DUE PROCESS AND PAROLE REVOCATION: PROMPT HEARINGS FOR INCARCERATED PAROLEES

Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975)

Petitioners were convicted and reincarcerated[1] for federal offenses committed while they were on parole. The United States Board of Parole issued parole violator warrants,[2] which were lodged as detainers[3] with the director of the penal institution in which petitioners were confined. Execution of the warrants[4] and revocation hearings[5] were to be deferred until the expiration of the intervening sentences. Each petitioner filed for a writ of habeas corpus,[6] claiming that the parole

1. All three petitioners had earlier been convicted and incarcerated for federal offenses. Whittaker and Beshers had been released on parole pursuant to 18 U.S.C. § 4203 (1970), providing for release on parole when, in the discretion of the parole board, "there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws [and] such release is not incompatible with the welfare of society . . . ." Cleveland v. Ciccone, 517 F.2d 1082, 1083 (8th Cir. 1975). Cleveland had been mandatorily released in accordance with 18 U.S.C. § 4164 (1970), which provides that a

> prisoner having served his term or terms less good-time deductions shall, upon release, be deemed as if released on parole until the maximum term or terms for which he was sentenced less one hundred and eight days.

Cleveland v. Ciccone, 517 F.2d 1082, 1084 (8th Cir. 1975).

2. 18 U.S.C. § 4205 (1970):

> A warrant for the retaking of any United States prisoner who has violated his parole, may be issued only by the Board of Parole or a member thereof and within the maximum term or terms for which he was sentenced. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the custody of the Attorney General under said warrant, and the time the prisoner was on parole shall not diminish the time he was sentenced to serve.

3. A detainer serves to notify the prisoner's custodian that the prisoner is wanted in the jurisdiction issuing the detainer. *See* notes 31 & 43 *infra* and accompanying text.

4. 18 U.S.C. § 4206 (1970) provides that a federal officer shall "execute such [violator] warrant by taking such prisoner and returning him to the custody of the Attorney General."

5. 18 U.S.C. § 4207 (1970):

> A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.
>
> The Board may then or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.
>
> If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

6. *See* 28 U.S.C. § 2241 (1970). Cleveland sought a prompt revocation hearing, while Whittaker and Beshers requested that the parole violator warrants be quashed. *See* notes 10 & 41 *infra.*

board's failure to execute the warrants and afford prompt revocation hearings constituted a denial of due process.[7] The federal district court ordered the parole board to execute the warrants and grant parole revocation hearings "with reasonable dispatch."[8] On appeal,[9] the Court of Appeals for the Eighth Circuit affirmed and *held*: The due process clause of the fifth amendment requires that a federal parole violation warrant lodged as a detainer against a parolee incarcerated for a subsequent offense must be executed promptly and a parole revocation hearing held within a reasonable time thereafter.[10]

Until recently, courts uniformly refused to find the due process clause applicable to parole revocation proceedings.[11] The decisions were

---

7. U.S. CONST. amend. V.

8. 517 F.2d at 1084. The district court refused to quash the warrants. *Id.* at 1085.

9. Respondent Ciccone, director of the United States Medical Center for Federal Prisoners in Springfield, Missouri, appealed the district court judgment ordering him to execute the parole violator warrants. Cleveland v. Ciccone, 517 F.2d 1082, 1084 (8th Cir. 1975). Whittaker and Beshers appealed from the judgment of the court refusing to quash the warrants. *Id.* at 1085.

10. Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975). The court refused to quash the warrants because the decision imposed a previously unrecognized constitutional obligation upon the parole board. Additionally, there was no showing of severe prejudice or "invidious or purposeful interference by respondents with the due process rights of the class members. . . ." *Id.* at 1089. The court emphasized, however, that future delays would be "measured in consonance with notice of our holding today." *Id.* Other courts have found delays unreasonable and quashed warrants. *E.g.* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975) (refusing to quash warrant would grant a right without a remedy); Arnold v. United States Bd. of Parole, 390 F. Supp. 1177, 1179-80 (D.D.C. 1975); Wells v. Wise, 390 F. Supp. 229, 231 (C.D. Cal. 1975); Fitzgerald v. Sigler, 372 F. Supp. 889, 898 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571, 574 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270, 272-73 (D.D.C. 1973). *See also* Gay v. United States Bd. of Parole, 394 F. Supp. 1374 (E.D. Va. 1975); Peele v. Sigler, 392 F. Supp. 325, 327 (E.D. Wash. 1974) (parole board given 15 days to hold hearing).

11. *See, e.g.*, Morrissey v. Brewer, 443 F.2d 942 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972); Allen v. Perini, 424 F.2d 134 (6th Cir.), *cert. denied*, 400 U.S. 906 (1970); Earnest v. Willingham, 406 F.2d 681 (10th Cir. 1969); Eason v. Dickson, 390 F.2d 585 (9th Cir.), *cert. denied*, 392 U.S. 914 (1968); Richardson v. Markley, 339 F.2d 967 (7th Cir. 1963), *cert. denied*, 382 U.S. 851 (1965); Hyser v. Reed, 318 F.2d 225 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). *But see* Bearden v. South Carolina, 443 F.2d 1090 (4th Cir. 1971), *petition for cert. dismissed*, 405 U.S. 972 (1972); United States *ex rel.* Bey v. Connecticut State Bd. of Parole, 443 F.2d 1079 (2d Cir.), *vacated as moot*, 404 U.S. 879 (1971); Menechino v. Oswald, 430 F.2d 403, 409 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (dictum).

