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In the

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGH J. ADDONIZIO,

Respondent,

and

UNITED STATES OF AMERICA

Petitioner,

v.

THOMAS J. WHELAN and THOMAS M. FLAHERTY,

Respondents.

No. 78-156

Washington, D. C.
March 27, 1979

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA, Petitioner, v. HUGH J. ADDONIZIO, Respondent, and UNITED STATES OF AMERICA, Petitioner, v. THOMAS J. WHELAN and THOMAS M. FLAHERTY, Respondents.	:	No. 78-156

Washington, D. C.
Tuesday, March 27, 1979

The above-entitled matter came on for argument at 2:20 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

FRANK H. EASTERBROOK, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of petitioner.

MICHAEL EDELSON, ESQ., Gateway I, Newark, New Jersey, 07102; on behalf of respondent.

LEON J. GREENSPAN, ESQ., Greenspan & Jaffe, 180 East Post Road, White Plains, New York 10601; on behalf of respondents.

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C O N T E N T S

P R O C E E D I N G S

28 MR. CHIEF JUSTICE BURGER: We will hear arguments next in United States against Addonizio, No. 78-156.

Mr. Easterbrook, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF FRANK H. EASTERBROOK, ESQ.,

ON BEHALF OF THE PETITIONER

MR. EASTERBROOK: Mr. Chief Justice, and may it please the Court:

This case involves questions about the allocation of authority to determine how long a convicted prisoner remains in jail.

It presents the question whether a district court can reduce a lawful sentence if a judge determines that a decision by parole authorities frustrated the judge's expectations about when the prisoner would be released.

My argument has a number of strands, and my presentation may be clearer if I tell you now where I intend to go during the argument.

After stating the case, I will argue three propositions: first, there has not been any dramatic change in the practice of the parole authorities since respondents were sentenced; consequently, no one's expectations should have been frustrated.

My second proposition is that any subjective expectations of the judge that were frustrated in fact were

not legitimate expectations, because courts never had a right to insist, or even expect, that the parole commission would exercise its discretion in any particular way, so that release would take place at a particular time.

The third proposition is that even if judges have some legitimate expectations about the date of release, they are not entitled to insist that the parole commission conform its behavior to those expectations.

QUESTION: And part of your third point: Even if they had some legitimate expectations, and even if those -- and even if there has been a change of policy of the Parole Board, nonetheless.

MR. EASTERBROOK: My point then is that there is no collateral remedy for that sort of thing, that there's no --

QUESTION: Inother words, even if you're mistaken on the first two points, nonetheless?

MR. EASTERBROOK: Nonetheless; that's the sense of what I intend to present.

QUESTION: Where does the phrase, "legitimate expectation," come from, Mr. Easterbrook? Is it a property right, a liberty right?

QUESTION: Roth against the United States.

MR. EASTERBROOK: The -- "legitimate expectation" has been used in Roth; it's been used in cases like --

QUESTION: You mean judges have property rights and liberty rights under Roth?

MR. EASTERBROOK: I don't want to argue that judges have liberty or property rights under Roth. They're not vindicating their own rights.

Although there's a strong undercurrent in the Third Circuit's opinion in this case, that this case's all about the rights of judges; that this is about the right of judges to insist on the release at a particular time; that it frustrates the legitimate expectations to do anything else.

And in that sense, arguments about legitimate expectations and the like responds to what the Third Circuit was talking about.

But I'd like to begin with a short statement of the facts.

Addonizio was the Mayor of Newark between 1962 and 1970. In 1970, he was convicted of 63 counts of extortion; essentially, of conspiring with members of organized crime to sell for money his performance of governmental services.

The maximum sentence on these convictions exceeded 1,000 years in jail. Judge Barlow said that Addonizio had committed, and I quote, "crimes of monumental proportion, the enormity of which can scarcely be exaggerated."

And he said, these were no ordinary --

QUESTION: What was your time frame in which he expressed that view?

MR. EASTERBROOK: This was in 1970, Your Honor.

QUESTION: That's when he imposed the sentence?

MR. EASTERBROOK: Yes, when Mayor Addonizio was convicted. He said these were no ordinary criminal acts, but instead were -- and I againquote from page 10 of the Appendix -- 'brazen, callous and contemptuous of the law."

The judge then sentence Addonizio to 10 years in jail, and said not one word about his expectations of release on parole.

The Parole Commission essentially took the judge at his word, and concluded that Addonizio was not an ordinary criminal. The Commission decided that because of the magnitude and nature of the crimes, Addonizio should serve approximately six years of the 10 year sentence in this case, at the end of which he would be released mandatorily on good time credits.

Judge Barlow responded to this decision by reducing the sentence from 10 years to 5, stating that the Commission's decision had frustrated his expectations that Addonizio would be released after 3 or 4 years.

Because the Commission had decided to hold Addonizio longer, Judge Barlow said it was necessary to reduce his sentence to achieve earlier release.

The cases of Whelan and Flaherty are much the same. They were officials of Jersey City convicted of 27 counts of extortion; again, of selling governmental services for private gain.

They were sentenced to 15 years in prison. And they sought reduction of their sentences when it appeared that the Parole Commission would hold them for a little more than 7 years before their release.

Judge Biunno denied relief, finding release would frustrate the sentencing intentions of Judge Shaw, who imposed the sentence.

QUESTION: And who is now deceased?

MR. EASETERBROOK: And who is deceased. Judge Barlow is also deceased now.

But the Third Circuit affirmed in Addonizio's case and reversed in Whelan's and Flaherty's. And it gave two principal reasons for holding that district judges have authority to reduce their sentences in response to parole decisions.

First it said because judges have almost unlimited authority to set a maximum term of imprisonment it just follow that the judge's expectations about the actual time to be served should be vindicated to the fullest possible extent.

