ORIGINAL

In the

Supreme Court of the United States

JOHN B. GREENHOLTZ, INDIVIDUALLY, AND AS CHAIRMAN, NEBRASKA BOARDS OF PAROLE, EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, AND EDWARD M. ROWLEY,

PETITIONER,

V.

INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH , RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. Grant, WAYNE GOHAM, AND CHARLES LaPLANTE,

RESPONDENTS.

No. 78-201

Washington, D. C.
January 17, 1979

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IN THE SUPREME COURT OF THE UNITED STATES

JOHN B. GREENHOLTZ, Individually, and as Chairman, Nebraska Boards of Parole; EUGENE E. NEAL, CATHERINE R. DAHLQUIST, MARSHALL M. TATE, AND EDWARD M. ROWLEY, Petitioners,	:	
v.	:	No. 78-201
INMATES OF THE NEBRASKA PENAL AND CORRECTIONAL COMPLEX, RICHARD C. WALKER, WILLIAM RANDOLPH, RICHARD J. LEARY, ROBERT L. GAMRON, FREDERICK L. GRANT, WAYNE GOHAM, AND CHARLES LaPLANTE, Respondents.	:	

Washington, D. C.
Wednesday, January 17, 1979

The above-entitled matter came on for argument at 1:27 o'clock, p.m.

BEFORE:

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

APPEARANCES:

MR. RALPH H. GILLAN, ESQ., Assistant Attorney General, 2115 State Capitol, Lincoln, NE 68509; on behalf of the Petitioners.

MR. WILLIAM ALSUP, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae.

APPEARANCES (Cont'd):

BRIAN K. RIDENOUR, ESQ., Nelson & Harding, P.O. Box 82028, Lincoln, Nebraska 68501; on behalf of the Respondents.

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C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-201, Greenholtz and others against Inmates of the Nebraska Penal and Correctional Complex and others.

Mr. Gillian, you may proceed when you're ready.

ORAL ARGUMENT OF RALPH H. GILLAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GILLAN: Mr. Chief Justice, and may it please this Court:

This case involves a question of whether procedural due process applies in the granting of parole. And if so, the extent of the required procedures.

As this Court is aware, the circuits have been pretty evenly divided on this, some of them saying that no procedural due process applies at all, and others saying that it applies to the extent that reasons must be given for the denial of parole.

As a matter of fact, the Fourth Circuit, in Franklin v. Shields, required more extensive procedures. And the court sitting en banc, it reversed the panel and said that the only procedures it required were the giving of the reasons for the denial.

However, in this case, the court of appeals mandated very extensive procedures requiring that each inmate be given a formal hearing at the time that he first became eligible;

that he be given notice of the factors that were to be considered and so forth. I won't list all of them.

The most important one, I think the one that we're most concerned with, is the last. The court of appeals said that an inmate denied parole must be given a full and fair explanation in writing of the essential facts relied on and the reasons for denial.

Now, we have no objections to the giving of the reasons for denial, because under state law he is now required to be given the reasons for denial.

But when the Board is required to give him a full and fair explanation in writing of the essential facts relied upon, we think that they are changing the entire type of hearing and make it an evidentiary hearing, and that it would be very difficult for us to comply with that.

So the issues --

QUESTION: One way to comply might be to abolish parole.

MR. GILLAN: I beg your pardon?

QUESTION: One way to comply might be to abolish parole.

MR. GILLAN: Very true, Your Honor. And I think there may well be a very strong inclination for various states to do that if some of these procedures are required.

Now -- so our question here is whether it applies at

all, and whether Nebraska has complied with any procedures which are required by the federal constitution.

We believe that there are two basic reasons why procedural due process should not apply to the granting of parole, and I will discuss the weaker of those two arguments first.

First we believe that there is a difference between the deprivation of a right which has already been granted, and a freedom which has been granted, and the refusal to grant that freedom in the first place.

Now, the Fifth Circuit has relied pretty exclusively on that distinction in Scarpa v. U.S. Parole Board, and in Morrissey v. Brewer; this Court quoted with approval the language in Bay v. Board of Parole, drawing that distinction, holding that there was a difference between refusing to give someone a benefit, and taking away a benefit which had already been given.

I am not contending that that distinction should be decisive in this case. Because I can visualize a situation in which a state statute provided that on proof of a certain set of facts that a person should be entitled to a certain benefit; or conversely, that he should be entitled to a certain benefit in the absence of the proof of certain facts.

I do think, however, that the cases' indications are that the showings should be much clearer in the case of a

granting of a benefit, and that the procedures that would be required would probably be less in that situation.

The primary reason that I believe that the -- that procedural due process should not apply in this case is that under state law there are no provable facts which require the granting of parole, and there are no facts which must be proved to deny it.

The statute that Nebraska operates under is cited in our brief, and first of all, it makes denial of parole dependent upon the parole board's having an opinion. There is nothing in here that says that if it should be found that certain facts are true, that he shall be granted parole, or that he may be denied a parole in the event certain facts are established.

It provides whenever the board of parole considers the release of a committed offender, it shall order his release unless it is of the opinion that his release shall be deferred.

And then look at the factors -- or the conditions under which they can deny it. There is a substantial risk that he will not conform to the conditions of parole.

What facts would one prove that would show that there is a substantial risk that he will not conform to the conditions of his parole?

QUESTION: I suppose they might show that he had been paroled three times previously and had always broken his

conditions of parole. That would be --

MR. GILLAN: It would be purely predictive, Your Honor. And then the next is even less susceptible to proof. His release would depreciate the seriousness of his crime or promote disrespect for law.

Now --

QUESTION: Mr. Gillan, this case itself didn't come up through the Supreme Court of Nebraska, did it?

MR. GILLAN: No, Your Honor, it did not.

QUESTION: Has the Supreme Court of Nebraska ever interpreted this language?

MR. GILLAN: Never.

QUESTION: The government, as you know, the United States, American, as amicus here, construes the Nebraska statutory provisions as being quite different from the main run of statutory provisions governing parole in most states.

You -- do I understand that you disagree with that construction of your position?

MR. GILLAN: I am startled at the position that the Solicitor General has taken in this case, because I have read the federal act, and I find it virtually indistinguishable from the Nebraska act inthis respect, because the federal act also says that the inmate shall be paroled unless the parole board finds -- and I believe one of the criteria is that his release would depreciate the seriousness of his crime or

promote disrespect for law.

I think that the federal act is very similar to the Nebraska act.

QUESTION: Well, do you think the Solicitor General has misconstrued your act or misconstrued the federal act?

MR. GILLAN: Well, I think he has attempted to make a distinction between the two --

QUESTION: Yes, he has, because they are quite different.

MR. GILLAN: I think that he has misconstrued our act.

QUESTION: You don't believe your act confers an entitlement to release in the absence of specific findings?

MR. GILLAN: No, Your Honor, I do not, because --

QUESTION: Because that's the way he construes it, as I understand his brief.