Some federal courts construing 18 U.S.C. § 4207 (1970), *quoted in* note 5 *supra*, found a statutory right to a hearing. *See, e.g.*, Hyser v. Reed, 318 F.2d 225 (D.C. Cir.

based on deference to the discretion of the parole boards[12] mandated by several theories of parolee status. Under the "grace" theory,[13] parole was deemed an act of grace by a benevolent sovereign who retained the power to revoke the privilege at will. Under the "constructive custody" theory,[14] a parolee was viewed as continuing to serve his sentence

---

1963) (parole revocation hearings must be held as promptly as possible); Reed v. Butterworth, 297 F.2d 776 (D.C. Cir. 1961) (parolee released due to unreasonable delay in granting revocation hearing); United States *ex rel.* Buono v. Kenton, 287 F.2d 534 (2d Cir. 1961) (revocation hearing must be held within reasonable time after parolee is taken into custody). *See also* Robbins v. Reed, 269 F.2d 242 (D.C. Cir. 1959); Moore v. Reid, 246 F.2d 654 (D.C. Cir. 1957); Fleming v. Tate, 156 F.2d 848 (D.C. Cir. 1946); United States *ex rel.* Hitchcock v. Kenton, 256 F. Supp. 296 (D. Conn. 1966); United States *ex rel.* Vance v. Kenton, 252 F. Supp. 344 (D. Conn. 1966); Holliday v. Settle, 218 F. Supp. 738 (W.D. Mo. 1963).

For discussions of state and federal parole revocation procedures, see Cohen, *Due Process, Equal Protection and State Parole Revocation Proceedings*, 42 U. COLO. L. REV., 197 (1970) (state); Sklaar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. CRIM. L.C. & P.S. 175 (1964) (state and federal); Note, *Parole Revocation in the Federal System*, 56 GEO. L.J. 705 (1968); Note, *Parole: A Critique of its Legal Foundations and Conditions*, 38 N.Y.U.L. REV. 702, 702-13 (1963) (federal).

12. *See, e.g.*, Cook v. United States Attorney Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974); Adams v. United States, 432 F.2d 62 (5th Cir. 1970); Smith v. United States, 409 F.2d 1188 (9th Cir. 1968); Brest v. Ciccone, 371 F.2d 981 (8th Cir. 1967) (Board has absolute discretion in matters of parole). *But see* Burton v. Ciccone, 484 F.2d 1322 (8th Cir. 1973) (criticizing *Brest v. Ciccone, supra*); Bland v. Rodgers, 332 F. Supp. 989, 992-93 (D.D.C. 1972) (discretion limited by "paramount federal constitutional or statutory rights"). *See also* Wolff v. McDonnell, 418 U.S. 539 (1974); Morrissey v. Brewer, 408 U.S. 471 (1972); Parsons-Lewis, *Due Process in Parole Release Decisions*, 60 CALIF. L. REV. 1518, 1521-24 (1972); Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform*, 57 VA. L. REV. 841 (1971).

13. *See, e.g.*, Escoe v. Zerbst, 295 U.S. 490, 494 (1935); Morrissey v. Brewer, 443 F.2d 942, 946 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972); Rose v. Haskins, 388 F.2d 91, 93 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Brown v. Kearney, 355 F.2d 199, 200 (5th Cir. 1966); Hiatt v. Compagna, 178 F.2d 42, 45 (5th Cir. 1949).

14. *See, e.g.*, Anderson v. Corall, 263 U.S. 193, 196 (1923); Morrissey v. Brewer, 443 F.2d 942, 947 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972); Padilla v. Lynch, 398 F.2d 481, 482 (9th Cir. 1966), *cert. denied*, 390 U.S. 928 (1967); Doherty v. United States, 280 F.2d 35, 37 (9th Cir. 1960); Jenkins v. Madigan, 211 F.2d 904, 906 (7th Cir. 1954).

Courts relied upon three other theories less frequently. Under the contract theory, a parolee was deemed to have obtained his liberty in exchange for a binding agreement to abide by the conditions of parole. *See, e.g.*, United States *ex rel.* Randazzo v. Follette, 282 F. Supp. 10, 15-16 (S.D.N.Y. 1968), *aff'd*, 418 F.2d 1319 (2d Cir. 1969), *cert. denied*, 402 U.S. 984 (1971); *Ex parte* Edwards, 78 Okla. Crim. 213, 219-20, 146 P.2d 311, 314 (1944). The "exhaustion of rights" theory held that the parolee expended all of his rights at his criminal trial. Since this theory considered parole revocation to be part of the prison system, rather than an aspect of the sentencing process, summary deprivation was permissible. *See, e.g.*, Morrisey v. Brewer, 443 F.2d 942, 948

beyond the prison walls under the custody of the warden, subject to recall at any time. These theories, founded on the notion that "rights" but not "privileges" were protected by the due process clause,[15] were undermined[16] by a series of Supreme Court decisions that expanded the scope of the liberty and property protected by the due process clause.[17] In *Morrissey v. Brewer*[18] the Supreme Court held that limited[19] due process must be afforded at parole revocation proceedings.

In *Morrissey*, the Court reasoned that due process must be afforded whenever an individual may suffer a "grievous loss"[20] because of gov-

(8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972). By analogy to the doctrine of parens patriae, the relationship of parole board and parolee was deemed to resemble that of parent and child. Because the parole board was acting for the benefit of the parolee, procedural safeguards were unnecessary. *See, e.g.*, Menechino v. Oswald, 430 F.2d 403, 407 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), *quoting* Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied*, 375 U.S. 957 (1963). For a discussion of these theories, see Note, *Parole Revocation in the Federal System, supra* note 11; Note, *Parole: A Critique of its Legal Foundations and Conditions, supra* note 11, at 702-13; Comment, *The Parole System*, 120 U. PA. L. REV. 282, 284-300 (1971). Note, *Freedom and Rehabilitation in Parole Revocation Hearings*, 72 YALE L.J. 368, 382 (1962).

15. On the right-privilege distinction, see Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1439-45 (1968). Judicial refusal to afford due process at parole revocation proceedings has been the subject of academic criticism. *See, e.g.*, Note, *Parole: A Critique of its Legal Foundations and Conditions, supra* note 11, at 734 (obstructs "primary goal of rehabilitation"); Comment, *The Parole System, supra* note 14, at 282-293 (parole theories unrealistic, illogical, inconsistent, and tend to paralyze the courts).

16. *See, e.g.*, Graham v. Richardson, 403 U.S. 365, 374 (1971) (concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or as a privilege has been rejected); Van Alstyne, *supra* note 15.