The change in the Commission's approach to release decisions had thwarted the judge's ability to achieve release at a particular time, the Third Circuit reasoned. And so the only way that judges could vindicate their expectations, and achieve release, was to shorten sentences.

And the second argument that the court gave was

that traditional standards of criminal justice reject imposition of double punishment. They found double punishment here because both the district judge and the Parole Commission had taken the nature of the offense and its severity into account in making their decisions.

Underlying much of the Court of Appeals' reasoning, and all of the arguments of respondents, is the contention that in 1973 the parole officials radically changed their approach to making decisions.

Until 1973, they thought, well behaved prisoners could expect to be released after serving approximately one-third of their sentences.

After November, 1973, this was no longer true, they argued. Judges had imposed sentences, they thought, in the expectation that there would be release after one-third, so that they could achieve an easily predictable date of release simply by sentencing defendants to three times as much as they really wanted them to serve.

And then when the Commission rudely surprised everyone by changing its policy, requiring some people to serve more than a third, the argument runs, judges were entitled to revise their sentences to bring the actual time to be served back in line with what they had in mind to begin with.

The same argument, I assume, would apply whenever the Parole Commission changes its policies or its guidelines,

a practice that now occurs every six months to every year, as a result of hearings, and continuing oversight of parole practices.

But this argument really doesn't hang together. It fails at a number of points.

It assumes, first, that there was a radical change in policy. There was not.

It assumes that judges were entitled to set sentences in a way that achieves definite release dates. They were not.

And it assumes that there's a statutory source of authority to resentence a defendant if the original plan goes awry; there is not.

But I will start with the argument that there has been a radical change in parole criteria sometime between 1970 and thepresent.

The first place to start on that score, it seems to me, is with the statute that allocates authority between judges and the Commission. The basic statutes allocating authority are unchanged between 1970 and today.

The principal statutes prohibit judges from setting a minimum term of imprisonment of more than one-third of the maximum. The consequence of this is that the Commission retains substantial discretion between the one-third and the mandatory release date on accumulated good-time credits.

Another statute, a statute dealing with probation

prohibits split sentences. It's a statute in which Congress was very careful. When a term of imprisonment is combined with a sentence of probation, the imprisonment component cannot exceed six months.

The effect of this is that a judge cannot divide up release supervision with imprisonment in a way that sets a release date at any distance in the future.

There's another statute, 18 U.S.C. 4218(d), which provides that release decisions are committed to agency discretion by law, which effectively prohibits any judicial review, even under the arbitrary and capricious standard, of decisions to the Parole Commission about actual release date.

And there's one more rule which allocates authority. This Court held in the Affronti and Murray cases that a judge cannot reduce a sentence after service has commenced, even if he discovers that the sentence was a mistake, which was the case in Murray.

That rule has been changed by a Federal Rule of Criminal Procedure 35, but only by giving the court authority for 120 days. And the 120 days marked the dividing line between the authority of courts and the authority of the Commission under the statutes.

And all of those have remained constant throughout this litigation.

QUESTION: Mr. Easterbrook, may a judge say the

sentence is going to be from three to seven, and I want him to remain confined for at least four?

MR. EASTERBROOK: A judge could --

QUESTION: Could he to that extent impinge upon the authority of the parole --

MR. EASTERBROOK: Your Honor, he could not say three to seven, because three is more than one-third of seven. He could say two to seven, for example. And he could say that he wants the Commission to release him at the end of four years.

QUESTION: What standing does that advisory utterance have?

MR. EASTERBROOK: The Commission is now required by statute to consider what the judge says in that respect. There's an explicit statute providing that judges can give the Commission recommendations, and requiring the Commission to consider them.

In that sense --

QUESTION: Well, what I'm trying to get at is, can the judge require there to be -- you say it should be two to seven. Can the judge require the Parole Board not to release him?

MR. EASTERBROOK: No, Your Honor, he can't. He has not authority to require him to be held.

QUESTION: I see.

MR. EASTERBROOK: At the end of one-third of his sentence, the Parole Commission can release him notwithstanding the judges' desires and expectations.

QUESTION: Okay.

MR. EASTERBROOK: One of the ironies of this case is that if you credit the Third Circuit view that the Commission cannot consider the nature and seriousness of the offense, the Parole Commission would presumably be prohibited from releasing someone early in his sentence on the ground that the crime is trivial and that the defendant didn't deserve to stay in jail.

Because that entire field is prohibited by the Third Circuit's decision. It cuts both ways.

In any even, the Commission in 1970 -- the time of the sentences here -- faced substantial pressure for change. It was under criticism from the administrative conference; from respected scholars such as Professor Davis and some others, who contended that it was making arbitrary decisions without published standards and so on.

And there was substantial desire on the Commission's part, and on the part of the academic and administrative law community, that the Commission do something else.

What it did was to cooperate with the National Counsel on Crime and Delinquency to study its own procedures. Persons sat in at hearings that were being conducted by the

Commission and tried to figure out what the Commission was doing in fact.

The study found that the Commission's decisions could be explained most adequately if you knew three kinds of things: If you knew the nature and seriousness of the offense; if you knew his release prospects, that is, how likely he was to commit new crimes if released; and if you knew something about his prison behavior.

And of those two, the nature and seriousness of the offense, and his release prospects, were the most important.

These findings became the basis for the system of guidelines which the Commission adopted in 1973, which allows you to look up in a table some range of dates, for example, 26 to 35 months, within which approximately 80 percent of the people of a particular offense's seriousness and a particular release prognosis could expect to serve.