MR. GILLAN: Yes. The act says -- our act says that he -- it shall order his release. And they apparently take the position that that confers some sort of an entitlement.

But the distinction that I draw is that it does not order his release conditional upon the finding of any deterinable facts or any provable facts; that no one is capable --

QUESTION: That instead of fact findings, these are subjective opinions?

MR. GILLAN: Exactly.

QUESTION: Sometimes hunches; is that not so?

MR. GILLAN: They certainly could be hunches. And very often it may be based on nothing more than the parole board's appraisal of the man as he stands before them. They may reach a conclusion as to his character from simply listening to him and watching him. And of course, obviously, they will have looked at his record to see what previous crimes he has committed and how many convictions he has had. And at what he has done in the penitentiary.

QUESTION: His behavior record there.

MR. GILLAN: Yes. And --

QUESTION: And they may also come to the conclusion that all people like him are bound to commit crimes?

MR. GILLAN: Well, no, Your Honor, I don't think --

QUESTION: Say he doesn't look you in the face.

MR. GILLAN: Well, certainly, it's not an exact science. And I think nobody can with any great confidence look at anyone and reach a conclusion that he will or will not commit further crimes.

But nevertheless --

QUESTION: Well, where do you get the hunch from?

MR. GILLAN: Well, I think that the --

QUESTION: You got it from me, didn't you?

That was my term.

MR. GILLAN: Yes, I think the word came from the Chief Justice.

While no one is god, no one can predict with any certainty that this man will or will not commit further crimes, the parole board is charged with the duty of making those predictions, and they do it on whatever basis they have, and they're frequently wrong.

QUESTION: When I put the question to you, proposition to you, counsel, I was using hunch in the sense that Judge Hutchison of the Fifth Circuit used that once in a rather notable article.

In that sense, do you think that a parole officer and the parole board could terminate parole on the basis of a hunch that this fellow was likely to get into trouble?

MR. GILLAN: Definitely not, of course.

QUESTION: And that's a distinction you made, that when it comes to granting parole, they have a vastly wider range.

MR. GILLAN: You made it clear in Morrissey v. Brewer that a man who is on parole has an expectation, founded on state law, that his parole will not be terminated in the absence of misconduct.

And -- so unless they have evidence of specific misconduct, they cannot terminate his parole.

QUESTION: Mr. Gillan, suppose the state statute

provided that the parole board could act on the basis of a hunch. Say the language was very, very broad and said that because these things are largely discretionary they can act on the basis of their personal experience with respect to certain kinds of people. And if they just think that there's some risk that the man bmay not be behaving properly, they have a statutory right to do it.

Would that statute be unconstitutional?

MR. GILLAN: I don't believe that it would be, and I haven't considered that.

However --

QUESTION: Well, if it's not, then there really is no fundamental distinction between granting and denying.

If you rely on -- does the language of the statute make any difference? I know the government places -- argues heavily on that basis.

MR. GILLAN: Well, of course, according to the government's position, as I understand it, the statute could provide no standards whatever.

The government seems to take the position that this could be in the complete discretion of theparole board with no standards whatsoever, in which case I suppose they could, under the statute at least, do it on whatever basis they wished, on a whim or a hunch or anything that they saw fit.

Nebraska has seen fit to lay down some standards for

the parole board to guide them in the exercise of their discretion.

And --

QUESTION: Mr. Gillan, would you straighten me out on one detail? Is an inmate in Nebraska permitted to inspect the file prior to a parole review hearing?

MR. GILLAN: No, Your Honor, he is not.

QUESTION: So that if there is something incorrect or adverse in that file, he doesn't have a whack at it?

MR. GILLAN: No; that's right, he does not.

I frequently -- I believe his file is discussed with him, if there is something in there which the parole board feels is important one way or the other in the granting or denial of the parole. That matter is discussed with him.

But there's no guarantee, of course, that that will be true. And he has no access to it.

We submit that a fair determination of facts decisive of rights is the basic purpose of procedural due process. The reason for having a hearing is to determine facts.

And unless there are some facts which are capable of being determined which are decisive of rights, we see no purpose in having a due process hearing.

QUESTION: Well, does that mean really that there are three different positions taken here, that the state takes the position that there is neither a liberty nor a property

interest involved. The government says -- the federal government says there's a property interest because of the statute. And your opponents say there is a liberty interest because of the freedom which would result from the granting of parole.

MR. GILLAN: I say that there is no liberty interest, because the liberty interest has been taken away from him by his conviction and sentence.

And that liberty interest can be revived only in the event that a state statute makes provision for its being revived.

Now, in the situation where he is granted parole, then the state by its action, pursuant to statute, has recreated the liberty interest, and has provided that it cannot be taken away from him in the absence of misconduct.

But until that liberty interest is recreated, it does not exist. It's -- I believe that this matter has to be considered pretty much in property right terms -- property interest terms, which must be created by a state statute, in this situation.

And unless we find an interest created by state statute in parole, then it doesn't exist, because he has no viable liberty interest.

QUESTION: Mr. Gillan, doesn't the Nebraska statute first provide that after a certain period of time, the inmate

is eligible for parole.

MR. GILLAN: Yes, sir.

QUESTION: Doesn't it secondly provide that one who has reached that point in time shall be released on parole unless there are certain adverse findings made?

MR. GILLAN: Yes, Your Honor.

QUESTIN: And then doesn't the decision of whether those adverse conditions exist or not determine whether or not he will be in jail?

MR. GILLAN: It does, Your Honor. But --

QUESTION: And you say that's not a liberty interest, whether or not he's in jail?

MR. GILLAN: Well, it is not dependent upon facts. There are no facts --

QUESTION: -- maybe a liberty interest, but it's not a deprivation of liberty because he's already in jail.

MR. GILLAN: That's correct. And there's nothing -- now if we look at a due process hearing as an attempt to discover facts decisive of rights, there are no facts --

QUESTION: May I interrupt with just another quick -- supposing the statute provided a ten year term; the man was in jail.

At the expiration of the ten-year term, they decided to keep him in jail. Would he be deprived of his liberties?

He's already in jail.

MR. GILLAN: The sentence is for ten years.

QUESTION: Right. But he's already in jail. Is he being deprived of his liberty if he just stays there?

MR. GILLAN: Well, he is not in jail then pursuant to a sentence.

QUESTION: But the question is whether the deprivation is a deprivation of liberty when he's kept in jail longer than the law provides.

MR. GILLAN: Well, the sentence of ten years was imposed by the court pursuant to law. After the expiration of that ten years, he is no longer being detained pursuant to that sentence. He is simply being detained by the unlawful --

QUESTION: But is he being deprived of his liberty?

MR. GILLAN: I beg your pardon?

QUESTION: But is he being deprived of his liberty?

MR. GILLAN: Yes, because --

QUESTION: Well, then why not if, at the end of his parole eligibility period, and there's a law that says he's entitled to get out unless certain conditions are present, why isn't he then deprived of his liberty if they keep him in contrary to those provisions of law?