17. *See, e.g.*, Bell v. Burson, 402 U.S. 535 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254 (1970) (termination of welfare benefits); Mempa v. Rhay, 389 U.S. 128 (1967) (counsel must be appointed at probation revocation proceedings when sentencing has been deferred at the time of the trial); *In re* Gault, 387 U.S. 1, 16 (1967) (juvenile hearings); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961) (public employment). *See also* Reich, *The New Property*, 73 YALE L.J. 733 (1964); Note, *The Growth of Procedural Due Process Into a New Substance: An Expanding Protection for Personal Liberty and a "Specialized Type of Property . . . In Our Economic System,"* 66 NW. U.L. REV. 502 (1971); 1974 WASH. U.L.Q. 752, 753-54.

18. 408 U.S. 471 (1972).

19. "[R]evocation of parole is not part of a criminal prosecution and thus the *full panoply* of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* at 480 (emphasis added). The extensive protections of the sixth amendment are guaranteed only in "criminal prosecutions." U.S. CONST. amend. VI. "Parole arises after the end of the criminal prosecution . . . . Supervision is not directly by the court but by an administrative agency . . . ." 408 U.S. at 480.

20. *Id.* at 481, *quoting* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

ernment action affecting "liberty" or "property" protected by the fourteenth amendment, and that the deprivation of a parolee's conditional liberty is such a loss.[21] The Court emphasized that "due process is flexible and calls for such procedural protections as the particular situation demands."[22] Nevertheless, the Court listed procedural safeguards that must be provided a parolee threatened with parole revocation, including a hearing within a reasonable time after he is taken into custody and the opportunity to contest the charges or, when the violation is admitted, to present mitigating evidence showing that revocation is unwarranted.[23]

---

21. We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a 'right' or a 'privilege.' By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

408 U.S. at 482.

22. "Once it is determined that due process applies, the question remains what process is due. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.* at 481. *See also* Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Cafeteria Workers Local 473 v. McElroy, 367 U.S. 886, 895 (1961); Hannah v. Larche, 363 U.S. 420, 442 (1960); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957); Parsons-Lewis, *Due Process in Parole Release Decisions, supra* note 12; Tobriner & Cohen, *How Much Process is "Due" Parolees and Prisoners*, 25 HASTINGS L.J. 801 (1974).

23. 408 U.S. at 488. The Court stated that a "lapse of two months . . . would not appear to be unreasonable." *Id.* Other required safeguards included a preliminary hearing (in the character of a hearing in probable cause to determine existence of violation), held reasonably near the place of violation and as promptly as is convenient. *Id.* at 485. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held *Morrissey* applicable to probation revocation proceedings. Appointed counsel was required when the alleged violation of parole was denied or, if the violation was admitted, the parolee's case against revocation was complex or difficult to present. The Court refused to fashion precise rules, and left determinations to be made on a case-by-case basis. 411 U.S. at 790. *Cf.* Betts v. Brady, 316 U.S. 455 (1942), *overruled*, Gideon v. Wainwright, 372 U.S. 335 (1963). For discussion of *Morrissey* and *Gagnon*, see Cassour, *The* Morrissey *Maelstrom: Recent Developments in California Parole and Probation Revocations*, 9 U. SAN F.L. REV. 43 (1974); Cohen, *A Comment on* Morrissey v. Brewer: *Due Process and Parole Revocation*, 8 CRIM. L. BULL. 616 (1972); Fisher, *Parole and Probation Revocation Proceedings After* Morrissey *and* Gagnon, 65 J. CRIM. L. 46 (1974); Lowenstein, *Accelerating Change in Correctional Law*, 7 CLEARINGHOUSE REV. 528 (1974); Note, *Probation and Parole: The Right to an Attorney at Revocation Hearings: Are We Dragging Our Feet Toward Due Process and Equal Protection?*, 24 OKLA. L. REV. 279 (1974); 6 CONN. L. REV. 558 (1974) (criticizing *Gagnon* as a poor compromise between courts that had interpreted *Mempa* as requiring appointed counsel at all revocation hearings and those holding that *Mempa* should be limited to its facts); 24 SYRACUSE L. REV. 831 (1971) (criticizing *Morrissey* for leaving parole board in control of the proceedings and for con-

Since the parolees in *Morrissey* were at liberty at the time of revocation, the *Morrissey* holding is not directly applicable to parolees who have already been deprived of their conditional liberty by incarceration for subsequent offenses.[24] The Supreme Court by implication cast doubt on this incarceration distinction in *Wolff v. McDonnell*[25] when it held that due process must be afforded in prison disciplinary proceedings.[26] The Court found that the "liberty" protected by the fourteenth amendment encompassed a prisoner's interest in the "good time"[27] jeopardized by such proceedings, and that due process is required even though the loss of "good time" is less "grievous" than revocation of parole.[28]

When a federal parolee is incarcerated for a subsequent offense,[29] the United States Board of Parole issues a violator's warrant and lodges it as

---

tinuing state's discretionary power over the parolee). For a discussion of federal parole and probation procedures, see Fisher, *supra*; Annot., 36 L. Ed. 2d 1077 (1974).

24. There were no criminal charges lodged against the petitioners in *Morrissey*. Among the alleged parole violations were operating a motor vehicle without permission, obtaining a drivers license and credit under an assumed name, and disregarding territorial restrictions without permission. 408 U.S. at 473-74. For a discussion of restrictions that may be placed on parolees, see Comment, *The Parole System, supra* note 14, at 285. Incarcerated parolees no longer enjoy the conditional liberty the loss of which prompted the Court in *Morrissey* to require due process in parole revocation proceedings.

25. 418 U.S. 539 (1974).

26. *See* notes 64-69 *infra* and accompanying text. Although the Court in *Wolff* did not state that it was extending the holding in *Morrissey* and drew a distinction between loss of good time and parole revocation, it is clear that the primary reason for the refusal to hold *Morrissey* applicable in full was the desire to avoid prison violence. The Court concluded that procedures which might endanger prison officials or other inmates need not be afforded. *Id.* at 561. Justices Douglas and Marshall, objected strenuously to the majority's refusal to apply *Morrissey* in full. *Id.* at 581, 593.