What the Commission was trying to do there was to regularize its decisions to prevent what had been perceived as arbitrary, erratic and unexplained decisions, and in no small measure, to control its own hearing examiners, because parole policy is supposed to bemade by the Commissioners rather than by the hearing examiners, and if the Commission didn't have published criteria, how could the hearing examiners know what to do.

What happened in 1973 -- at least what the Commission

contended happened in 1973 -- was that the release criteria that had been used all along become visible and routine, rather than invisible and erratic.

And there's substantial confirmation for the Commission's view of what it was doing. No one should have thought in 1970 that there was presumptive release after one-third of the sentence.

The statute, in effect, in 1970, which we have quoted at note 14 on page 27 of our brief, said that the Commission acquired discretion to release someone only if it found two things first: One was that rehabilitation or -- it was a rehabilitation and welfare criteria, essentially.

And the second dealt with the welfare of society. The latter, we think, included considerations of general deterrence, just desserts, and so on; or at least the Commission so interpreted them.

But even if a prisoner could show that he was rehabilitated, and that release was not incompatible with the welfare of society, what the statute then provided was, quote, the commission may in its discretion elect to grant parole.

In other words, it had absolutely unbridled discretion. Nothing in the statute could have supported an inference or a belief that there was an entitlement to release after one-third of the sentence.

The Commission, during the period at issue here,

repeatedly said that it took offense severity into account. That's discussed at pages 51 to 53 of our brief, where we reproduce some of the statements by the Chairman of the Commission and others of the Commissioners.

If anyone had a contrary expectation about what the Commission was doing, it was invented; it wasn't derived from what the Commission said.

QUESTION: Well, Mr. Easterbrook, we were advised some years ago by a public official to pay attention to what we do and not to what we say.

MR. EASTERBROOK: Precisely.

QUESTION: And --

MR. EASTERBROOK: The Commission's deeds comported with its words, Mr. Justice Stewart.

QUESTION: Well, that's what I was going to ask you.

MR. EASTERBROOK: In the 1970 Parole Commission biennial report, which collects figures from 1966 to 1970, the report of the release decisions over that period, table 10 of the report, which appears at page 20, describes release decisions.

And according to the table, of all adult prisoners, only 45.5 percent were ever released on parole; that is more than half of all adult prisoners were held until mandatory expiration.

Those figures speak, I think, quite loudly about the

absence of any presumption of release at the one-third point.

We've also collected, at page 47 -- excuse, at note 47 of our brief, some data that were assembled by the Commission on Crime and Delinquency, the same commission that conducted the study that led to the guidelines.

And those data show that almost -- if you can find the sample of the first offenders who were sentenced to more than a year, approximately 30 percent of that group was continued to expiration of sentence, in 1970, that particular year, the year of the sentencing of Mr. Addonizio.

QUESTION: Mr. Easterbrook, was it not true at that time that there were a number of narcotic offenders who were ineligible for parole?

MR. EASTERBROOK: It's true.

QUESTION: How much of that -- how much do they account for?

MR. EASTERBROOK: The data in this brief contain only people who were eligible for release on parole; that's my understanding.

That's one reason why -- not only were they excluded, but it was also necessary to set -- to select a class of prisoners who were serving more than a year; because under statute, prisoners sentenced to a year or less were not eligible for parole. They're just held to release on good time.

QUESTION: Have you got any figures for first offenders?

MR. EASTERBROOK: Yes, the first offenders are in the first paragraph of the note on page 47. The Parole Commission's published table --

QUESTION: That is, note 47 on page 55?

MR. EASTERBROOK: Note 47 on page 55 in our brief; the first paragraph does try to break down the first offenders, distinguishes first offenders from all offenders.

The Parole Commission data, which is at page 20, table 10, of the biennial report for the years in question, does not break it down that way. You can't get a breakdown on first offenders fromthat table.

QUESTION: Mr. Easterbrook, on that footnote 47, how precise is this one-third? It says a certain percentage up to one-third, and some 61 percent sometime after one-third. How -- in other words, two weeks after a third, or three weeks, or how much?

MR. EASTERBROOK: No -- in fact, it was pointed out that we hadn't been sufficiently precise by respondent Addonizio.

The data apparently deal with releases within two months of the one-third point. If you are released within two months of one-third, you treated as being released at one-third. Releases more than two months after one-third are

being treated as after one-third.

QUESTION: I see.

MR. EASTERBROOK: The reason for the two month gap is because many people didn't have their hearings until very close to the one-third point, and couldn't be released --

QUESTION: Well, in fact, it didn't happen until after they passed the one-third point; isn't that right? Don't regulations provide that there's no hearing until the one-third, and you have the hearing, and then in the time it takes to do the paperwork, a lot of people --

MR. EASTERBROOK: That -- yes, Your Honor, that was the reason for the allowance of the two months.

QUESTION: And is two months enough to take care of everybody who is successful at his first --

MR. EASTERBROOK: The Parole Commission believes it is. I must say I haven't e xamined the data myself.

QUESTION: But it is -- it is correct, is it not, there was a mandatory parole hearing under the regulations then in effect then after one-third?

MR. EASTERBROOK: Yes, there was.

QUESTION: And --

MR. EASTERBROOK: It -- with the exception of persons sentenced under what's now the (d)(2) sentence --

QUESTION: Right.

MR. EASTERBROOK: -- that is, persons who were

eligible for --

QUESTION: And they were even later, the way it worked out. They got a meaningless hearing early, and a significant one later, is the way it worked. At least the Seventh Circuit --

MR. EASTERBROOK: Some people, as the data show, got released at the allegedly meaningless first hearing. They were released almost right away.

QUESTION: Right.

MR. EASTERBROOK: In many events, because the Commission thought the crime was trivial. And there was a policy of letting them out.

But --

QUESTION: But in any event, there was -- putting those to one side, there was a regulation which mandated a hearing after one-third of the sentence had been served?