What's the difference?

MR. GILLAN: Because --

QUESTION: In terms of whether there's a deprivation of liberty. What's the difference?

MR. GILLAN: Well, I -- if this were dependent on a factual determination, then I would say that if the facts were true that conditionally give him his liberty, then perhaps he would be deprived of a liberty interest.

QUESTION: On Justice Stevens' hypothesis, is that a guarantee of liberty, as the constitution guarantees your liberty and my liberty right now?

MR. GILLAN: No, it's certainly not any guarantee of any liberty.

QUESTION: It's an option for possible release, is it not?

MR. GILLAN: Yes, that's right, Your Honor, conditioned upon --

QUESTION: Would you mind reading that statute again, to see if there's an option in there? Isn't there the word "shall" in there?

MR. GILLAN: That's correct.

QUESTION: Is that an option?

MR. GILLAN: Well, but it is conditional.

QUESTION: Tell me your idea of an option.

MR. GILLAN: Unless -- it can be when it's conditioned. Whenever the board of parole considers the release of a committed offender who is eligible for release on parole, it shall ordder his release unless it is of the opinion that his release should be deferred because there is substantial risk

he will not conform to the conditions of parole; B, his release would depreciate the seriousness of his crime or promote disrespect for law; his release would have a substantially adverse effect on institutional discipline; or D, his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

QUESTION: That's really not much different from saying -- your point is it drains all the force, normal force, out of the word "shall."

MR. GILLAN: Yes.

QUESTION: It sas though it said the parole board shall order his release unless it decides it would be a bad idea.

MR. GILLAN: Correct.

As I cite in my brief, there are two states, as I believe it is, Kansas and Iowa, which have substantially identical statutes, not as elaborate as this. But in one of them they say, shall, and in the other one they say, may, or shall have the power to.

And it would be preposterous, I think, to say that there is a difference. Because in the one case, it would be saying that the state parole board could reach a conclusion that he should be released, and that there was no reason why

he shouldn't be released, and the statutory criteria had been met.

And yet because it says they shall have the power to do so, that they could keep him in the penitentiary simply because it didn't say shall.

So I --

QUESTION: Maybe it's not dispositive for Delaware, but is it true that today we've had two unique arguments? One is, the man can be put in jail on a hunch? And the other is, that he can be kept there on a hunch.

MR. GILLAN: I have heard no one suggest --

QUESTION: Isn't that -- well, didn't you hear Delaware this morning?

As I say, I can't hold you responsible for it.

MR. GILLAN: Well, certainly --

QUESTION: Well, you were just reading the statutes. Supposing there were four reasons why parole release may be denied: one, that he may be -- he will not conform to the conditions of parole, and they list the other three.

Now assume you have a case in which the members of the parole board get together and they all agree that there's, A, no substantial risk; B, that letting him out after 10 years in jail wouldn't create disrespect for the law; and three -- they say each of these four conditions is met. And they put that down in writing and say so.

Don't they a statutory duty to release him?

MR. GILLAN: Yes, they do.

QUESTION: Oh, well, then there is a duty in some circumstances.

MR. GILLAN: Well, they certainly have a duty to attempt to obey the law to the best of their ability. And I think no one has suggested that they don't do it. If they reach the conclusion that he should be released, they release him.

QUESTION: If they wrote all those things out, there probably could be mandamus, because the discretionary factor would all be washed out, wouldn't it?

MR. GILLAN: Yes.

QUESTIN: They would have found all the things necessary to release him.

MR. GILLAN: Yes.

QUESTION: Therefore, that would be a mandamus case.

MR. GILLAN: If I may, unless there are further questions, I'd like --

QUESTION: Let me ask one further question: If they made those findings, would he have a federal constitutional right to be released, even though his liberty was then being deprived?

MR. GILLAN: If they were to make the finding of the record that they were of this -- of the opinion that these

things were true, and they made such a finding, then I suspect that there could be mandamus to release him, or --

QUESTION: Well, I --

MR. GILLAN: But --

QUESTION: Would it be because the federal constitution would then entitle them to their liberties?

MR. GILLAN: It would be because the state statute entitled them to their liberty, if the court were to make -- were -- not -- the parole board were to make a finding that they were of the opinion that all these things had been met, but we nevertheless conclude not to parole him for some undisclosed reason which is not authorized by the statute, then I think they'd be entitled -- he'd be entitled to his release under the state statute.

QUESTION: I understand.

Would they also have a federal right to release?

MR. GILLAN: I -- I question it. I haven't considered it, Your Honor, so I'd want to give that some thought before I --

QUESTION: It does apply to Nebraska?

MR. GILLAN: I beg your pardon?

QUESTION: The federal constitutiona does apply to Nebraska?

MR. GILLAN: Yes, it --

QUESTION: Well, is the reason -- is that a part of

the reason why you don't want to put it down in writing?

MR. GILLAN: Well --

QUESTION: If you know. I don't know whether you know or not.

MR. GILLAN: Why we don't want to put what in writing?

QUESTION: The reason for not granting parole.

MR. GILLAN: Well, the reason we don't want to put it in writing is that it would convert the hearing from a determination of these -- purely subjective matters to an evidentiary hearing, and it would probably require the parole board to make a record and present evidence which would justify a denial.

Many times it --

QUESTION: -- on each case they go through each one of these four points.

MR. GILLAN: Well --

QUESTION: Do you agree? Is that true?

MR. GILLAN: They go through -- yes, I --

QUESTION: The statute requires them to.

MR. GILLAN: I'm sure that they --

QUESTION: Well, why couldn't they just make a note on each one of them?

MR. GILLAN: Well, suppose that the reason that they decided -- not to grant this man a parole was that because of

the nature of his crime, his release would depreciate the seriousness of his crime or promote disrespect for law.

Now, that's just a general subjective feeling of the members of the board of parole, that this man has been convicted of a very serious crime, and to release him now would depreciate the seriousness of the crime.

Now, if they have got to present evidence to show that, I don't know how they would do it. We had a man who was convicted of robbery and in the process of the robbery he gouged the woman's eyes out to prevent her identifying him. The parole board is going to feel that he should probably never be paroled.

But how does one present any evidence?

QUESTION: Why couldn't they do it -- just say what you said?

MR. GILLAN: That could be given as a reason, perhaps. But to present evidence? I think it would --

QUESTION: That wouldn't be evidence, would it; that would be the record.

MR. GILLAN: That's the record, but how is that evidence --

QUESTION: The record in this case showed that the man gouged out the woman's eyes; period.

MR. GILLAN: But is that evidence that his release would depreciate the seriousness of his crime or promote

disrespect --

QUESTION: I -- if that -- my point is, I'm not questioning what they, I'm just question why they can't say it.

MR. GILLAN: Well, so many times it is purely subjective, and sentencing is something that is not susceptible to factual proof.

QUESTION: What was this person convicted of?