While the *Wolff* Court declined to grant prisoners the full array of *Morrissey* rights, the crux of *Wolff* is its application of due process and the principles underlying *Morrissey* to situations in which the interests involved and the loss threatened are not comparable to the revocation of a parolee's conditional liberty. This loss of conditional liberty prompted the application of due process in *Morrissey*. The *Wolff* Court's willingness to find the due process clause applicable to less grievous losses was thus a significant extension of the principals underlying *Morrissey*.

27. *Id.* at 558.

28. *Id.* at 560-61. For a discussion of the erosion of the judicial "hands off" policy towards prison proceedings see Note, *Decency and Fairness: An Emerging Judicial Role in Prison Reform, supra* note 12.

29. Where a parolee has been convicted of an offense that constitutes a violation of parole, a preliminary hearing is unnecessary because the fact of violation has already been determined. The question is whether a final revocation hearing is necessary, and if so, when.

a detainer with the prisoner's custodian.[30] The detainer is a request that the custodian notify the parole board before releasing the prisoner.[31] Execution of the warrant and a revocation hearing are usually delayed until the intervening sentence has been served.[32] Since the unexpired portion of the original sentence does not begin to run until the warrant is executed,[33] the parole board in effect imposes a consecutive sentence as a penalty for the violation of parole.[34] If the warrant were promptly executed, the parolee would automatically receive concurrent sentences.[35]

Prior to *Wolff*, the Court of Appeals for the Fifth[36] and Tenth[37]

30. 28 C.F.R. § 2.53 (1975), provides:

(a) In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to disposition of the warrant, and may request that it be withdrawn or executed so his violator term will run concurrently with the new sentence. Should further information be deemed necessary, the Regional Director may designate a hearing examiner panel to conduct a dispositional interview at the institution where the prisoner is confined . . . .

(b) Following the dispositional review the Regional Director may:

(1) Let the detainer stand

(2) Withdraw the detainer and close the case if the expiration date has passed;

(3) Withdraw the detainer and reinstate to supervision; thus permitting the federal sentence time to run uninterruptedly from the time of his original release on parole or mandatory release.

(4) Execute warrant, thus permitting the sentence to run from that point in time. If the warrant is executed, a previously conducted dispositional interview may be construed as a revocation hearing.

31. The underlying reason for detainers is the inability of one jurisdiction to compel another to surrender a prisoner. A detainer is not binding upon a custodial state but is usually honored as a matter of comity. It has been estimated that as many as thirty percent of all federal prisoners have at least one detainer lodged against them, less than one-half of which are ever exercised. Shelton, *Unconstitutional Uncertainty: A Study of the Use of Detainers*, 1 PROSPECTUS 119, 120 (1968). *See generally* Bennet, *The Last Full Ounce*, 23 FED. PROBATION 20, 21 (1950); Dauber, *Reforming the Detainer System: A Case Study*, 7 CRIM. L. BULL. 669 (1971); Wexler & Hershey, *Criminal Detainers in a Nutshell*, 7 CRIM. L. BULL. 753 (1971); Note, *Detainers and the Correctional Process*, 1966 WASH. U.L.Q. 417; note 43 *infra*.

32. RULES OF THE UNITED STATES BOARD OF PAROLE, 34, 35 (1971):

The prisoner will ordinarily be required to serve the period of [the intervening] sentence before the hearing is held . . . and his violator time will be served consecutively to the new sentence.

33. *See* 18 U.S.C. § 4205 (1970), *quoted in* note 2 *supra*; 18 U.S.C. § 4206 (1970) *quoted in* note 4 *supra*.

34. *See* note 32 *supra*.

35. *See* Cleveland v. Ciccone, 517 F.2d 1082, 1087 (8th Cir. 1975).

36. *See* Cook v. United States Attorney Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974). *See also* Trimmings v. Henderson, 498 F.2d 86 (5th Cir. 1974),

Circuits held that the board's policy of delay did not violate due process.[38] They reasoned that only parolees "in custody" for the purposes of the federal parole statute are entitled to a *Morrissey* hearing. Formal execution of a violator warrant was deemed a prerequisite to custody.[39] The two courts held a prompt hearing unnecessary[40] despite the unfairness of a delayed hearing[41] and the intervening subjection of

---

cert. denied, 420 U.S. 931 (1975); Burnett v. United States Bd. of Parole, 491 F.2d 966 (5th Cir. 1974).

37. *See* Small v. Britton, 500 F.2d 299 (10th Cir. 1974).

38. Prior to *Morrissey*, the practice of delaying execution of warrants and revocation hearings was universally upheld. *E.g.*, Cox v. Feldkamp, 438 F.2d 1 (5th Cir. 1971); Hash v. Henderson, 385 F.2d 475 (8th Cir. 1967); Maples v. United States, 360 F.2d 155 (8th Cir. 1966); Saylor v. United States Bd. of Parole, 345 F.2d 100 (D.C. Cir. 1965); Avellino v. United States, 330 F.2d 490 (2d Cir. 1964); Wiesenthal v. United States, 322 F.2d 231 (9th Cir. 1963).

Two cases decided after *Wolff* adopted the reasoning of the Fifth and Tenth Circuits and upheld the constitutionality of the parole board's policy of delay. *See* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975) (failing to recognize *Wolff*); Gray v. Hogan, 388 F. Supp. 476 (N.D. Ga. 1975) (attempting to distinguish *Wolff*). *But see* notes 49 & 65 *infra*.

39. *See* Small v. Britton, 500 F.2d 299, 301 (10th Cir. 1974); Cook v. United States Attorney Gen., 488 F.2d 667, 671 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974). In *Cook*, the Fifth Circuit rejected the argument that the warrant had been technically executed when it had been lodged as a detainer. Under the statute, execution triggers custody, *see* note 4 *supra*. These courts found that the parolee was merely in custody for the intervening charge and not for the parole violation.