MR. EASTERBROOK: There was.

QUESTION: And is it not true that a significant number of people were released at that hearing?

MR. EASTERBROOK: Oh yes; oh yes. There's no doubt about that. It comes tolerably close to 40 percent or 50 percent of all prisoners who had a hearing got released right then. And that is --

QUESTION: And I just wonder, is it your position that the judge could not reasonably anticipate that a

defendant who had good institutional behavior would very likely be released at the end of approximately a third of his sentence?

MR. EASTERBROOK: I think in 1970 a judge could reasonably have anticipated that a substantial portion of all prisoners with good institutional behavior would be released in that time.

The question is whether he could have reasonably expected that the substantial proportion was not simply 50 percent or 60 percent or the like; hopefully, including persons like Mr. Addonizio.

QUESTION: Right.

MR. EASTERBROOK: But even in 1970 there was -- if you can visualize a bell-shaped curve -- there's a -- really a tail-off toward the more serious end.

Somebody has to fit in that tail, even in 1970. And the Commission had a habit then, and it still does, of filling that group with persons like Mr. Addonizio whose crimes are really quite severe, or are perceived as quite severe, by the Commission's qualified judgment.

QUESTION: Mr. Easterbrook, if the government prevails here, does Addonizio have to --

MR. EASTERBROOK: If the government prevails here, Mr. Justice Brennan, his original 10-year sentence willbe restored. And the Commission's practice has been in cases of

this sort -- and it has informed me that it will follow the practice -- of giving the prisoner another hearing before his return to prison.

In many of the cases --

QUESTION: Well, what -- didn't Judge Barlow actually reduce the sentence to time served?

MR. EASTERBROOK: He did, and he had served five years and two months.

QUESTION: And you challenged --

MR. EASTERBROOK: We challenged --

QUESTION: -- his power to reduce it?

MR. EASTERBROOK: Yes, Your Honor. So that if we prevail here, Judge Barlow's order will be set aside, and the sentence restored to 10 years.

The Commission --

QUESTION: How long has he been out now?

MR. EASTERBROOK: He's been out for a little more than two years now.

And in light of that --

QUESTION: Didn't I release him at one time?

MR. EASTERBROOK: Your Honor, Judge Barlow released him, the Third Circuit ordered him to return to jail, and the Supreme Court, by a vote of 7-2, released him.

But before the Commission would order him to serve any additional portion of his sentence, it would hold an additional hearing to take into account what's happened in

the two years he's been released. And my understanding of other cases in which district judges have ordered persons to be released, and the Commission has then prevailed on appeal -- in the First, the Eighth and several of the other circuits that have this kind of litigation going on -- is that a substantial number of persons are now returned to prison or are continued on parole.

That judgment will be for the Commission to make in all three cases here.

But even I'm wrong on all of this, and if you grant that there was a change in policy, I think it clear fromthe network of statutes and rules that we've been discussing that Congress gave the Commission the power to establish the parole policy and its exercise of the parole policy, its change of the parole policy, is not something that can lead to resentencing.

When a prisoner is sentenced, he's subjected to the Commission's discretion. That's exactly the meaning of the sentence that gives the Commission authority between the one-third point and the end of the sentence.

A particular use of that discretion is, we submit, not a ground for complaint, even if ten years ago the Commission would have exercised its discretion in a different way.

A judge can object to the consequences of that kind of change only if he has some legitimate ability to control

the time of release. But it's exactly that ability to control the time of release that Congress denied to judges.

The Third Circuit's general view, which is, that because judges have absolute control over the maximum time to be served, they must have control over the actual time to be served, is a classic nonsequitar. It's nothing but disagreement with the statutory policy giving one branch of government authority over the maximum and another branch of government authority over the actual time tobe served.

It's almost inevitable that that kind of process is going to produce frustration. Judges may well believe -- and legitimately so -- that a particular prisoner should be released after four years. Given the statutory framework, there is no way he can hand down a sentence saying, "Hold this many for four years and then release him."

A judge must attempt to approximate. But his inability to predict correctly the error in successive approximations is, we submit, not anything that entitles a judge to claim the very power that Congress withheld, the power to set a precise release date.

My final argument is that I could be wrong in that too, and respondents still aren't entitled to relief. No statute authorizes a court to review sentences in response to the frustration of sentencing judges, even if the frustrations and the judge's expectations were legitimate.

This Court's decision in Affronti and in Murray established that courts cannot reduce sentences after their service has commenced. Rule 35 mitigates that only to the extent of establishing a line of demarcation at 120 days after the judgment, rather than at the beginning the sentence.

The Court of Appeals held that Section 2255 supplies a residual source of authority to revise sentences. This, we think, is incorrect.

That very proposition was implicitly rejected in Murray and Affronti. But more than that, the Court of Appeals' position overlooks the limits on the scope of collateral review.

As this Court held in Davis, collateral review in non-constitutional cases, or in cases of non-constitutional defects, is available only when necessary to avoid a miscarriage of justice.

But all that happened here was that respondents lawfully sentenced to substantial terms of imprisonment, have been required to continue in service of those terms; no matter how you look at it, we think, continued service of lawful terms of imprisonment is not a miscarriage of justice.

Respondents here should be treated no differently than other persons who are held in jail after the judge believes they should be released. There may be circumstances,

such as the religious conversion of a prisoner, that would lead a judge to believe that his sentence had become wildly inappropriate.

And yet it seems clear that the release discretion at that point is entrusted to the Commission, or perhaps to the President, rather than a continuing supervisory authority of the courts.

We think that a court at that point cannot claim to use Section 2255 to produce the result that is otherwise forbidden.

And for all of these reasons, we submit, the judgment of the Court of Appeals should be reversed.