MR. GILLAN: He was convicted of robbery, Your Honor, and was given 50 years. And the minimum sentence for robbery is 3 years. So he may have been given something like 20 to 50, but the maximum he was given was 50.

QUESTION: What was the allowable maximum?

MR. GILLAN: The allowable maximum was 50. That was the maximum term he was given. And the greatest minimum he could be given would be one-third of 50, so he couldn't have been given more than about 16 years as a minimum.

And at the end of 16 years he would be eligible for parole.

QUESTION: But so much of this depends on the original sentence in which there's never been thought to be any requirement of any fact finding, or any entitlement on the part of the convicted defendant to a short sentence or a medium sentence, as contrasted with an allowable longer sentence.

MR. GILLAN: That's correct.

Everybody is eligible for parole after one-third of the maximum sentence.

QUESTION: One-third of the maximum sentence.

MR. GILLAN: Yes.

QUESTION: Regardless of what was imposed by the judge.

MR. GILLAN: Regardless of what the judge may want to do.

QUESTION: Or what he actually imposed?

MR. GILLAN: Yes. They are eligible after serving one-third of the statutory maximum sentence.

MR. CHIEF JUSTICE BURGER: Mr. Alsup, I know that you say in your amicus brief that we acknowledge -- the government acknowledges -- the requirement of a statement of reasons have become an accepted part of due process safeguards.

Now, if a sentencing judge is pressed to grant probation, suppose he lets defense counsel argue that, as they often do, and then he proceeds to sentence the man to 10 to 30 years, tor 3 to 9 years.

Must the sentencing judge give reasons for it?

ORAL ARGUMENT OF WILLIAM ALSUP, ESQ.,

AS AMICUS CURIAE

MR. ALSUP: Absolutely not, Your Honor. The --

QUESTION: Well, then that statement is a little

bit sweeping, isn't it, that you havein your brief at page 45?

MR. ALSUP: Well, the --

QUESTION: A little bit broad.

MR. ALSUP: Mr. Chief Justice, the decisions of the Court since the Roth case, at least in many instances including the Morrissey case, have required a statement of reasons as part of the bundle of rights that the Court has prescribed for a given circumstance.

And our reference in the brief was an acknowledgement of the fact that on occasions the Court has required a statement of reasons.

QUESTION: You say in these circumstances.

Do you regard the circumstances the same in Morrissey and here?

MR. ALSUP; No, Your Honor, they're different circumstances.

QUESTION: Quite different, aren't they?

MR. ALSUP: Yes, Your Honor.

QUESTION: You think Morrissey turned on the presence of a liberty interest or the presence of a property interest?

MR. ALSUP: Morrissey turned upon an entitledment to liberty that was created by the implicit promise, as the Chief Justice recognized in the opinion for the Court, that that conditional liberty would not be revoked unless certain

specified conditions were met.

QUESTION: So you feel that the parole provisions of Nebraska here are different from the Morrissey-type provisions that you were just describing as referred to in the Chief Justice's opinion?

Because I take it the government position here is, it's a property interest that's --

MR. ALSUP; Well, the government recognizes that the entitlement-to-property cases are analogous to the entitlement-to-liberty cases.

In fact, that very analogy was used by the Court in Wolff v. McDonnell, that there could be a statutorily created right to liberty, just as there could be a statutorily created right to property.

I should -- if there is any confusion on --

QUESTION: But if the -- but whatever it is, it -- you're talking about something rooted in state law?

MR. ALSUP; That's correct; or in a federal statute.

QUESTION: Yes, but here in state law.

MR. ALSUP: That's correct, Your Honor.

QUESTION: And I take it if the Supreme Court of Nebraska next month were to say that the federal government's construction of its parole statute was wrong, and that it's a purely discretionary thing, the government's argument would be somewhat different in this case?

MR. ALSUP: If the Surpeme Court of Nebraska were to give an authoritative ruling saying that this statute does not mean what it appears to mean, and it's a purely discretionary parole proceeding with no rights or entitlement to release upon certain conditions, then we would take the position that there would be no due process hearing required.

So I think the answer is, Mr. Chief Justice Rehnquist, yes, if they were to change the law --

QUESTION: You flatter me.

QUESTION: Mr. Alsup, on that point, supposing Nebraska said that the revocation of parole shall be purely discretionary with the parole board; can do it on a hunch, for any arbitrary reason. So there would be no reasonable expectation of continued parole if the board decided to change its mind.

Would such a statute be constitutional, in your judgment?

MR. ALSUP: Let me respond, Mr. Chief Justice Stevens, in two respects:

First, there might be a cruel and unusual punishment problem with such a form of punishment that allowed an individual to go back into his community to re-establish roots with his family, and then for an arbitrary and capricious reason to be ripped out of that environment.

Whether tor not that would unconstitutional on that ground, I can't say, but certainly such an issue would arise.

QUESTION: Just under the rationale of Morrissey against Brewer, going no -- just staying within the four corners of that opinion; would the statute I described be constitutional or unconstitutional, in your view?

MR. ALSUP: Again, not to fight the hypotheticals too much, I think the Court --

QUESTION: You discuss it in your brief at some length.

MR. ALSUP: Well, I think we would have to say, if in fact it were a purely discretionary right to revoke, then the particular person out on parole would have no legitimate expectation of continuing with his liberty.

I have to say, Mr. Justice Stevens, I don't think that would ever occur.

QUESTION: Well, would it follow then that such a statute would be constitutional? Are you saying that even on parole revocation that the parolee's right to a hearing is entirely based on a statutory grant?

MR. ALSUP: Let's see if I understand the circumstances.

We have a parolee who has been released subject to the normal conditions, and in addition there is a statute which allows the board to revoke parole at awhim?

QUESTION: That's right, and with the -- and the parolee, when he's released, gets a copy of a statute and he's

told, if we get worried about the way you're behaving, even if we don't have any proof of anything at all, we have the power to revoke your parole like that.

Is such a statute constitutional?

MR. ALSUP: There might be a problem with ausuch a statute under the division wthat was apparent in the Court in the Arnett case, in which some of the justices took the position that a substantive right could be prescribed by the state legislature, but the procedure for revoking it could not be.

I believe six justices rejected the position that such arbitrary procedures could be --

QUESTION: Well, I'm familiar with the Arnett case. I'm just curious about whether the government has a position on the question which I've asked you, which you're willing to identify for us.

MR. ALSUP: Well, Mr. --

QUESTION: You've surely thought about it before you came here today.

MR. ALSUP: Well, that of course is not the case that's presented here.

QUESTION: Well, I know. But if you decline to answer, just say so.

MR. ALSUP: Well, I would say --

QUESTION: If you have a position, I'd like to know

what it is.

MR. ALSUP: We do not have a position, and I can only say that there would be an Arnett v. Kennedy problem.

QUESTION: Well, the federal system particularly, and many of the states, inmates are released on what's now called "work release," very frequently independently of any statute and independent of the parole system. They're allowed to go somewhere and work on a job and report back.