40. The Tenth Circuit found that although a violator warrant must be executed within a reasonable time after issuance, incarceration for a subsequent offense justified delay. Small v. Britton, 500 F.2d 299, 300 (10th Cir. 1974). *See also* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975). In *Small* neither the court nor any of the cases cited offered any explanation for permitting this exception. In *Gaddy*, the Fourth Circuit unconvincingly explained that the justification for delaying execution of parole violator warrants was "founded primarily on fairness to the parolee . . . ." 519 F.2d at 647. The crux of the Fourth Circuit's position is that an earlier decision would more likely result in revocation than a decision made at the end of the intervening sentence.

In *Morrissey*, however, the Supreme Court rejected the state's contention that requiring due process at parole revocations would lead to fewer grants of parole. 408 U.S. at 483. Additionally, the only authority cited by the Fourth Circuit, Noorlander v. United States Attorney Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973), was effectively overruled by Cleveland v. Ciccone, 517 F.2d 1082, 1087 (8th Cir. 1975). It is difficult to understand how this practice promotes "fairness to the parolee" when it deprives the parolee of prison privileges, bars any opportunity for parole, impairs the rehabilitation process, and precludes the effective presentation of mitigating evidence at the revocation hearing. *See* note 43 *infra*.

41. The Fifth and Tenth Circuits acknowledged that a revocation hearing is required under *Morrissey* once the warrant is executed. This delayed hearing is of questionable value because it may take place years after the occurrence. *See, e.g.*, Small v. Britton, 500 F.2d 299 (10th Cir. 1974) (three years); Cook v. United States Attorney Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974) (six years); Smith

the parolee to the punitive effects of a detainer.[42]

The lodging of a detainer, which frequently results in deprivation of prison privileges and more restrictive confinement, impairs the rehabilitation process.[43] In *Cooper v. Lockhart*,[44] the Eighth Circuit held that a

---

v. Blackwell, 367 F.2d 539 (5th Cir. 1966) (seven years). In *Small*, as in *Cook*, the court emphasized that the parolees had failed to demonstrate that the long delay had prejudiced either their ability to present favorable evidence or their right to a fair hearing. 500 F.2d at 302; 488 F.2d at 673. *See also* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975). Unless evidence was lost or witnesses became unavailable, it is unlikely that a parolee could demonstrate how a delay had prejudiced him. While he might argue that his memory had faded, this argument would probably be rejected by both courts. Also, petitioners in *Small* and *Cook* requested cancellation of the charges rather than a revocation hearing. The remedy requested may have influenced the courts' holdings. *Cf.* Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), *construed in* United States *ex rel.* Johnson v. Chairman of New York State Bd. of Parole, 500 F.2d 925 (2d Cir.), *dismissed as moot*, 419 U.S. 1015 (1974), *noted in* 1974 WASH. U.L.Q. 752, 755-57. This was clearly the case in Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975) in which petitioner made no attempt to secure a hearing while incarcerated and simply sought cancellation of the warrant at the end of the intervening sentence. The Fourth Circuit found that petitioner's failure to protest seriously impaired his credibility. *Id.* at 678.

42. In *Cook*, the disadvantages of a detainer were deemed to be not so severe or so unrelated to the reason for the very existence of a detainer as to require that a hearing be granted early in the intervening sentence. 488 F.2d at 672. *But see* note 43 *infra*.

43. The inmate may be assigned to maximum security or become ineligible for work release programs, trustyships, and parole. *See* Cooper v. Lockhart, 489 F.2d 308, 313 (8th Cir. 1973); United States v. Candelaria, 131 F. Supp. 797, 806 (S.D. Cal. 1955), *quoting* HANDBOOK ON INTERSTATE CRIME CONTROL (1947):

> The prison administrator is thwarted in his efforts toward rehabilitation. The inmate who has a detainer lodged against him is filled with anxiety and apprehension and frequently does not respond to a training program. He often must be kept in close custody which bars him from treatment such as trustyships, moderation of custody and opportunity for transfer to farms and work camps. . . . [H]e often becomes embittered with institutionalization and the objective of the correctional system is defeated.

Critics maintain that detainers rest upon the irrational and impermissible assumptions that a prisoner subject to a detainer is guilty of the underlying charges and that he is a serious escape risk. They point out that detainers are filed at the whim of a prosecutor, often for purposes of harassment, and that a prisoner charged with a crime in another jurisdiction is hardly a more serious escape risk than a prisoner serving a long sentence in the custodial jurisdiction. *See* Cooper v. Lockhart, *supra*; COUNCIL OF STATE GOVERNMENTS, HANDBOOK ON INTERSTATE CRIME CONTROL 93 (rev. ed. 1966) (Interstate Agreement on Detainers); note 31 *supra*.

The disruptive and unjust effects of detainers are recognized in the Interstate Agreement on Detainers, which is designed to provide for the speedy resolution of outstanding charges underlying detainers. The Agreement applies only to prisoners awaiting and requesting a trial in another jurisdiction, not to those who await parole or probation revocation hearings. Parole and probation detainers, however, generally remain outstand-

parolee incarcerated for a subsequent offense was denied due process when the custodial state continued to subject him to the effects of a detainer lodged by another state that refused to conduct a parole revocation hearing.[45] The court determined that the parolee was entitled to a hearing under *Morrissey*, notwithstanding incarceration for a subsequent offense.[46] Having no jurisdiction over the state that requested the

---

ing longer than those affected by the Agreement, with identical debilitating effects upon the prisoner. Although detainers are still honored only as a matter of comity by a custodial state, the Agreement itself is binding upon the parties to it. To date, thirty-seven states and the federal government have adopted the Agreement. For discussion and criticism of the Interstate Agreement on Detainers, see sources cited note 31 *supra*.

44. 489 F.2d 308 (8th Cir. 1973).

45. *Id.* at 315.