QUESTION: Mr. Easterbrook, was there ever a claim in this case that the Commission's change in regulations constituted an ex post facto law?

MR. EASTERBROOK: There has never been such a claim in this case, Your Honor.

QUESTION: Mr. Easterbrook, did Judge Aldisert refer to Affronti in his opinion at all?

MR. EASTERBROOK: He did not, nor to Murray.

QUESTION: Was it urged on him at the Third Circuit level?

MR. EASTERBROOK: I believe it was, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Edelson.

ORAL ARGUMENT OF MICHAEL EDELSON, ESQ.,

ON BEHALF OF RESPONDENT ADDONIZIO

MR. EDELSON: Mr. Chief Justice, and may it please the Court:

My brother Mr. Easterbrook gave you some background, factual background, in the Addonizio case. He told you about the indictment; he added up the cumulative sentence which might have been imposed.

To a certain extent, I think that that goes to the heart of this case. This was a 15 co-defendant, multi-count co-conspiracy trial. The trial judge sat through a very lengthy trial.

After conviction, the trial judge set a sentence for a particular purpose to achieve a particular end. In his opinion granting the Section 2255 motion, Judge Barlow said, "Yes, indeed, I felt Mr. Addonizio was guilty of a very severe offense."

QUESTION: That's putting it mildly, isn't it, in light of the excoriating statements he made at page 10?

MR. EDELSON: Well, if I may, Mr. Chief Justice, in that entire indictment, Mr. Addonizio was accused of receiving $4,000.

QUESTION: But I'm not -- I'm concerned with what the judge said about the nature of his offense --

MR. EDELSON: All right.

QUESTION: -- which he committed by betrayal of trust as the highest elected official of Newark.

MR. EDELSON: That is correct, Your Honor. But Judge Barlow also stated at page 9, in the Appendix, in response to arguments made by trial counsel, Judge Barlow stated, "An intricate conspiracy of this magnitude, I suggest to you, Mr. Addonizio, could have never succeeded without the then-Mayor's approval and participation."

QUESTION: And he was the then-Mayor.

MR. EDELSON: He was the then-Mayor.

I suggest to Your Honor that the finding of guilt with regard to Mr. Addonizio was the finding that he was the Mayor, and that as the Mayor, he bore ultimate responsibility in terms --

QUESTION: Well, are you suggesting that this record doesn't show that he was in it up to his eyes?

MR. EDELSON: I am suggesting, if your Honor please, that this record does not show that he was in it up to his eyes.

QUESTION: Then this was an outrageous statement on the part of Judge Barlow to make.

MR. EDELSON: Judge -- I understand that. Yes, he -- Judge Barlow found it to be extremely severe. And as Your Honor said, that may be an understatement.

What Judge Barlow said is clearly set forth. The words are there.

What he intended, his evaluation of the severity of the offense, and what he intended to be the punishment based on his evaluation of the severity of the offense, he also has said very clearly, and he has said that in his opinion granting the motion, the Section 2255 motion.

QUESTION: Then do you suggest that Judge Barlow was not fully aware that the parole authority would ultimately take into account what he would say in passing on possible parole release?

MR. EDELSON: I would suggest to Your Honor that he was -- in one sense -- he was not aware that the Parole Board would re-evaluate the severity of the offense and take into consideration his statements --

QUESTION: Well, they didn't have to re-evaluate it. It just shows very clearly in the record that they didn't re-evaluate it, they just took Judge Barlow's evaluation -- they say at page 11, as the highest elected official of the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct and otherwise thwart the construction -- construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects; and

because of the magnitude of this crime, the money being $241,000, indicated, its effect on the city is very great; and so forth.

Now, the Parole Board was doing what it should do, namely, take into account the total record up to the time of the imposition of the sentence, including everything in the presentencing report; everything the sentencing judge said either by way of mitigation or aggravation; isn't that correct?

MR. EDELSON: If Your Honor please, in reviewing the pre-sentence report, and everything said by way of mitigation and aggravation, and the weight that they ultimately gave to that review, I suggest to the Court that they were in fact re-evaluating the severity of the offense.

QUESTION: Well, I would read the Parole Board's statement as much more moderate than Judge Barlow's statements; not involving a re-evaluation at all.

MR. EDELSON: Well, if Your Honor please, we do at least know that Judge Barlow felt that the punishment which fit the crime, in his evaluation of the severity, would have been incarceration for 3-1/2 to 4 years; that is perfectly clear from what Judge Barlow has said in his motion granting the Section 2255, in his opinion granting the Section 2255 motion.

QUESTION: Mr. Edelson, with respect to 2255, did

Judge Barlow or the Third Circuit give any explanation for why they thought this was a sentence subject to collateral attack, in view of our holdings in Murray and Affronti?

MR. EDELSON: Well, neither court addressed Murray and Affronti. But yes, they did give reasons why they felt Section 2255 --

QUESTION: I've read their opinions, and I'm amazed, frankly,that they didn't even discuss Murray or Affronti. They addressed other lower-court opinions.

MR. EDELSON: Well, Murray and Affronti, if Your Honor please, did both -- if I'm correct -- did both deal with the interpretation of probation statutes. And probation is somewhat different from parole, and also in this case, what both Judge Barlow and the Third Circuit found was that there was in fact a radical change in the criteria which was applied in parole decision-making after sentence, and before parole eligibility, and that was the controlling fact.

QUESTION: But did Murray and Affronti suggest that that was at all relevant? Whether or not there had beena radical change?

MR. EDELSON: Well, I would agree that there is the suggestion there. But I also believe that the cases are in fact distinguishable. I can't answer for the Third Circuit or Judge Barlow as to why those issues were not addressed in the opinions.