Now, would you think that once an inmate is allowed to go and work on a job he's acquired some new or different interest from what he had before he was allowed to go on a work release program?

MR. ALSUP: In such a case as that, Mr. Chief Justice, I think the government's position would be clear if most of these work-furlough programs are of short durations up to 30 days. And it is an absolute condition of any of those work-study or work-release programs that the warden or the bureau of prisons has the absolute authority to terminate the program or liberty at any time.

Under those circumstances, under a statute or regulation which conferred no entitlement to work release or furlough, we would say there would be no right to a due process hearing at all.

Because there has been some questions raised about the federal parole system, perhaps I should take just a moment

to draw the Court's attention to two features of the federal parole statute which, at least for purposes of the issue that's presented here, distinguish the federal parole system.

Unlike the Nebraska statute, which creates a presumption that a prisoner will be released at the first moment of eligibility or shortly thereafter, the United States Parole Commission statute establishes at most a [illegible] that the prisoner will be released at some time during the guidelines established by the United States Parole Commission.

The Commission is absolutely free in its discretion to select a date within that guideline range. Although if the Commission selects a date outside the guideline range, the Commission must have good cause to do so.

Because the Commission has absolute discretion to select a date within the guideline range, under the position that we have taken, no due process hearing at all would be required so long as the release date that is selected does fall within that guideline period.

Now that's under the statute itself. I should hasten to say as a second distinguishing feature, that by regulation the United States Parole Commission has adopted a procedure of setting a presumptive release date, which very soon after the prisoner arrives at the federal institution, which tells the prisoner that on -- for example, March 3rd, 1981, the prisoner

will be released, so long as a -- there's good behavior; B, a satisfactor release plan is established; and finally, there's no subsequent new information which comes to light which shows that the original plan was a mistake in the first place -- or the original date was a mistake.

Now, in fact, just by regulations issued yesterday by the Parole Commission, this presumptive release date practice has now been extended --

QUESTION: Federal?

MR. ALSUP: That's correct. This federal procedure of a presumptive release date has now been extended by a regulation issued yesterday to virtually all federal prisoners.

The significance of that is that under the position of the United States, once a presumptive release date is set, subject to those conditions, it cannot be changed or altered without some sort of a due process hearing.

With respect to the merits, it is our position that denial of parole drequires a due process hearing only where the statute or regulations or some mutual expectation, as the Court said in the Lees v. Flynt? case last Monday, exists to create an entitlement to release.

We think this follows from two propositions: First, the denial of parole itself does not result in a deprivation of liberty. A deprivation of liberty occurs on conviction.

The denial of parole continues the incarceration under that lawfully imposed sentence.

Now, if the Court accepts that argument, then the remainder of the argument seems to be dictated by this Court's decision since Roth, in which the questionhas been very clearly posed in terms of whether or not the state or federal statute or some custom has created an enetitlement under given circumstances.

Here the Nebraska statute does create an entitlement to release, as the court of appeals found, upon -- subject to the feasance upon of the four conditions. And we believe that does fall within this Court's definition of what an entitlement --

QUESTION: Well, the court of appeals found that, you say. But there wasn't a single Nebraska judge on the court of appeals, was there?

MR. ALSUP: I'm not sure what states --

QUESTION: I am, and there wasn't any.

MR. ALSUP: Well, I can only say that they're responsible, and they take cases from the district court of Nebraska. And in the past this Court has been willing to defer to the court of appeals' understanding of the state law involved.

QUESTION: Sometimes you defer a little bit more when there is a judge of the particular state sitting on

the panel, although that doesn't right as to constitutional dimensions, of course.

MR. ALSUP: Well, quite right, Mr. Chief Justice.

QUESTION: Sometimes we defer when it's even a different circuit than that of the state involved.

?

Polecki.

QUESTION: Polecki.

MR. ALSUP: Well, whether or not there should be deference in this case, it does appear that the plain language of the statute does provide a presumption of release subject to the feasance -- one of the four conditions.

QUESTION: Mr. Alsup, are you using entitlement as a synonym for property.

Is that it?

QUESTION: Either one.

MR. ALSUP: No. An entitlement either to liberty or to property.

QUESTION: And you don't choose? Here nentitlement for what?

MR. ALSUP: It looks more like liberty than property, but because it is an entitlement, and because both liberty and property are used together in the due process clause, we think that the analsysis with respect to each would be the same, whether or not there is some entitlement, either to liberty or to property.

With respect to what process is due, there is -- normally the due process cases in this Court have addressed the full panoply of rights or components under hearing.

In this particular case, the petition only raised two issues. One of those issues was when should the hearing be held, not what the components should be. And the other issue is whether or not a summary of the evidence or facts should be required.

In my remaining time I would like to address briefly just the first of those.

It is a very important question that differentiates parole release from parole revocation, intertwined with the question of when the hearing itself should be held.

Unlike the case in Morrissey where the revocation hearing had to come in the wake of the alleged violation, here we have a sensitive process of monitoring the progress of an inmate. And the very question itself of determing when is the most propitious moment to hold a hearing is itself a delicate question subject to the expertise of the parole board.

And for that reason, we would sugeest that perhaps the court of appeals was in error in mandating that that hearing be held at the first moment of eligibility, rather than perhaps at a moment when a hearing might really do the inmates more good.

MR. CHIEF JUSTICE BURGER: Well, Mr. Alsup, thank you.

Mr. Ridenour.

ORAL ARGUMENT OF BRIAN K. RIDENOUR, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The crucial and overriding question presented by this case is the fundamental fairness of parole release proceedings in the state of Nebraska.

QUESTION: What do you think about the question I put first to your friend: If a judge who has the option to grant probation at the time of the verdict permits a hearing, an argument, on whether it should be granted, and then simply without any elucidation denies probation, and sentences the defendant to a traditional term.

Must he give reason?

MR. RIDENOUR: I would start first from the proposition, Your Honor, that in the sentencing process that there has typically not been a requirement for a statement of reasons for the sentencing judges.

QUESTION: No, I'm trying to find out -- I'm trying to see if there's some analogy.

What if -- then carry it on. Suppose he, the counsel says, I'd like to argue and present some evidence as to why

you should grant probation here. And the judge says, no, I don't need any arguments and I don't need any evidence. I'll decide this matter on my own. And he adjourns court. And enters later, or at this very time, imposes a sentence, 10 to 30 years, 3 to 9 nyears.

Must he give reasons? Must he conduct the hearing that's been requested?

MR. RIDENOUR: He, of course -- in the concept and the process of the criminal proceeding, the inmate -- or the individual has been accorded a great deal of due process. The facts on which the judge will base his opinion --

QUESTION: Well, but now that's all been terminated with a verdict of the jury.

MR. RIDENOUR: Correct, Your Honor. But the judge is acquainted with the facts that came through that process. And that's the facts that will influence his decision as to whether or not to grant probation; as to whether or not -- what sentence is going to be applied.