46. The court found that the loss of any opportunity for concurrent sentences, the effects of the detainer, and the likelihood that a delayed hearing would be unfair rendered an early hearing a constitutional necessity under *Morrissey*. The court relied heavily upon Smith v. Hooey, 393 U.S. 374 (1969). In *Smith*, a sixth amendment case, the Supreme Court held that a prisoner in one state is entitled to a speedy trial on charges brought by another state which requests that a detainer be lodged against him. The Court reasoned that delaying the trial deprived the prisoner of any opportunity to serve concurrent sentences, impaired his ability to defend himself at trial, continued the unjustified effects of the detainer, and caused uncertainty and anxiety that reduced the prisoner's chances of rehabilitation. The *Cooper* court astutely recognized that although the sixth amendment is inapplicable to parole revocations, this factor

> does not mean that the due process clause rejects a prompt and timely hearing in other procedures, formal or informal. Dim memories and disappearance of witnesses can well affect the outcome of a parole revocation hearing as much as any criminal trial. Delay in any procedure may well affect its fundamental fairness.

489 F.2d at 312-13.

The *Cooper* court thus found that the parolee was entitled to a prompt parole revocation hearing. The custodial state, by taking him into custody, honoring the detainer, and subjecting him to the effects of the detainer, acted as agent for the parole state. To support this reasoning, the court relied on Braden v. 30th Judicial Cir. Ct., 410 U.S. 484 (1973), a landmark habeas corpus case. The federal habeas corpus statute requires that a prisoner be "in custody" before he can seek habeas corpus relief. 28 U.S.C. § 2241(c)(3) (1970). Under the prematurity doctrine, enunciated in McNally v. Hill, 293 U.S. 131 (1934), a prisoner serving the first of consecutive sentences was deemed to be in custody only under the first. In Peyton v. Rowe, 391 U.S. 54 (1968), the court overruled *McNally*, holding that for the purposes of the federal habeas corpus statute a prisoner serving the first of two consecutive sentences was in custody for both. Among the reasons given in *Peyton* were those offered by the Eighth Circuit in *Cleveland*: that dim memories and the loss of witnesses and evidence precluded a fair hearing. Peyton v. Rowe, 391 U.S. 54, 62 (1968); Cleveland v. Ciccone, 517 F.2d 1082, 1086 (8th Cir. 1975).

Peyton was extended in Braden v. 30th Judicial Cir. Ct., *supra*, which held that a prisoner could challenge a future sentence or a detainer lodged against him by another state. "The state holding the prisoner in immediate confinement acts as the agent for the demanding state." 410 U.S. at 498-99. Although *Braden* dealt with custody under

detainer, however, the court could not require the parole board to grant a hearing and insisted only that the custodial state refuse to continue the effects of the detainer.[47]

In *Cleveland v. Ciccone*,[48] the Eighth Circuit was the first court of appeals to hold the United States Board of Parole's practice unconstitutional and to require a prompt revocation hearing for an incarcerated parolee.[49] The court found that conviction and incarceration for a subsequent offense do not destroy a parolee's right to a hearing granted "at a meaningful time and in a meaningful manner."[50] The hearing would not be a mere formality since conviction for a subsequent offense does not necessarily result in revocation.[51] The Eighth Circuit rejected as a

---

the habeas corpus statute and thus was not controlling, it was logical to apply its reasoning to the parole statute. To protect important constitutional rights that are endangered by the use of technical definitions, courts have adopted practical definitions of "custody" to permit liberal use of the writ of habeas corpus. *See* Carafas v. La Vallee, 391 U.S. 234 (1968); Jones v. Cunningham, 371 U.S. 236 (1962); United States *ex rel.* Meadows v. New York, 426 F.2d 1176 (2d Cir.), *cert. denied*, 401 U.S. 941 (1970); Word v. North Carolina, 406 F.2d 352 (4th Cir. 1969); Note, *Developments in the Law of Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1087-93 (1970). States have not only an obligation, but an affirmative interest in dealing fairly with parolees. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 484 (1972). The difference between a violator warrant lodged as a detainer and an executed one is formal. This mere formality should not deprive a parolee of his constitutional right to a meaningful revocation hearing.

47. 489 F.2d at 315. In *Cooper*, because of the lack of jurisdiction, the court was unable to order the parole state to hold a revocation hearing. The possibility that a parolee might not receive a fair hearing in the event of a long delay, or lose the opportunity for concurrent sentences, was not precluded by the holding in that case. One petitioner's case was dismissed as moot after he had been transferred pursuant to the detainer. *Id.* at 311.

48. 517 F.2d 1082 (8th Cir. 1975).

49. A number of district courts have held the parole board policy unconstitutional. *See, e.g.*, Gay v. United States Bd. of Parole, 394 F. Supp. 1374 (E.D. Va. 1975); Wade v. United States Bd. of Parole, 392 F. Supp. 327 (E.D. Wash. 1975); Peele v. Sigler, 392 F. Supp. 325 (E.D. Wash. 1974); Arnold v. United States Bd. of Parole, 390 F. Supp. 1177 (D.D.C. 1975); Wells v. Wise, 390 F. Supp. 229 (C.D. Cal. 1975); Pavia v. Hogan, 386 F. Supp. 1379 (N.D. Ga. 1974); Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973). In *Cleveland*, the Eighth Circuit was not plagued by the jurisdictional problem of dual sovereignties that had precluded the court in *Cooper* from requiring the parole board to conduct a prompt hearing, *see* note 46 & 47 *supra* and accompanying text. The *Cleveland* court therefore had jurisdiction to order the custodian, a federal parole officer, to execute the warrant and grant a revocation hearing as agent for the parole board. The problem of multiple sovereignties was not solved by *Cleveland*. Resolution is badly needed.

50. 517 F.2d at 1086.