If the Court please, when the sentence of 10 years was set, at least what Judge Barlow says he was doing was something very specific. He was trying to set, in accordance with the statutes then in effect, and what was known by sentencing judges, a time of incarceration.

Mr. Justice Brennan asked, could the judge set a three to seven sentence, and say, "He may not be released until four years?"

In 1970, in order for Judge Barlow to have guaranteed that Mr. Addonizio stayed in prison, stayed incarcerated, for the 3-1/2 to 4 years that he intended, he had to give him a 10-year sentence. But he also had the expectation that when he became eligible for parole under the statute, under 4202, at the one-third point, his eligibility would then be considered based upon his institutional record and the evaluation of the probability of recidivism.

QUESTION: But maybe Congress didn't want to give Judge Barlow either the power to guarantee a minimum or to give him any expectation as to a maximum.

MR. EDELSON: Well, I think they did give -- they did give him the right to guarantee the minimum.

QUESTION: By fixing a higher maximum.

MR. EDELSON: That's correct.

QUESTION: Yes.

MR. EDELSON: Because the statute provides when --

provided, and still provides -- when there is a straight sentence, then the inmate is not eligible for parole until he has served one-third of his sentence.

QUESTION: But there's still nothing in the sentencing statutes about giving the judge any expectation as to a maximum.

MR. EDELSON: Well, there is nothing -- I would agree that there is nothing in the statute. There was a lot in case law by 1970.

QUESTION: In this Court?

MR. EDELSON: Not in this Court, if Your Honor please. I don't -- although there were -- there are comments, general comments, on the philosophy of parole, which I assume were shared by trial courts in their expectation of how the parole system worked.

In the Third Circuit, for example, we had the case of --

QUESTION: Of course what we have --

MR. EDELSON: -- of Berry v. United States. Excuse me, I just wanted to give you the citation.

QUESTION: Yes.

MR. EDELSON: Where the Court said that the reasonable expectation is that the prisoner will serve one-third of the full sentence.

QUESTION: Well, the fact that the Third Circuit's

opinions may have given Judge Barlow the district judge in New Jersey, an expectation, certainly doesn't bind us in any way, does it?

MR. EDELSON: If there was such an expectation, and if sentences were imposed based on that expectation, it is our contention that there was a crucial error in the imposition of sentence.

QUESTION: Even though this Court had never sustained the Third Circuit's position?

MR. EDELSON: Yes, even though this Court had never sustained the Third Circuit's opinion, because there was nothing from this Court to say whether or not there was an expectation, other than this Court -- there are -- there are -- there is language in Morrissey v. Brewer, for example, which is similar to language in many circuit court cases, that the object of parole is to release the inmate as quickly as the parole authorities have determined that he has shown rehabilitation and can be put back on the street without the fear of recidivism, without --

QUESTION: Isn't there another factor that's added to that at every level, and that is, wehther in weighing -- looking at the seriousness and gravity of the crime, the release at that time will discourage or depreciate the administration of justice, and undermine the deterrent factor of punishment?

MR. EDELSON: If Your Honor please, that was very specifically added in the 1976 Parole Commission Reorganization Act, a comparison between 184203, and the present 184206(a), which sets the criteria, shows that first of all, the old criteria did not tell the Parole Commission, or Parole Board, at that time, to look at the severity of the offense; and 4202 -- I'm sorry, 420 -- 420 -- I was correct at first, 4203, said that if it appears to the Parole Board from a report by the proper institutional officers, or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such person 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, the Board may in its discretion authorize the release of such prisoner on parole.

That, if Your Honor please, should be compared to 4206(a) today, which contains the additional language, if an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined; and if, the Commission, upon considering the nature and circumstances of the offense and history, and charachteristics of the prisoner, determines that release will not depreciate the seriousness of his offense, or promote disrespect for the law.

Those words were not in the statute in 1970. They

were --

QUESTION: Do you suppose they were in the minds of the people who were experienced in this activity, and judges who were imposing sentences?

MR. EDELSON: I --

QUESTION: There's nothing new about those concepts? You find them through the literature on the subject over the last 30 or 40 years.

MR. EDELSON: Judge, I believe that until the new act, the punishment-retribution-deterrence aspects were covered generally by the sentence imposed. Parole was not viewed as having a primary, or even meaningful secondary, purpose in serving those functions.

Parole started out as an ameliorative measure. Parole started -- parole was, to a certain extent, the embodiment of the rehabilitation model in the Federal system.

Not sentencing. Sentencing fully was supposed to take care of deterrence. Sentencing fully was supposed to -- to take care of punishment.

But parole was not.

QUESTION: Are you familiar with any sentencing institutes?

MR. EDELSON: I -- not --

#661 QUESTION: Well, you've heard of them, haven't you? Institutes that federal judges attend on sentencing.

MR. EDELSON: I am -- I am familiar with that Federal judges attend institutes on sentencing. I have never attended. I have read some reports and synopses of things that are said.

Of all the things that I have found published that have taken place at those institutes, I would say that most of the comments of the judges were concerned with their assumption that in fact release was really almost automatically granted, and our case does not depend on that.

Severity of the offense was mentioned. But our position here is that it was almost a flip-flopping of what the criteria were when they were -- as applied in 1970 and as presently applied, and as apply after Mr. Addonizio was sentenced and became eligible for parole.

QUESTION: There certainly was a flip-flop by the sentencing judge from the expressions he gave at the time of sentencing and the expressions he made when he took his final action.

MR. EDELSON: Well, my time is up, but if I may just respond to that.

MR. CHIEF JUSTICE BURGER: Yes.