QUESTION: But in most states, you'll find a statute that permits the judge to grant probation.

Does that create a reasonable expectation that the judge might grant probation?

MR. RIDENOUR: It creates a reasonable expectation on my line that the judge might grant probation, and -- the due process has been accorded throughout the criminal

proceedings accords the inmates -- or the individual what he's entitled to.

As to your question on reasons, I think there's a fundamental distinction between sentencing and the parole system. In sentencing, if you deny -- if you indicate you are not going to grant probation, there is no function served, as such, by the reasons.

It does not advise that individual of anything he could do to get probation in the future. It's a decision made at that point.

On the other hand, in the parole process, if you advise the inmate of the reasons for his denial of parole, then as -- at a future time he can work -- or as he goes along, he can work on those items, and attempt to convince the board at his next hearing that he should be granted parole.

QUESTION: Isn't that almost exactly the same thing if the judge is required to say why he is denied probation, then denies it, and theperson goes to the institution, he has a little bit of the idea of what he should do in order to qualify for parole.

Is that not so?

MR. RIDENOUR: I'm not frankly certain, Your Honor, that the factors, or considerations, would be precisely the same in a probation versus a parole concept.

I agree with you. It would probably help the

inmate, though, to know something about what he should be doing to correct his personality problems, whatever they may be, so that he can better convince the parole board to grant him parole.

But that might be several years -- three, four, five years off. And the parole board's attitudes may be significantly different than what that sentencing judge's attitudes may be.

As the Solicitor General has argued here, a liberty interest is created by the statutes of the state of Nebraska. That interest is routinely deprived by the practices employed by the Nebraska parole board.

What has not yet been pointed out to the Court with any specificity is the stage at which the parole release decision is made in the state of Nebraska, and the lack of procedural protections which are there afforded.

In fact, the parole release decision is seldom made at the final parole haering. Rather it is made in the state of Nebraska at a case and record review, a proceeding at which few if any procedural safeguards are employed.

In these reviews, the inmate is not entitled to present evidence, either documentary or alive. He is not entitled to the assistance of counsel or counsel substitutes. He is not entitled to see, hear or know of any adverse information received or considered by the board.

Indeed, the most fundamental of the procedural protections, his presence at that hearing, is in practical reality, denied.

The Board of Parole in Nebraska conducts these review hearings on two days of each month, during the period of July 1, 1975, through June 30, 1976, they conducted 1,645 of these on those two days out of each month.

That averages out to about 7 minutes per hearing, at which the Board's principle function is to ask the inmates a few questions and then excuse him from the room while they make their determination.

QUESTION: Well, Mr. Ridenour, do you suggest that litigants are entitled to be present at our conference following the open sessions of the court? Because that's where we really decide the case, even though they had an opportunity to have their counsel argue it in open court?

MR. RIDENOUR: No, Your Honor, I'm not suggesting that at all. I'm suggesting that an inmate is entitled to at least an appearance before that board, at which he has a realistic opportunity to make his case, if you want to call it that, known to the parole board, as to why he should be granted parole.

I'm saying Nebraska, in effect, denies that right.

QUESTION: But he does have an opportunity to appear before the parole board, doesn't he?

MR. RIDENOUR: For five minutes a t a review hearing.

QUESTION: Well, do you say that we are prohibited by our constitution from limiting arguments to, say, 30 minutes?

MR. RIDENOUR: I think as a requirement, no, I don't think that you're prohibited by the constitution from limiting arguments to 30 minutes. I don't think you're required to give me an argument at all in this case. You could submit the case on briefs and decide it on that basis.

QUESTION: We decide more cases without arguments than with arguments, don't we?

MR. RIDENOUR: Certainly. But you're not affecting, Your Honor, my -- you know, my interests. You're not affecting me, the person appearing before you, statements. In the parole context, in the risk of the erroneous decisions inherent in the types of records that parole boards deal with and the types of discretionary decisions that they make, that inmate must have -- or his counsel or someone must have -- the ability to examine those records and to make corrections and to appear before that board and make his case.

QUESTION: Mr. Ridenour, what if the Nebraska law had simply listed these factors, just like they area, but said the decision shall be entirely within the discretion of the parole officers and not subject to judicial; just completely

within the discretion of the parole authorities?

MR. RIDENOUR: I think the very listing of factors Your Honor, regardless of the preparatory language in the statute, limits in some effect that discretion. It channels it and directs it.

QUESTION: Well, but the statute says, all you have to do -- here are the factors, now you apply them. But I suppose you could say, couldn't you, and I think our cases might indicate this, if you could have a liberty of property interests but no right to procedures.

Simply because a hearing would do no good.

MR. RIDENOUR: But I believe in the context we're dealing with, Your Honor, a hearing in fact will do good. Because there are objective factors required to be considered by the Nebraska statute, because you shall -- the board shall consider these fourteen factors --

QUESTION: I know, but what -- at the most, so far, all you're saying is that the inmate should be assured that they went through the procedures.

MR. RIDENOUR: That they had considered the factors and that the factors were in fact correct.

QUESTION: That hasn't very much to do with a hearing?

MR. RIDENOUR: It does in the sense that it gives the inmates the ability to know whether the factors considered

were correct.

QUESTION: Well, what if the statute said that when they were through they cwould certify what they did.

We considered the following factors, and we exercised our discretion, and we arrived at this conclusion. And if you had a hearing, if you put them on the stand, they would say, yes, we considered everyone of them. And the statute says -- the result is within your discretion.

Now, would due process require any more than that?

MR. RIDENOUR: Due process requires -- or the state statute in the first place, Your Honor, requires that those factors be considered. Many of those factors can come only from the inmate, and the only opportunity he would have is either through a written submission or --

QUESTION: Or he might have an opportunity to make sure hethey considered them.

MR. RIDENOUR: I would suggest that a written submission, Your HOnor, in the case of many inmates, would not be an adequate opportunity for that inmate to make his case.

There are many inmates who simply cannot express themselves in writing, cannot bring forth the factual information they might need. They need the opportunity to appear before that board to have a meaningful chance to talk to that board, to make a case for parole.

QUESTION: You think he should be able to testify or call witnesses?

MR. RIDENOUR: I do, Your Honor.

Let me clarify, I think, in that respect why I think that is true.

In Nebraska there are two types of parole proceedings: the review hearing and the final hearing. It's at the review hearing that the decision is typically made. They decide at the review hearing whether the inmate should be set for a final hearing in the case.

It's used as a screening device.

I would suggest to the Court in Nebraska that the final hearing is in fact simply confirmation of the prior decision of the board at the review hearing; roughly -- well, in a six month period, 375 inmates at Nebraska who were eligible for parole were denied that final hearing on the basis of the review hearing.

Now at the final hearing, Nebraska statutes permit --

QUESTION: How long would it take for a hearing with a lawyer? I shudder --

MR. RIDENOUR: I shudder at the thought, too. If all hearings were to have lawyers at them, and it was of a very adversary nature.