51. *Id.* at 1087. Unless the Eighth Circuit unrealistically believes that the parole board frequently fails to revoke parole, this statement contradicts the court's position

"technical distinction"[52] the argument that the *Morrissey* right to a prompt hearing does not attach until a warrant is formally executed,[53] reasoning that the lodging of the warrant as a detainer amply demonstrates the board's intention to revoke parole.[54] The loss of any opportunity to serve concurrent sentences, the impact of the delay upon rehabilitation, and the potential loss of mitigating evidence were deemed to be significant interests of the parolee's liberty threatened by the board's policy of delay.[55]

The court determined that a *prompt* hearing is required as a matter of due process.[56] Dispositional interviews conducted by the board in lieu of revocation hearings do not satisfy the requirements of due process.[57] Although under existing law prompt execution of violator warrants automatically triggers concurrent sentences[58] and deprives the board of the opportunity to penalize parole violators,[59] the court concluded that amendment of the statute, not denial of due process, was the proper means of preserving the board's discretion.[60]

---

that the lodging of a detainer amply demonstrates the board's intention to revoke parole. *See* note 54 *infra* and accompanying text. Lodging the detainer merely allows the board to postpone its decision; approximately one-half are never executed. *See* note 31 *supra*. The court still correctly required execution promptly after the warrant is lodged as a detainer, since the inadequacy of a delayed hearing and the punitive effects of a detainer imposed without a hearing, *see* notes 42 & 43 *supra*, constitute a denial of due process.

52. *Id.* at 1087.

53. *See* notes 38 & 39 *supra* and accompanying text.

54. 517 F.2d at 1087.

55. *Id.* at 1086. Given the decision in *Cooper, see* notes 46 & 47 *supra* and accompanying text, it is surprising that the Eighth Circuit did not consider the effects of the detainer lodged against the petitioners without a hearing in *Cleveland* to be among the endangered interests of liberty, *see* note 43 *supra* and accompanying text. In *Cleveland*, however, the petitioners may not have suffered appreciably because of the detainers.

56. *Id.* at 1083.

57. *Id.* at 1088-89. The court rejected the argument that dispositional interviews were an adequate substitute for revocation hearings. The parole board, as a matter of policy, refuses to grant an interview unless the prisoner simultaneously requests that parole be revoked. *See* RULES OF THE UNITED STATES BOARD OF PAROLE, 34 (1971):

> The violator may petition prior to the expiration of his new sentence that his parole or mandatory release be revoked and that he be permitted to serve some part of his violator time concurrently with his new sentence.

58. *See* notes 32-35 *supra* and accompanying text.

59. 517 F.2d at 1087 (8th Cir. 1975). In three pre-*Wolff* cases, the Eighth Circuit upheld delaying execution of violator warrants until the expiration of the intervening sentence in order to preserve the Board's power. *See, e.g.*, Noorlander v. United States Attorney Gen., 465 F.2d 1106 (8th Cir. 1972), *cert. denied*, 410 U.S. 938 (1973); Tanner v. Mosely, 441 F.2d 122 (8th Cir. 1971); Hash v. Henderson, 385 F.2d 475 (8th Cir. 1967). *See also* Zerbst v. Kidwell, 304 U.S. 359 (1938) (leading case).

60. 517 F.2d at 1087.

The *Cleveland* court properly repudiated the board's policy of delay.[61] The interests of an incarcerated parolee in prison privileges, rehabilitation,[62] and the opportunity to serve concurrent sentences[63] clearly fall within the *Wolff* definition of "liberty" protected by the due process clause.[64] A prompt hearing should be required as a matter of due process;[65] the right to be heard implies that a hearing be granted

61. *Accord*, United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Gay v. United States Bd. of Parole, 394 F. Supp. 1374 (E.D. Va. 1974); Wade v. United States Bd. of Parole, 392 F. Supp. 327 (E.D. Wash. 1975); Peele v. Sigler, 392 F. Supp. 325 (E.D. Wash. 1974); Arnold v. United States Bd. of Parole, 390 F. Supp. 1177 (D.D.C. 1975); Wells v. Wise, 390 F. Supp. 229 (C.D. Cal. 1975); Pavia v. Hogan, 386 F. Supp. 379 (N.D. Ga. 1974); Fitzgerald v. Sigler, 372 F. Supp. 889 (D.D.C. 1974); Jones v. Johnston, 368 F. Supp. 571 (D.D.C. 1974); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973).

62. *See* notes 43 & 46 *supra* and accompanying text.

63. *See* notes 23 & 46 *supra* and accompanying text. The argument accepted by the *Cleveland* court, that loss of concurrent sentences is significant, appears to be stronger in speedy trial cases, *see* Smith v. Hooey, 393 U.S. 374 (1969); note 46 *supra*, than in cases in which a prisoner seeks a prompt parole revocation hearing. In the former situation it is likely that the sentencing court will grant concurrent sentences. It is not as likely that the parole board would do so in the latter instance when the hearing is requested early in the intervening sentence. The board delays execution of warrants and hearings to avoid concurrent sentences, the statutory consequence of execution.

The argument that loss of the opportunity to capitalize upon the anomolous statutory grant of concurrent sentences constitutes a deprivation of "liberty" is deficient, particularly in light of the *Cleveland* court's admission that Congress intended to allow the parole board to penalize parole violators and that the statute should be amended. *But see* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975); Wells v. Wise, 390 F. Supp. 229 (C.D. Cal. 1975); Sutherland v. District of Columbia Bd. of Parole, 366 F. Supp. 270 (D.D.C. 1973). *Cf.* Smith v. Hooey, 393 U.S. 374 (1969).

64. *See* notes 26-28 *supra* and accompanying text.

65. Although an incarcerated parolee may not suffer the "grievous loss" found by the Court in *Morrissey*, his loss is sufficiently grievous to require due process under *Wolff*. The courts that have required a prompt hearing, however, have relied almost exclusively upon *Morrissey*. *See* cases cited note 49 *supra*. The Court in *Morrissey* stated:

> Control over proceedings . . . can assure that delaying tactics and other abuses . . . do not occur. Obviously a parolee can not relitigate issues determined against him in other forums as . . . when the revocation is based on conviction of another crime.