MR. EDELSON: I don't think there was a flip-flop at all. I think he was entirely consistent. He found that the Mayor of the City had ultimate responsibility for what he felt was a horrendous crime, and he fashioned a specific

sentence to deal with that. The change in the parole guidelines changed the import of that sentence radically.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Greenspan.

ORAL ARGUMENT OF LEON J. GREENSPAN, ESQ.,

ON BEHALF OF RESPONDENTS WHELAN AND FLAHERTY

MR. GREENSPAN: Mr. Chief Justice and may it please the Court:

I represent former Mayor Whelan and former Councilman Flaherty from the city of Jersey City, New Jersey.

They, too, were sentenced under what was commonly known as the Federal extortion statute for selling to the public in general, whoever was willing to buy, their favors in government.

Unlike Mr. Addonizio, Messrs. Whelan and Flahertv were not connected with organized crime, and also unlike Addonizio, they were sentenced to 15 years rather than 10 years.

Also unlike Addonizio, there was a tax problem that was connected to the Whelan and Flaherty case, which was resolved by a plea of guilty, and the imposition of a sentence to run concurrently with the 15 years sentence.

Also unlike Addonizio, unfortunately, Judge Shaw was presiding in a much higher court; he passed away.

Thereafter, an application was made in the district

courtfor the District of New Jersey, and it was referred to Judge Biunno, who was presented with the problem of ascertaining, under the Third Circuit rule, what was the expectation of Judge Shaw at the time that he passed the 15-year sentence.

I would submit to this Court that regardless of what my brother, the Solicitor General, has to say, he is after the fact attempting to ascertain what was the fact in 1970, and prior to 1970, with regard to the expectations of sentencing judges at the time that a sentence was passed upon any prisoner or any convict before a judge.

And under the rule of U.S. v. Berry, the courts themselves enunciated the fact that it was commonly known that after one-third of the service of the sentence imposed, the prisoner would be released unless there were factors that were present at that time to determine that he should not be released.

And I take the position that under the statutes as they were then in existence, and as they would be applicable today, that the onus shifted not so that it was now upon the Parole Board or the Parole Commission to have a burden of proof as to why a prisoner should not be released once he had served the one-third of his sentence.

The statute that was in effect then was the statute that my clients were sentenced under. And they had every right to expect that if they met the criteria, as they did,

that they would be released at the end of one-third, and Judge Shaw had every right to expect, because that is what he had in his mind at the time that he sentenced the two individuals, simply because that was what was in the minds of all the judges who were sentencing prisoners at that time, because that's what the judges said was in their minds, and it says so in U.S. v. Berry.

QUESTION: Do you think Judge Shaw's rights survived his death?

MR. GREENSPAN: It's not a question of Judge Shaw's rights. It's the question of rights of individuals under the constitution to be protected from an impingement upon the powers of the judiciary by the powers of the executive.

All that the judge is doing at the time that he fixes a sentence, or in this case, at the time that he acts under 225, to correct or modify a sentence, is to vindicate the rights that are inherent in the individual to be sentenced to a term of years that is no more than the judge wanted him to serve at the time.

Now, if the Third Circuit uses language that the judge was frustrated; that -- it's vindicating the judicial function; all it's saying is that it's vindicating the rights of individuals to have the judiciary determine how long they're going to serve, when it was the judiciary --

QUESTION: Where do you find those rights? You find

them in an act of Congress, don't you?

MR. GREENSPAN: No, sir. All that Congress does is set up the courts. The powers of the courts are inherent in the constitution.

QUESTION: You mean a judge could impose whatever sentence he wanted after a guilty verdict, regardless of what Congress has said about that?

MR. GREENSPAN: No, sir. What the Congress does is pass the maximum sentence under which the court can -- is required to act. That's a legislative function to determine the limitations.

Once the judge passes the sentence, which are within the limitations, then it's not the executive's to say -- unless the court wishes to pass on to a certain degree its rights in pronouncing the sentence to the executive -- to determine.

Now ifyou have a statute that says, yes, the judge can make a sentence, pass a sentence, that will say, we are going to sentence you at the discretion of the Attorney General; or at the discretion of the Parole Commission. But that's not the case here.

You have a classic balance of power problem, one that I haven't seen before this Court before; and that is, where does the powers of the judiciary to vindicate not its rights, but the rights of the individual, stop; and where does

the power of the executive begin?

I do not agree with the Solicitor General that magically at the end of 120 days the courts have no powers whatsoever to see what's happening. I don't believe there's any magic in that 120 days, and I do believe that 2255 was put there specifically for the purpose, not of vindicating the right of a judge, but of upholding the right of a judge to vindicate the rights of the individuals.

QUESTION: What is your explanation, then, of the Federal rule? You must have some explanation of it?

MR. GREENSPAN: Rule 35?

QUESTION: Yes.

MR. GREENSPAN: I think that Rule 35 deals with an entirely different proposition; that's not the proposition we have before us.

I think that 2255 deals in a -- if I may attempt to explain it in this fashion -- with a --

QUESTION: -- tell me what your explanation is of 2255. Tell me what the explanation is of Rule 35, which you say is such a different proposition?

MR. GREENSPAN: If a judge has made a mistake, if something has happened where a judge for one reason or another wants to do something different, hat Congress has given the judge the authority to change the sentence, for whatever reason or no reason, the way I see Rule 35.

However, 2255 is entirely different, where a mistake has been made in the nature of a quorum notice type of problem, where something has happened which is a question of fact, which was unavailable or unaware at the time that whatever happened happened, that's when 2255 comes in.

QUESTION: What about Affronti and Murray?

MR. GREENSPAN: Affronti and Murray have absolutely nothing to do with this.

QUESTION: I know -- that's why -- I would expect you to say that.

Why not? They just say that the judge can't -- hasn't any power once he's -- once the sentence has begun -- to change his probation rule.