I don't suggest that it should be anything but

informal. But I think -- but the inmate should have the opportunity to bring in the witness for an informal discussion if he has a witness who indeed can present evidence that --

QUESTION: And he doesn't need a lawyer? He can ask some other inmate or something like that?

MR. RIDENOUR: We are not contending here that he has a right to an attorney, in these type of proceedings. Nebraska at final hearings permits the inmate, if he can afford counsel on his own, to have those -- to have counsel present.

QUESTION: I think you mentioned 645 hearings --

MR. RIDENOUR: 1,645.

QUESTION: -- seven minutes, seven minutes was the average. That

MR. RIDENOUR: That's my computation of the testimony --

QUESTION: I take it that means that some hearings might have been 30 minutes and some might have been 3 minutes; a range.

MR. RIDENOUR: It's not my understanding, Your Honor, in review hearings, that many -- there would be a rare exception that any would run 30 minutes. The testimony of the chairman of the board of parole was that in general these hearings take no longer than 10 minutes.

QUESTION: Of course, in many courts, including this one, some matters are resolved with finality with no -- not only no hearings, no discussion, just after the justices have reviewed the papers.

Do you suggest there's any denial of due process there?

MR. RIDENOUR: No, I think most cases arising in this Court, however, come from lower courts where there was, in fact, a great deal of due process accorded. And that's significantly different in the parole situation.

QUESTION: Well now when you talk about the informal procedure, the very purpose, historic purpose, of procedure and formality is to speed up the process instead of letting people just wander all over the lot and talk at will in any form they want.

So how much time do you think it would take to conduct all the hearings that you're talking aboiut?

MR. RIDENOUR: I think it first needs to be remembered? --

QUESTION: Have you done a calculation on that?

MR. RIDENOUR: No, I have not done a calculation on that. But for each of the formal hearings -- in the words of the board, they would call it a formal hearing. If they accorded full due process rights, or the due process this Court might say was applicable.

They would have one less review hearings that they would have to conduct, because the review hearings now serve essentially as a substitute for the --

QUESTION: What would you guess, that that would double, or treble, or add fifty percent or add --

MR. RIDENOUR: It would approximately double the number of formal hearings that were likely to be held by the Nebraska parole board during the year.

I don't believe that that adds a significant burden, or it's a burden that ancan be easily handled. They have five members, apparently. All five members sit at every formal hearing.

The Nebraska statute does not require that. It requires only a majority of the board members to sit at the hearings.

QUESTION: Do you think we should tell Nebraska how many of its parole officers should sit in their hearings?

MR. RIDENOUR: No, this Court should not tell Nebraska that. I simply say that because this Court has, under its cown cases, concerned with an analysis of what the burden is to the state of the additional safeguards that it might employ.

I'm saying that the burdens incurred in this case wouldn't be burdens that could be handled by the Nebraska board of parole, both because they have the extra members

that they could utilize, and because it would result in a like reduction in the number of review hearings that would be held.

I do not argue that there is not some increased burden to the state. I say simply that the interests of the inmate and his liberty outweigh that burden.

The discussion we have been having, of course, assumes the applicability of the due process clause to parole release proceedings.

That analysis requires an examination of the nature of the interests at stake.

The analysis must begin, I think, with an examination of Nebraska statutory provisions. The statute's been quoted here several times. I think it bears reading again.

Whenever the board of parole considers the release of a committed offender who is eligible for release on parole, it shall order his release, unless it is of the opinion that his release should be deferred because -- it lists then the four statutory grounds on which parole may be denied.

That same statute lists 14 factors that must be considered by the parole board in its decision.

The statute comes from the model penal code. It's an exact adoption of that, the provisions of the model penal code.

QUESTION: If that weren't shown, or it may --

you wouldn't have any case at all? Do you concede that?

MR. RIDENOUR: No, I do not concede that at all, Your Honor. I say that the simplest and easiest grounds that this Court can find for my clients on is on the basis of that statute.

I think there's a larger question involved in this case, obviously, as to whether an inmate has a constitutional liberty interest in parole, separate and paparte from the Nebraska statute.

QUESTION: At least in being fully and fairly considered for parole.

MR. RIDENOUR: At least in that respect. Whether it be considered the right to parole, or the right to be fully considered, it's the same result, I think, to my clients.

They have a right to due process at that release proceeding.

QUESTION: -- because he doesn't have any liberty now.

MR. RIDENOUR: I agree with you in that respect.

I think Nebraska's statute goes almost as far to create, in essence, a statutory entitlement to parole, not to -- it also creates a statutory entitlement to consideration for parole.

But it goes almost as far as saying a statutory

entitlement to parole.

QUESTION: Mr. Ridenour, could I ask you a question about the stipulation of facts that appears at pages 30 and 31 of the Appendix?

MR. RIDENOUR: Certainly, Your Honor.

QUESTION: Paragraph one says discretionary parole is used by the Nebraska Board of Parole as a release on parole by virtue of an exercise of discretion on the part of the board of parole.

Is that something different than what we're talking about here?

MR. RIDENOUR: No. We are talking about discretionary parole.

Discretionary parole is the term that the state has long used in describing the process. I don't think by the stipulation that we mean to say that it's been exercised solely at discretion, or that that discretion is unbridled or unchanneled by the state ststutes however.

QUESTION: Well, but you say in the stipulation that it is a release on parole by virtue of an exercise of discretion on the board of parole.

MR. RIDENOUR: I do not deny that there are large elements of discretion in the parole release proceeding. But I suggest that the Nebraska statutes channel and instruct the parole board on how to exercise that discretion. And under

those circumstances, there's a statutory entitlement to a fair consideration of parole.

In discussing that very statute, the National Advisory Commission on the Criminal Justices Standards and Goals, stated that the model penal code represents a turnaround in the traditional assumption that the burden of proof, however,evaluation, rests on the inmate.

It proposes that an inmate is to be released on parole when he is first eligible unless one of the four conditions exist.

I suggest to the Court that the statute therefore creates a presumption in favor of release, defeasible only if one of a limited number of grounds for denial is found to be present.

This case thus is unlike Meachum v. Fano where there was no such statutory entitlement. It rather is like the Morrissey case. It is like Wolff v. McDonnell -- excuse me -- both in that it affects the term of confinement of the inmate rather than the conditions of confinement, as woulwere at issue in Meachum, and because --

QUESTION: What if the record showed that a particular inmate, coming up for eieligibility, and his record is being processed in the board and by the staff, and it shows that seven times in four years he was put in solitary confinement for assaulting fellow prisoners and

guards and the most recent being within 30 days.

The chairman of the parole board says, there's no use in even wasting seven minutes on this fellow; no hearing at all. Period.

MR. RIDENOUR: You're asking me do I think he's been denied due process? I certainly do.

Part of the risk in the Nebraska procedure, and I think in any parole board procedure, is that that might be the file of another individual.

QUESTION: You mean you think he could -- it might be what?