408 U.S. 471, 490 (1972). Noting the *Morrissey* Court's insistence upon the right to present mitigating evidence, and *Morrissey*'s determination that the states have an interest in treating parolees fairly, these district courts have considered this language from *Morrissey* and inferred from it a requirement that hearings must be held promptly, although the content may be altered where conviction forms the basis of revocation. *But see* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975), in which the Fourth Circuit, after quoting *Morrissey* both incorrectly and out of context, interpreted the same statement from *Morrissey* to mean that no hearing was required when revocation was based on

"at a meaningful time and in a meaningful manner."[66]

The Eighth Circuit correctly rejected the argument that the right to a *Morrissey* hearing does not attach until a warrant is executed. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[67] For reincarcerated parolees subject to the effects of a detainer, the purposes of the due process clause can only be served by granting a hearing early in the intervening sentence.[68] In permitting delay of execution of the warrant and a hearing, the Fifth and Tenth Circuits applied the label, but not the principles, of due process. Their position is inconsistent with *Wolff's* rejection of the "notion that the prisoner's rights under *Morrissey* hang in suspended animation."[69] As the *Cleveland* court determined, even a congressional intent to permit the parole board to impose consecutive sentences as a penalty for the violation of parole cannot justify this clear violation of due process.

The Eighth Circuit did not consider other means of avoiding the undesirable effects of the statute—for instance, by holding that the

---

a subsequent conviction. *Id.* at 676. Although the district courts' interpretation of *Morrissey* is sound, a stronger argument can be made if *Morrissey* is coupled with *Wolff*. The interests of incarcerated parolees fall within *Wolff's* definition of "liberty," *see* notes 25-28 *supra* and accompanying text, and the loss to which they are subjected is sufficiently "grievous," *see* note 20 *supra* and accompanying text, to require a prompt hearing as a matter of due process.

66. Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

67. Morrissey v. Brewer, 408 U.S. 471, 481 (1972). *See* note 22 *supra* and accompanying text.

68. Even if the parolee is not deemed to be in custody for purposes of the parole statute, a hearing should be required. The right to a hearing is constitutional, not statutory. For the purposes of *Morrissey*, an incarcerated parolee is in custody when his custodian, acting at the request of a parole board, lodges a detainer against him. *See* Gay v. United States Bd. of Parole, 394 F. Supp. 1374 (E.D. Va. 1975). The agency argument presented in *Cooper*, *see* note 46 *supra*, is particularly convincing in a case like *Cleveland* in which the custodian is a federal parole officer.

69. Pavia v. Hogan, 386 F. Supp. 1379, 1385 (N.D. Ga. 1974). In his well-reasoned opinion in *Pavia*, Chief Judge Edenfield maintained that Cook v. United States Attorney Gen., 488 F.2d 667 (5th Cir.), *cert. denied*, 419 U.S. 846 (1974), was overruled sub silentio by Wolff v. McDonnell, 418 U.S. 539 (1974). Another judge in the same district subsequently criticized *Pavia*, attempted to distinguish *Wolff*, and held that *Cook* was still controlling. Gray v. Hogan, 388 F. Supp. 477 (N.D. Ga. 1975). *See also* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975). It is clear from Small v. Britton, 500 F.2d 299, 301 (10th Cir. 1974), that the delays permitted by the Fifth and Tenth Circuits would be impermissible if the parolee were not incarcerated. Since the constitutional right of all parolees to a *Morrissey* hearing is not, and cannot be denied, these courts are using the fact of incarceration to justify an otherwise unconstitutional delay.

revocation hearing may precede execution of a violator warrant.[70] Also, *Cleveland's* mandate for a prompt hearing after the warrant is issued and lodged as a detainer can be avoided if the parole board simply delays issuance.[71] This evasion would be impossible had the Eighth Circuit required a parole revocation hearing within a reasonable time after the board received notice of a criminal conviction.[72]

The *Cleveland* decision called for legislative amendment and created a sharp conflict among the circuits. Unless other courts adopt the position of the Eighth Circuit[73] the Supreme Court will need to resolve the issue. *Cleveland* is a logical and practical step beyond *Morrissey* and is consistent with *Wolff*. It is probable that its conclusions will ultimately prevail.

---

70. *See* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975). Although the result in *Hahn* mitigates the need for legislative amendment, the Seventh Circuit failed to discuss adequately the custody issue produced by the interrelation of *Morrissey* and the federal parole statutes. In holding that the revocation hearing may precede execution of the warrant, the *Hahn* court seems to have implicitly accepted the Fifth and Tenth Circuits' distinction between an issued and an executed warrant. Since the essence of that distinction is that a parolee is not in custody until the warrant is executed, the Seventh Circuit in effect held that a prompt hearing must be granted even if a parolee has not been taken into custody. If, on the other hand, the Seventh Circuit intended to hold that the parolee is in custody for the purposes of *Morrissey*, but not the federal parole statute, its position is stronger and arguably preferrable to legislative amendment. The Eighth Circuit in *Cleveland* declared that the problem produced by the dual use of the word "custody" could be no longer endured. If a parolee is in custody, then the warrant must be executed regardless of the statutory effects. Legislative clarity in the area of parole revocation is desperately needed and long overdue, *see* notes 14 & 15 *supra* and accompanying text. Although the Eighth Circuit in *Cleveland* did not consider the *Hahn* alternative, its suggestion that amendment is required appears to be the better solution.

71. Under 18 U.S.C. § 4205 (1970), *quoted in* note 2 *supra*, a violator warrant may be *issued* at any time during the *original sentence*.

72. *See* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975). If the hearing must be granted before the warrant is lodged as a detainer, then it is, in effect, required before the parolee has been taken into custody regardless of what standard is used to define custody. *See* note 70 *supra*. This alternative was not presented by either counsel for the court's consideration.

73. Acceptance of the Eighth Circuit's position by the Fifth and Tenth Circuits is not inconceivable since the leading decisions of those courts preceded *Wolff*. *See* United States *ex rel.* Hahn v. Revis, 520 F.2d 632 (7th Cir. 1975). *But see* Gaddy v. Michael, 519 F.2d 669 (4th Cir. 1975).

As this issue went to press, the District of Columbia Circuit "concur[red] with the conclusion of the . . . Eighth Circuit" and reached the same result as *Cleveland*. Jones v. Johnston, Civil No. 74-1424 (D.C. Cir. Mar. 23, 1976), at 45.