial hearing, the goals to be accomplished are outlined; the broad features of the Youth Act are covered and, if there is a continuance, the inmate should have a good idea of how long it will be and for what reasons. If it is a review hearing, the discussion will envisage what the inmate has accomplished in the realm of education, vocational training, group therapy, personal development activities, etc., together with his release plans. From this discussion, the inmate acquires some knowledge of how the Board looks at his case and what the possible outcome will be. Sometimes, if the inmate asks what the outcome will be, the interviewer may give him his best thinking at that time.

There are approximately 12,000 of these interviews conducted each year and, in addition to these decisions, the Board grants or denies parole on approximately 5,000 cases which are decided instead entirely on the basis of a progress report submitted by the institution containing a summary of the inmate's adjustment, his attainments, behavior, and plans which have been developed since the last interview or review in his case. There are, of course, a number of cases decided each year by the Board sitting *en banc*, and a number of cases decided on the Board's own motion as a result of new information contained in letters from inmates, friends, relatives, judges, public officials, etc.

In cases where a personal interview is conducted with the inmate, no witnesses are heard; none have been subpoenaed (as the Board does not have subpoena power); and no witnesses have been sworn. All available and pertinent information and data have been considered however. No attorneys have been present, and the actions of the Board have been chiefly judgmental actions based upon all information contained in the file and that submitted by the Bureau of Prisons and other interested people. The purpose has been that of ascertaining whether the Board feels that there is a reasonable probability that the inmate would live and remain at liberty without violating the law and whether his release, in the opinion of the Board, would not be incompatible with the welfare of society.

No opinions, as such, are written by the Board and it would seem valueless to publish the Board decisions even if they were worded with

a cut-away name as is suggested. It is questionable that they would be of any value to others and, at the same time, it is difficult to imagine how such decisions could be worded impersonally because each case is different and is decided upon its own merits. One of the chief demands at present is that specific, and not general, reasons be given for continuances or denials.

Inasmuch as many decisions are made without interviews and all are non-adversary in nature, it is difficult to see how the Board is subject to the *Administrative Procedure Act* in that it does not render findings of fact, conclusions of law, and recommended decisions with replies. To burden the Board with these legalistic concepts would tend to destroy its value as a decision-making Board operating in a narrow field requiring parole expertise and timing which cannot be measured or "boxed in" without destroying its utility.

The Board does not operate on the basis of precedent and *stare decisis* as courts and lawyers do. Cases with the same set of facts are very often decided differently because of varying factors such as: all people are different in their make-up and some change for the better and some for the worse. Not all inmates can be rehabilitated, and often co-defendants are distinguishable for this reason. Different decisions on similar facts might be made because of job opportunities, inequality of community resources, health, emergencies, disparity of sentences, etc.

Board's position: The value of publishing approximately 17,000 opinions each year, even of a general nature, would be highly questionable, and the Board is of the opinion that this procedure should not be initiated.

E. *PAROLE REVOCATION*

Committee recommendations:

"1. Local Hearing. The Board should by rule or policy statement provide for a local hearing except where parole revocation, as contrasted to technical parole violation, is already indicated by admission or conviction.

"2. Adverse Evidence. The parolee or his counsel should have access to the written evidence against him, and should hear and examine adverse witnesses who appear at the revocation hearing.

"3. Recommendation. A copy of the Hearing Officer's recommendation should be given the parolee, and he should be given an opportunity to comment or reply in writing before the Board enters its decision.

"4. Board Decision. The Board should state its reasons and make them publicly available, all as recommended in respect to parole decisions in Part D above."

Comment: The Committee's description of the criteria for local revocation hearings is perhaps accurate but could be more clearly stated as: Local revocation hearings will be granted in all cases where there is no conviction or where the parolee does not admit to any violation charged and desires counsel and/or witnesses to appear in his behalf.

The second sentence following the above criteria beginning "in 1970, etc.," is a bit misleading. The figures cited correspond to the 1969 annual report figures. The 1970 annual report figures are listed in Tables XVI and XVII of the second draft of the report prepared by Professor Johnson. There were 13 institutional revocation hearings with counsel and about 65 local revocation hearings with counsel. The revocation hearings stated as uncontested (1,500) were actually 1,716 and represent the cases in which a full revocation hearing was held, and in which the parolee contested the charges or admitted them as he chose. The fact that counsel was not present does not, per se, indicate that the charges were uncontested. A further statement that the hearings last a few hours is probably inaccurate, since they vary from case to case, and the length of time required varies from a relatively short period to several hours.

Recommendation #1 appears to indicate that, irrespective of technical violations and their admission, a local hearing should be given unless there is a conviction or admission of a crime, even though no attorney or witnesses are to be present.

The present policy provides for a local revocation hearing where there is no conviction and no admission of any charge and the parolee wishes either counsel or witnesses.

Board's position: Attached is a policy statement governing parole revocation recently adopted by the Board and issued to the field February 1, 1972. It sets forth the procedure and policy followed by the Board in all aspects of the revocation process. The procedure expressed in this statement is now being followed by the Board, and it feels such procedure is fair and just and in conformity with case law.

Recommendations 2, 3 and 4 are dealt with, *supra*, as they relate to the general area of confidentiality.

CONCLUSION

The above material is respectfully submitted to the Committee on

Informal Action as representing the majority opinion of the Members of the United States Board of Parole, and its serious consideration is urged. The Board will be most willing to make further exposition of these matters at the joint meeting scheduled for February 23, 1972. The Board also wishes to reserve time to re-appear before the Committee at a later date to make further exposition and possibly submit further proposals during the time period in which the Committee is preparing its report to the Executive Committee of the Administrative Conference of the United States.