Don't they say that?

MR. GREENSPAN: Sure, but it doesn't apply here, simply because Affronti and Murray assume that the judge has changed his mind; that the judge wants to do something different than what he's done.

QUESTION: Yes, it certainly does. And I thought you said that 2255 would be available for the judge --

MR. GREENSPAN: No, sir, I didn't say that. I said 2255 would be available in a situation where the judge has passed a sentence based upon a set of facts as he perceives them at that time, and which were the fact, which were in existence.

And in this case I would say, the state of the law would be a fact that was in existence at that time. 2255 is available so that the judge can say, "Now, wait a minute. I don't want something to happen today that's different than 1974."

QUESTION: Well, what about -- what if a judge discovers that some facts -- what if the probation officer came in and said, "Gee, I gave you a very bad report last year. This fellow should have really gone on probation. Instead, he's in the prison for five years." And the judge says, "What do you mean?"

Then he gives him some facts he didn't have. And the judge says, "Gee, if I'd known that, I'd have put him on probation."

And the probation officer says, "Well, I listened to that argument in the Supreme Court last week. You've got power under 2255 to effect a different result based on facts you didn't know."

MR. GREENSPAN: If Your Honor please, I don't know that that wouldn't be a good rule. But I'm not arguing that rule. I'm arguing something entirely different.

I'm arguing that where the judge has an intention, where the facts were the facts at that point, and nothing has changed, except that somebody else wants to treat it differently, then 2255 applies.

I don't know that 2255 wouldn't apply under the fact pattern which you've described to me. I would suggest that it does.

QUESTION: Well, you'd have to do something about Affronti, wouldn't you?

MR. GREENSPAN: In that case, I certainly would. But not in the case that I argue here today. I'd say Affronti and Murray just have no place in this argument, and I believe that the brother in the Third Circuit so believed because they didn't even discuss it.

I would suggest that we're dealing with a question of wherever you have a question as to who has to have the final word in a conflict between co-equal branches of government, that I believe that it's the judiciary that has to have the final word, unless there is a clear statutory or constitutional mandate that the judiciary does not have the final word.

Otherwise, you're going to have the situation which has been described as a judicial frustration, but it's not really a judicial frustration -- although the judge may feel himself frustrated -- but it is a frustration of the rights of individual who is before the judicial system who is seeking to have the expectations that was pronounced upon him vindicated.

Now, I cannot accept any rule which would say that if a judge has pronounced a sentence based on the state of the law as it was then, under the facts as he perceived them to be,

as they were then, that the executive department could say, "I'm sorry, judge. We have decided that the sentence that you gave was not severe enough. We're going to change that sentence."

Now, there is no implicit or inherent right in the executive department to do that. There is the implicit right in the judicial system to see that when a sentence is passed, that the expectation of the judge was vindicated, because it was the expectation of the judge that should be vindicated in this point, and not the expectation of the executive department.

QUESTION: How can a judge, at that stage, have any idea how the prisoner is going to conduct himself in prison over a period of a few years, five years into the future?

MR. GREENSPAN: He can't. And that's precisely why the only discretion that's invested in the executive department under that set of circumstances is to determine whether or not he has adopted to the prison life, whether there is going to be recidivistic tendencies, and whether the other criteria which are set forth in the statutes and the a regulations, are met.

QUESTION: You mean the Parole Board cannot take into account the nature of the crime?

MR. GREENSPAN: Absolutely not, simply because it would -- in my judgment -- be a violation of the constitutional

prohibition against double jeopardy. You would be unconstitutionally enhancing the amount of time the individual is going to serve after the judge has already said, "I'm sentencing you to this sentence because of the severity of the crime," and now the Parole Commission is going to say, "Well, now that you've been sentenced because of the severity of your crime, we're going to keep you longer because of the severity of the crime."

It just doesn't --

QUESTION: Longer than what?

MR. GREENSPAN: Excuse me, sir.

QUESTION: Longer than what?

MR. GREENSPAN: Longer than the expectation of the judge in sentencing, because of the severity of the crime. Now at the time it was one-third.

I --

QUESTION: So the parole commission is just a rubber stamp?

MR. GREENSPAN: No, it's not just a rubber stamp. I think that if this Court were to hold that there was no right in the judge under 2255, the judge would be a rubber stamp.

It would be -- the judge would say, "I'm going to pass a sentence --"

QUESTION: That's not -- I asked one question. I

didn't say a word about the judge did I?

MR. GREENSPAN: No, you didn't, Your Honor. That was my own language. But that's what I would learn from that.

I think that we're dealing with a very, very narrow, narrow issue, which is even getting narrower. And that is the question of what happens to sentences that were passed before 1973 when the individual was not released according to what the expectation of the Court was at the time that the sentence was passed.

As the years go by, we're not going to be dealing with many more of these cases. I think that if there's a constitutional issue before this Court, it's merely, just where do the rights of the judiciary end, and where do the rights of the executive begin?

I cannot see it in a 120(a)? line. There has to be some sort of an overlap where there is some sort of concurrent jurisdiction. And we've argued that in our brief, and we have specifically narrowed it in our brief.

Now, amicus has filed a brief which purports to argue that certiorari was improvidently granted. I would adopt that argument, and I will not devote any more of my time to it. I believe it is well written in that brief.

I would just close by saying that this Court many years ago in the Morton Salt case came to the conclusion that executive officers cannot usurp judicial functions, or prevent

the court from exercising such functions.

If this Court were to permit the Parole Commission, under the peculiar facts in this case, to hold in prison Messrs Whelan and Flaherty any longer than the time they've already served, I would submit that they have usurped the judicial function, and that they should not be permitted to do so.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:17 o'clock, p.m., the case in the above-entitled matter was submitted.]