MR. RIDENOUR: It might be the file of another individual. You might have two John Does, and you're looking at the wrong John Doe, and you deny hearing to the individual who was --

QUESTION: That's what we suggested in Morrissey as the only reason for holding it.

But suppose there's only one John McCormack Doe in the entire prison, and the chairman says, check this out, and they say, yes, there's only one.

MR. RIDENOUR: I certainly agree with your Honor that in some extreme circumstances we're going to know, and the parole board is going to know beforehand, that a hearing and perhaps the inmate will know, is essentially useless.

But in many cases I think it will be very useful

both to the inmate and the board.

And if the court can instruct us on how to draw a line between what will be useful and what won't from that standpoint, I think, you know, it would be very helpful to all concerned.

But absent that kind of a line, I think that all of those hearings are going to have to be conducted, for the benefit of the many over the extreme examples.

The board is -- has argued here, and some of the questions have concerned, the subjective or discretionary nature of the decision.

I think it important to note that this Court's cases have required a consideration of the interests at stake, not the nature of the board's proceedings, in determining whether due process applies.

Release proceedings in my mind are two-step processes. The first is a fact-gathering process, through the file, through the social history of the inmates, through the correctional department talking to the employee -- people he may be employed by.

It gathers many of the objective facts that the parole board will consider in the exercise of its discretion, that discretion being the second step in the parole process.

But it's significant and important to the inmate that they have the ability to insure that the facts upon

which that predictive expertise of the parole board is exercised are accurate and correct, in order to prevent the occurrence of inaccurate decisions based on inaccurate facts.

Briefly, I'd like to call to the Court's attention as well the notice provisions undertaken by the state of Nebraska at the parole proceedings.

In the state of Nebraska, at a parole release review hearing, or at a final hearing, if the inmate is either deferred or denied parole, he's informed of the month during which he will next appear before the board.

He is not advised, howeveer, as to the date or the hour at which that hearing will occur. That information is supplied to the inmate only on the day of the actual hearing through the posting of a list at the penal complex of the inmate who will be heard on that day.

In notifying the inmates of the reasons for denial, particularly following a review hearing, the notice takes on the effect of being almost meaningless to the inmate. The board uses a pre-printed form, called a PB-1, an example of which is located at page 35 of the Appendix.

While the Board contains the statutory ground -- or the form contains the statutory grounds for denial of parole, the board simply checks it off without explanation of what the specific facts on which it is relying are.

In 80 percent of the cases it checks Item A, which reads, your continued correctional treatment, vocational

educational, or job assignment in the facility will substantially enhance your capacity to lead a law-abiding life when released at a later date.

No explanation is ever given on this form to the inmate as to which of the alternatives listed in that item apply to him, and no response is made to an inmate if he requests the board specifically to tell him whether it is correctional treatment, vocational treatment, educational treatment, or job assignment that they are concerned with.

The second part of the form is entitled: correction of deficiencies. It's commendable that the board would want to tell the inmate whow to correct their deficiencies. But six listed deficiencies are stated on that form, and in 379, I think the figure is, out of 385 cases covered in the survey in the back of the appendix, the inmates had all six items checked, items such as, join self-improvement club, regardless of the fact that the inmate was a member of every self-improvement club at the penitentiary.

QUESTION: Mr. Ridenour?

MR. RIDENOUR: Yes, Your Honor.

QUESTION: Would you tell us a little bit about the board in Nebraska, how large is it, how is it selected, for what terms do they serve, are they compensated, and what staff do they have?

MR. RIDENOUR: I can answer some of those questions;

I'm not sure I can answer of them for you, Your HOnor.

The board is a five-member board, three of which are parttime, two of which are -- three of which are fulltime, two of which are parttime.

They are appointed by the governor of the state -- could you repeat some of your questions to me, Your Honor?

QUESTION: They serve for specified terms?

MR. RIDENOUR: I believe they do.

QUESTION: And what sort of staff do they have?

MR. RIDENOUR: I think I'm going to have to defer Mr. Gillan, because he works with them on a daily basis, and I frankly do not --

QUESTION: Well, that's -- they do have a staff?

MR. RIDENOUR: They do have a staff; I do not know how large that staff is. They do much of their own work. I will acknowledge that they do much of their own, and that we are treating a system which may, indeed, require them to hire additional staff or putting on hearing examiners.

QUESTION: Are there two permanent members of the board?

MR. RIDENOUR: Three permanent members, Your Honor.

QUESTION: Three permanent, subject to the jurisdiction of the same individual in charge of the penal system, or are they independent?

MR. RIDENOUR: No, they are not; they are separate.

They are independent.

QUESTION: Are they compensated?

MR. RIDENOUR: They are compensated.

QUESTION: All five of them, or just --

MR. RIDENOUR: All five of them are compensated.

QUESTION: And they meet only twice a month?

MR. RIDENOUR: No, they meet more frequently than that.

QUESTION: I thought somebody said --

MR. RIDENOUR: They have five days that they conduct hearings on during each month. One of those days is at the women's reformatory for the uyouth offenders; two of the days are spent on final hearings -- the two days that I was referring to are spent on review hearings.

That's the general practice throughout the year.

QUESTION: But you're not suggesting that the part-time people put in only two days a month in the aggregate?

MR. RIDENOUR: No, I'm not, Your Honor. I really could not tell you how much, but I assume they do spend some time beforehand looking at the files, at least for the final hearings.

The review hearings, I think the process is generally to open the file at the hearing and look at it at that point. That's because of the sheer numbers they're dealing with.

With respect to the interests at stake, I can say

only that in Morrissey, the Chief Justice indicated that the liberty of a parolee ,although indeterminate, includes many of the core values of unqualified liberty; by whatever name, that liberty is valuable, and must be seen as within the protection of the Fourteenth Amendment.

I submit to this Court that there is not a significant difference between the present liberty interest, whether it be created by statute or arise from the constitution.

And this Court should conclude that parole in Nebraska -- and parole release decisions -- are subject to the due process clause, and that in order for Nebraska to comply with the due process clause, the inmate must be afforded a reasonable advance notice of hearing; a record of those proceedings; and an opportunity -- and a written statement of the reasons for denial, including the essential facts relied upon, so that he may specifically know what it is that he needs to do to correct his behavior and to perhaps gain parole at a future time.

MR. CHIEF JUSTICE BURGER: Very well. Do you have something further, counsel?

REBUTTAL ARGUMENT OF RALPH H. GILLAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GILLAN: I believe not, Your Honor, except that I will say that the Attorney General's office does not work with the parole board on a daily basis, so we are not

intimately familiar with the procedures as Mr. Ridenour indicated.

I will answer one question. They serve six-year terms, and they have a secretarial staff only.

There are parole counsellors at the penitentiary, but they do not serve under the parole board, and the parole board has no control of them.

The only staff that the parole board has is secretarial.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:43 o'clock, p.m., the case in the above-entitled matter was submitted.]